P 4

2/3/8/20
FROM BOT

ANNUAL REPORT

And

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL

OF

MARYLAND

1989

J. JOSEPH CURRAN, JR.

ATTORNEY GENERAL

CONTENTS

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 Superseded by Carroll.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Plater I of St. Mary's County (Prot.), appears as acting Attorney General, for the crown, as early as 23 April 1691; superseded by Wynne.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

(Reprinted from "His Lordship's Patronage," pages 132-34, by permission of the author, Professor Donnell M. Owings, Department of History, University of Oklahoma.)

Luther Martin 1778

William Pinkney 1805

John Thomas Mason 1806

John Johnson 1806

John Montgomery 1811

Luther Martin 1818

[1]Nathanial Williams, Assistant Attorney General 1820

Thomas B. Dorsey 1822

Thomas Kell 1824

Roger B. Taney 1827

Josiah Bayley 1831

George R. Richardson 1845

Robert J. Brent 1851

[2]Alexander Randall 1864

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

---

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

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

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'Conor 1934

William C. Walsh 1938

William Curran 1945

[4]Hall Hammond 1946

[5]J. Edgar Harvey 1952

[6]Edward D. E. Rollins 1952

---

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

4 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.

5 *See* note 4.

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

---

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

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

[9] Elected at election of November, 1962.

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

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

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

OFFICE OF THE ATTORNEY GENERAL

J. Joseph Curran . . . . Attorney General

Judson P. Garrett, Jr. . . . . Deputy Attorney General

Dennis M. Sweeney . . . . Deputy Attorney General

Jack Schwartz . . . . Chief Counsel, Opinions and Advice

Ralph S. Tyler . . . . Chief of Litigation

Robert A. Zarnoch . . . . Chief Counsel, Legislation

James G. Klair . . . . Chief Counsel, Administration;
Counsel to the Courts

Evelyn O. Cannon . . . . Principal Counsel, Trial Litigation

Elizabeth L. Nilson . . . . Special Assistant to the Attorney General

*Illona Sheffey-Rawlings . . . . Special Assistant to the
Attorney General

Karen U. Smith . . . . . . Special Assistant to the Attorney General

---

Offices: 200 Saint Paul Place
Baltimore, Maryland 21202

---

* Resigned.

ASSISTANT ATTORNEYS GENERAL

ANTITRUST DIVISION -

Michael F. Brockmeyer, *Chief*

Alan M. Barr
Ellen S. Cooper
Dana H. Fox
Craig J. Hornig
Laura C. McWeeney
R. Hartman Roemer
Meredyth A. Smith
John R. Tennis

ASBESTOS LITIGATION -

Janet E. LaBella, *Chief*
Marlene Trestman, *Deputy Chief*

David M. Kennedy
Steven P. Lemmey
Mary L. Lucasse
Shelly E. Mintz
Sheila F. Salomon

CITIZEN INQUIRY AND VICTIM ASSISTANCE -

Stuart G. Buppert, II

CIVIL DIVISION -

Ralph S. Tyler, III, *Chief of Litigation*
Evelyn O. Cannon, *Principal Counsel, Trial Litigation*

Andrew H. Baida
* David Beller
Verna H. Glass
Mark P. McCurdy
Elizabeth L. Nilson
Lawrence H. Norton
Carolyn Quattrocki
*Illona Sheffey-Rawlings
Carmen Shepard
Catherine M. Shultz
Karen U. Smith

Civil Savings and Loan Unit -

Julia P. Davis
Susan Griisser
M. Jayne Wright

Correctional Litigation Unit -

Richard M. Kastendieck, *Supervising Attorney*

Glenn W. Bell
Maureen M. Dove
Stephanie Lane-Weber
Ronald M. Levitan
Timothy J. Paulus
Paulus

CONSUMER PROTECTION DIVISION -

William Leibovici, *Chief*
Peter V. Berns, *Deputy Chief*

James P. Abbott
Rebecca Bowman
John J. Capowski
Vincent DeMarco
Hillary Sloane Gebler
Steven M. Sakamoto-Wengel
William D. Gruhn
Sayra Wells Meyerhoff
Jacqueline W. Mintz
John H. Nethercut
Lucy A. Weisz

COURTS AND JUDICIAL AFFAIRS -

James G. Klair, *Counsel*

Julia M. Freit
Susan P. Whiteford

CRIMINAL APPEALS DIVISION -

Gary E. Bair, *Chief*
Jillyn K. Schulze, *Deputy*
Richard B. Rosenblatt, *Senior Counsel for Capital Litigation*

Mary Ellen Barbera
Ann N. Bosse
Cathleen C. Brockmeyer
Thomas K. Clancy
Audrey Creighton
Kreg P. Greer
Beverly P. Griffith
Diane E. Keller
Gwynn X. Kinsey, Jr.
Alfred Novotne
Sarah E. Page
Valerie M. Smith

CRIMINAL INVESTIGATIONS DIVISION -

Lynne A. Battaglia, *Chief*
Christopher J. Romano, *Deputy Chief*

Ben C. Clyburn
Carolyn H. Henneman
Karen J. Kruger
*Deidre White Lee
Norman L. Smith
John R. Tennis

EDUCATIONAL AFFAIRS DIVISION -

*James J. Mingle, *General Counsel*
John K. Anderson, *Chief Counsel*
*Michael A. Anselmi, *Deputy Counsel*
Lawrence White, *Deputy Counsel*
*Christine Steiner, *Principal Counsel Department of Education*
Valerie V. Cloutier, *Principal Counsel Department of Education*

James P. Abbott
Laura A. Burton-Graham
William F. Howard
Elena Langrill
Deborah Mason
*Susan J. Mathias
Mary L. Preis
*James J. Raggio
Mary H. Tillman

MEDICAID FRAUD CONTROL -

Gale R. Caplan, *Chief*
Daniel R. Anderson, *Deputy*

Carolyn J. McElroy
Melanie M. Shaw
Timothy X. Sokas

OPINIONS AND ADVICE -

Jack Schwartz, *Chief*
C.J. Messerschmidt

SECURITIES -

Ellyn L. Brown, *Securities Commissioner*
Sarah McCafferty, *Deputy*

T. Webster Brenner
Delia A. Burke
Melanie S. Lubin

DEPARTMENT AND AGENCY COUNSEL

AGING, OFFICE ON -

Margaret Ann Nolan, *Counsel*

Michele E. Bardos
*Rebecca M. Hornbeck

AGRICULTURE -

Craig A. Nielsen, *Principal Counsel*
Thomas F. Filbert

ASSESSMENTS AND TAXATION -

Kaye Brooks Bushel, *Principal Counsel*

William K. Hammond
David M. Lyon
Jane E. Pilliod

BUDGET AND FISCAL PLANNING -

Cecilia Januszkiewicz, *Principal Counsel*
Gail Rudie Cohn

Special Litigation Unit -

Norman E. Johnson, *Supervising Attorney*

Jean Baron
Nicolette H. Prevost

COMPTROLLER OF THE TREASURY -

Gerald I. Langbaum, *Principal Counsel*
John K. Barry

Sales and Use Tax Division -

Deborah B. Bacharach, *Deputy Counsel*

Linda K. Boyd
Sheldon H. Laskin
Gaylin Soponis

ECONOMIC AND EMPLOYMENT DEVELOPMENT -

*Arthur S. Drea, Jr., *Principal Counsel*
Alexander Wright, Jr, *Principal Counsel Counsel*
Laila K. Atallah, *Deputy Counsel*

*Thomas P. Carbo
James G. Davis
Ilene S. Garten
Barbara C. Kountz
Sheila McDonald Gill
Elizabeth S. Roese
Amy S. Scherr
Barbara G. Swain
Lynn Weiskittel

ENVIRONMENT -

Michael C. Powell, *Principal Counsel*
Denise Ferguson-Southard, *Deputy Counsel*
Ann Marie DeBiase, *Deputy Counsel*

Jean K. Belt
Susan M. Carrier
Richard W. Emory, Jr.
Catherine M. Flanagan
Neile Sue Friedman
Jeffrey E. Howard
Rebecca A. Laws
Pamela D. Marks
Paul T. O'Connell
Neil F. Quinter
Patricia A. Smith
Nancy W. Young

Environmental Crimes Unit -

Elizabeth B. Volz, *Supervising Attorney*

Nathan Braverman
Howard P. Nicholson
*David Y. Li

GENERAL ASSEMBLY -

Robert A. Zarnoch, *Counsel*

Richard E. Israel
Kathryn M. Rowe

GENERAL SERVICES -

Allan B. Blumberg, *Counsel*

Michael P. Kenney
John H. Thornton

Contract Litigation Unit -

Jeffrey H. Myers, *Deputy Counsel*
Brian W. Craver

HEALTH AND MENTAL HYGIENE -

Daniel F. O'Brien, *Counsel*
Carl F. Ameringer, *Deputy Counsel for Administrative Prosecutions*

Lawrence J. Ageloff
Geoffrey J.C. Boyd
Janet Klein Brown
Patricia M.C. Brown
Susan B. Feldman
Barbara Hull Foster
D. Michal Freedman
Robert J. Gilbert
Roberta L. Gill
Larry J. Goldberg
Alice D. Ike
Elizabeth M. Kameen
Harry J. Matz
Susan S. Nathan
Ann L. Rasenberger
C. Frederick Ryland
Martha H. Somerville
Judith K. Sykes
Nancy P. Tennis
Romaine N. Williams
Debra G. Woodruff

HEALTH SERVICES COST REVIEW COMMISSION -

Stanley Lustman, *Supervising Attorney*

HOUSING AND COMMUNITY DEVELOPMENT -

Margaret McFarland, *Principal Counsel*
Judith W. Price, *Deputy Counsel*

Sandra J. Cohen
Lawrence S. Conn
Elizabeth M. Dunn
Roger L. Fink
Beth Woodland Hargrove
George E. Hughes
C. Dale Janney
Judy K. Maistrellis

HUMAN RESOURCES -

Nancy B. Shuger, *Principal Counsel*
Catherine M. Shultz, *Deputy Counsel*

Mark J. Davis
Wendy J. Greenberg
Donna R. Heller
Stephanie R. Henderson
Steven D. Keller
Sherry A. Kendall
Kathleen A. Morse
Joseph B. Spillman

JUVENILE SERVICES AGENCY -

Ellen A. Callegary, *Principal Counsel*

Robert T. Fontaine
Ronald M. Levitan

LICENSING AND REGULATION -

Francis X. Pugh, *Counsel*
Dennis W. Carroll, Jr., *Deputy Counsel*
Elizabeth Hartley Trimble, *Chief*
Financial Regulation and Advice
*Frank C. Bonaventure, Jr., *Chief*
Financial Regulation and Advice

Jonathan W. Acton, II
David P. Bird
Alma L. Borenstein-Ohly
Susan M. Cherry
Martha V. Clarke
Susan Cohen
Joel A. Jacobson
*Brian G. Kim
Jonathan R. Krasnoff
J. Steven Lovejoy
John J. Lucas
Elaine Patrick
Daid M. Porter
Randi F. Reichel
Meg R. Rosthal
Gaston J. Sigur, III
Bruce C. Spizler
*Kathleen M. Sweeney
William Tutton, Jr.

LOTTERY AGENCY, MARYLAND STATE -

Shelley S. Wasserman, *Counsel*

MARYLAND AUTOMOBILE INSURANCE FUND -

James W. Himes

NATURAL RESOURCES -

Thomas A. Deming, *Principal Counsel*
Marianne D. Mason, *Deputy Counsel*

Pamela D. Andersen
Sharon B. Benzil
Lee R. Epstein
Maureen O'Ferrall Gardner
Meredith Ellen Gibbs
M. Brent Hare
Judith F. Plymyer
Pamela P. Quinn

Capital Programs Administration -

Jodi Rae O'Day

Environmental Services -

Sean L. Coleman

PESONNEL -

James F. Truitt, Jr., *Principal Counsel*

David R. Durfee
*Leronia A. Josey
Michael N. Gambrill

PLANNING, OFFICE ON

*Roberta B. McCarthy, *Counsel*
Shelley S. Wasserman, *Counsel*

PUBLIC SAFETY AND CORRECTIONAL SERVICES -

Emory A. Plitt, Jr., *Principal Counsel*
Stuart M. Nathan, *Deputy Counsel*

George A. Eichhorn
Steven G. Hildenbrand

Division of Correction -

Alan D. Eason
Scott S. Oakley

Maryland State Police -

Millicent E. Gordon, *Supervising Attorney*
Betty A. Stemley

RETIREMENT SYSTEMS, MARYLAND STATE -

Carol S. Sugar, *Counsel*

Harriet B. Granet

RETIREMENT SYSTEMS, MARYLAND STATE -

Carol S. Sugar, *Counsel*

Harriet B. Granet
Lindsay S. Waite

STADIUM AUTHORITY, MARYLAND -

Norman E. Parker, Jr., *Principal Counsel*
Nolan H. Rogers, *Principal Counsel*

STATE ACCIDENT FUND -

Thomas J. Michels, *Supervising Attorney*

A. Raymond Bevans, Jr.
Rona S. Dadds
J. Kent Leonnig
Timothy P. McGough
Bernadine Myles
Brett M. Schaffer
Barbara S. Schlachman
Wilbert Lee Taylor

STATE TREASURER'S OFFICE -

Margaret Lee Norton, *Principal Counsel*
Leland S. VanKoten

SUBSEQUENT INJURY FUND -

Sophia L. Swope, *Principal Counsel*

George E. Barrett,Jr.
Michael H. Bereston
Michael G. Comeau
David R. Jones
Irving B. Klitzner
Joanne F. Voelkel

TRANSPORTATION -

John K. Anderson, *Principal Counsel*
Robert N. McDonald, *Principal Counsel*
Thomas G. Peter, *Deputy Counsel*

Paul J. Ballard
Ben C. Clyburn
Elena Langrill

Aviation Administration -

Louisa H. Goldstein, *Counsel*
Charles M. Bell

Contract Litigation Unit -

William A. Kahn, *Principal Counsel*

Jay N. Bernstein
Mark S. Dachille
Joseph P. Gill
Edward S. Harris
Dana A. Reed
Lawrence G. Rosenthal

Maryland Transportation Authority -

Steven W. Vanderbosch

Mass Transit Administration -

Irwin Brown, *Counsel*
Rebecca A. Laws
William B. Tittsworth, Jr.

Motor Vehicle Administration -

Edward R.K. Hargadon, *Supervising Attorney*

Risselle R. Fleisher
Ann E. Singleton

Port Administration -

Donald A. Krach, *Counsel*

Tracy V. Drake
Janice G. Salzman

State Highway Administration -

Edward S. Harris, *Principal Counsel*
Nolan H. Rogers, *Prinicpal Counsel*

Pamila J. Brown
Jean A. Colburn
Douglas N. Silber

Interstate Division -

Andrea D. Johnson

Special Attorneys -

James R. Avnet
Richard T. Brice, IV
Sidney S. Campen, Jr.
James K. Eagan, III
Robert L. Gray
Lloyd J. Hammond
Janet Bush Handy
Henry F. Leonnig
Daniel F. McMullen, Jr.
Nancy P. Miller
Peyton Paul Phillips
George H. White
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:

1989

Ann Bosse	Criminal Appeals Division
Susan Cherry	Department of Licensing and Regulation
Mark J. Davis	Department of Human Resources
Alan Eason	Division of Correction, Department of Public Safety and Correctional Services
Barbara Hull Foster	Department of Health and Mental Hygiene
Richard Israel	General Assembly of Maryland
Mary Lucasse	Asbestos Litigation Unit
Carmen Shepard	Civil Division
Lucy Weisz	Consumer Protection Division

1988

James P. Abbott	Consumer Protection Division
Sandra J. Cohen	Department of Housing and Community Development
Andrea D. Johnson	State Highway Administration, Department of Transportation
C.J. Messerschmidt	Opinions Division
Kathleen N. Sweeney	Department of Licensing and Regulation

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

1986

Peter V. Berns	Consumer Protection Division
Edward S. Harris	Contract Litigation Unit, Department of Transportation and General Services
Peter Keith	Civil Division
Norman E. Parker, Jr.	Department of Economic and Community Development
Christine Steiner	Educational Affairs Division

1985

Jane F. Barrett	Hazardous Waste Unit, Department of Health and Mental Hygiene
Ben C. Clyburn	Department of Transportation
Louise H. Goldstein	State Highway Administration, Department 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 Z. Whitman	Maryland Industrial Development Financing Authority, Department of Economic and Community Development

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	Civil Division
Ralph S. Tyler	Department of Human Resources

1983

Alma L. Borenstein	Department of Licensing and Regulation
Michael F. Brockmeyer	Antitrust Division
Brian Cohen	Mass Transit Administration, Department 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 L. Robbins	Department of Health and Mental Hygiene

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, Department of of Budget and Fiscal Planning
James L. Shea	Civil Division
Alexander Wright, Jr.	Department of Personnel

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

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:

1989 . . . . Barbara Hull Foster

1988 . . . . James J. Mingle

1987 . . . . Susan Sugar Nathan

THE ATTORNEY GENERAL'S PRO BONO AWARD

In 1989, the Attorney General established a community service award to honor an attorney in the Attorney General's office who has made a significant contribution, whether of time, effort, or accomplishment, to organizations or individuals in need of free legal assistance.

The first Pro Bono Award is presented to Daniel R. Anderson.

ANNUAL REPORT FOR 1988

December 31, 1989

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 1989.

Criminal Investigations

For the second year in a row, the Criminal Investigations Division has achieved the remarkable record of a 100% conviction rate, sending a significant number of swindlers, embezzlers, tax cheats and thieves to prison while obtaining court orders for hundreds of thousands of dollars in fines and restitution for both individuals and the State. Every division of the Attorney General's Office strives to be the best at what it does. The Criminal Investigations Division clearly is.

In one major case, a 10-year prison sentence was imposed on John Wesley George, Jr., a 42-year-old Lutherville financial advisor who swindled some 30 investors out of $1.6 million, which he used to lease luxury automobiles, buy expensive jewelry and furniture, travel abroad, and finance a classic pyramid scheme in which he paid off early investors with money he got from subsequent victims. Once Mr. George gets out of prison, he will be required to pay back nearly all of the money he stole, even if it takes him the remainder of his life.

Our investigation of Mr. George's activities got under way when I received telephone calls at my home from some of the victims of his schemes, which he operated between 1982 and 1988. Initially, I referred the case to our Securities Division, which barred Mr. George from conducting business in the State after discovering that he had set up phony companies for which he solicited investments, and also took money meant for legitimate investments and spent it on himself.

Although the theft of large sums from many people requires strong action, the plight of even a single victim merits our close attention. Late this year an 18-month prison sentence was imposed on the Rev. Guy Addison Wenck, a former Baltimore County minister, who stole nearly $40,000 from the account of an elderly, incapacitated relative. Wenck hid his thievery by concocting phony account inventories in which he claimed that the money of the elderly victim, of whom he had been made the guardian, was being invested on her behalf. Instead, he used the money for his own personal expenses, including the purchase of clothing, shoes, a car, and membership in a weight-loss program.

Determined thieves can steal a lot by using one method or many. A five-year prison term was imposed on Curtis Graham Perkins, the flamboyant former chief of the now-defunct Eastern Indemnity Company of Maryland (EICOM), a Rockville-based surety bonding firm, who lived luxuriously -- residing in a $1 million mansion in Potomac, wearing $1,500 suits, driving a Rolls-Royce, and smoking $5 cigars -- by misappropriating $404,626 in collateral that company clients posted as security, as well as stealing an additional $235,903 from the firm. Perkins also has been ordered to make full restitution of the stolen collateral. When EICOM collapsed in 1984, it cost thousands of construction firms millions of dollars in building project losses.

If Perkins' misappropriation methods were straightforward, the thievery of former nurse Carolyn Petty Carter was convoluted. She was sent to jail for six months and ordered to pay $16,478.95 in restitution for tax perjury and theft charges stemming from a series of elaborate, multiple schemes she began using in 1983. Carter employed at least nine different Social Security numbers, eleven aliases, and forged countless documents to file phony tax returns to get unwarranted refunds; steal $11,558 in federal rental assistance payments; make out a fraudulent mortgage application for $113,000; file phony health insurance claims totalling $22,811, and embezzle $1,102 from a former employee.

Many defendants were successfully prosecuted for not paying their State taxes -- and were charged with or convicted of receiving pay from the State for work they did not do.

David Robinson, a former industrial development officer for the Department of Economic and Employment Development, was ordered to spend a year on work-release so he can earn the money to pay back the $59,500 he admitted misappropriating from fees he illegally sought from would-be business people who went to DEED for help. He told the neophyte entrepreneurs that the fees, made in checks payable to him in amounts ranging from $2,500 to $25,000, would be held in escrow and provide financing for the new companies. In fact, he pocketed the money himself. In another case involving a State employee, Yvette Waters, an office assistant and timekeeper at the State Highway Administration, admitted stealing more than $6,000 by altering time cards and claiming pay for 677 hours of overtime that she did not work. And in a case involving Maryland's Minority Business Enterprise (MBE) law, multiple indictments were returned against two corporations -- F. A. Taylor and Son, Inc., and Roofex, Inc. -- and their owners, accusing them of theft and fraud in connection with a minority business enterprise scheme that netted them $85,000.

Convictions were obtained against two more defendants who engaged in the illegal activities surrounding the Old Court Savings and Loan Association just before and after the 1985 collapse of that thrift led to Maryland's savings and loan crisis. Jerrold Gottleib, former chief operating officer of Levitt Builders, was sentenced to a year in prison for fraudulently misappropriating $90,000 from Old Court and one of its subsidiaries, Summit Ridge Partnership. He also was ordered to pay full restitution to the Maryland Deposit Insurance Fund (MDIF), the receiver for Old Court, and perform 1,200 hours of community service. Leon Rudd, a lawyer who represented Old Court, was ordered to serve 90 days in jail and make full restitution to MDIF of $52,000 he admitted stealing from the thrift between 1984 and 1985. He diverted the money from an escrow account that was set up for the purpose of developing property in Prince George's County.

A goal of every criminal prosecution is a just penalty, and perhaps no other case we had this year resulted in a fairer sentence than that imposed on Andrew Kean, who was ordered to pay $19,878 in restitution and spend 80 hours cleaning out the stalls in the stables of the Baltimore City Police Mounted Unit after he pleaded guilty to theft charges stemming from a scheme in which he stole more than $22,000 from Maryland horse trainers by selling them phony workers' compensation insurance policies.

In this, as in so many cases handled by the Criminal Investigations Division, the punishment indeed fit the crime.

Consumer Protection

The Consumer Protection Division remains the section of our office having the most frequent and direct contact with the public. This past year has been typical, with our trained volunteer complaint handlers in Baltimore, Salisbury, and Western Maryland responding to 93,721 telephone inquiries and complaints while also resolving more than 4,000 of the 9,000 formal, written complaints received. This represents an increase of more than 1,000 over the number of complaints mediated in 1988. Overall, the Division obtained monetary awards or savings totalling over $4.4 million for more than 6,700 consumers. Our Arbitration Unit handled more than 300 dispute resolutions, and our Education Unit published three additional issues of our award-winning Maryland Consumer Courier, as well as eight other new publications distributed for free to the public.

The Division's Health Education and Advocacy Unit received 719 written complaints and mediated 538 of them in 1989, obtaining an estimated $96,147 in refunds and savings for consumers. Our Health Club Registration Program now oversees some $7.8 million in bonds, letters of credit, or other security to protect the members of more than 450 registered facilities. Our law enforcement efforts involved us in 24 court cases, 24 administrative proceedings and 70 investigations, 37 of which were initiated this year. Through these efforts, more than $3.9 million was obtained in awards for consumers, as well as $10,200 in penalties and $1,300 for consumer education.

The problems we deal with cover a remarkable range of issues of concern to Maryland's consumers, from automobile advertising and sales practices to health care and housing matters, from questionable promotions of campgrounds and vacation timeshares to outright frauds in the sale of products and services.

In January, I issued an alert advising buyers of new Toyotas, Nissans and General Motors vehicles that they may be due refunds for "aftermarket" rustproofing that the manufacturers of these vehicles say is unnecessary. So far, more than a half-million dollars in voluntary refunds and settlements for consumers have been obtained, and administrative charges have been filed against two of the largest auto dealerships in the State. Settlements signed by Tate Nissan, Inc., of Annapolis and Antwerpen Toyota Village of Clarksville provide $390,140 in cash refunds and service credits to 1,382 customers should they file claims that the dealerships' salespeople did not tell them of the car manufacturer's extended anti-corrosion warranties and statements that additional "aftermarket" rust-inhibiting materials are unnecessary. Dozens of other car dealerships around the State have reached separate settlements with individual consumers who have complained to our office following my alert. These dealerships have voluntarily paid refunds totaling $332,391 to some 1,488 consumers.

Our ongoing review of automobile advertising in Maryland has produced some equally beneficial results for consumers. Ten All Star auto dealerships in Maryland, West Virginia, and Pennsylvania have signed an agreement promising to change their advertisements and establish a $200,000 restitution fund to give refunds to as many as 600 Marylanders who were sold cars for more than the prices at which the auto dealers had advertised the vehicles. One of the dealerships, located in Baltimore, also has agreed to replace parts on the cars of consumers who were told that their vehicles would be fixed with new parts but actually had old parts used in the repairs. In another case, Wootton Motor Cars in Glen Burnie agreed to pay $6,000 in refunds to consumers from Baltimore City, Baltimore, Anne Arundel and Queen Anne's counties who allegedly were persuaded by Wootton's advertisements that they were getting bargains they were not. Another $8,000 in refunds went to a dozen car buyers who were not given "free option" items that four dealerships -- Bill Kidd's Timonium Toyota, Brown's Toyota City in Glen Burnie, Brown's Castle Toyota in Edgewood, and Schaefer & Strominger's Toyota in Baltimore -- had advertised would come with the trucks the customers purchased. In yet another case, restitution worth up to $78,420 is due to 84 customers under a settlement with Shaffer Ford in Cumberland, which offered free Florida vacations to customers who purchased new vehicles from the dealership but failed to fulfill that promise.

In the ongoing case against Cottman Transmission Systems, the Baltimore City Circuit Court ruled that Cottman failed to disclose material diagnostic information to consumers before requiring them to commit to pay for extensive transmission repairs. The court denied restitution to consumers, however, a decision we may appeal.

A different kind of automobile-related case resulted in one of the largest judgments ever obtained by the Consumer Protection Division. The U.S. District Court in Baltimore imposed the maximum penalty -- $532,500 in damages -- on two men who sold 355 autos on which the odometers had been rolled back tens of thousands of miles. The Division had filed a civil suit against the defendants, Haynes Lee Locklear, owner of Riggs Motors in Chillum, and Walter R. Dickson, of Silver Spring.

Deceptive sales practices of a different, more flamboyant sort have been the specialty of Santa Victor Rigatuso, a Crofton jewelry marketer and businessman whom we have ordered to establish a $2 million restitution fund to provide refunds to thousands of consumers across the country. He bilked them by employing widespread, intentional and outrageous practices in the sales of phony gold trinkets, credit cards, and other merchandise that he claimed was part of a bequest from a phantom millionaire. Among other deceptions, Rigatuso substituted Alka Seltzer for acid in a TV ad that supposedly showed how impervious his gold-plated jewelry was to corrosion, said he could obtain major credit cards for consumers when he could not, and claimed that an anonymous millionaire had left $7 million to Marylanders in the form of $1,000 caches of merchandise for which they only had to pay shipping and handling fees. Earlier, in unrelated cases, the federal court in Baltimore sentenced Rigatuso to 10 months in prison and ordered him to pay $106,000 in restitution to 5,194 consumers he bilked in a credit card scheme, and a federal court in New Jersey ordered that $1.5 million in refunds be paid to 31,000 consumers defrauded by a different credit card scheme Rigatuso operated there.

A number of major cases involving housing were initiated in 1989. One case, against Christopher H. Hill and his defunct, Anne Arundel County-based American Homes Corporation, resulted in an order requiring him to pay $200,000 to the State for creation of a restitution fund for at least 52 home buyers whose down payments for houses were not secured, as required by law, or for whose homes Hill had failed to fulfill warranties. An independent hearing officer found that Hill illegally used the home buyers' deposits to pay his firm's operating expenses, systematically ignored consumer complaints about delayed or unfinished homebuilding projects; and duped consumers into completing settlements on their houses by falsely promising to fix numerous defects in the residences. The $73,000 to $533,000 homes that Hill built in Baltimore, Prince George's, and Anne Arundel counties often had leaky roofs and foundations, cracked or missing driveways, improperly functioning electricity, non-working or broken appliances, stained masonry and inadequate grading and landscaping.

In other housing cases, Kamakoti Realty, owner of the 160-unit Boston Heights apartments in Annapolis, and Michael G. Foundos and Associates, Inc., a one-time manager of the units, agreed to provide an undetermined amount of restitution to tenants and former tenants who were assessed illegally high "late charges" for tardy rent payments; and Advance Building Corporation, operated by the father-and-son team of Donald and Michael Betz, was ordered to pay $6,000 in restitution, plus interest, to three Baltimore County couples who gave the Betzes down payments for expensive modular homes that the builders had claimed they could obtain from the manufacturers when they really could not.

It is always unfortunate when consumers are harmed, but it is especially sad when those who appear to have been victimized are the elderly. In one major settlement this year, Emergency Alert Center, Inc., a Baltimore-based seller of "emergency communications devices" for telephones, agreed to create a $10,000 fund to pay restitution to consumers who were led to believe by the firm's advertising and sales pitches that it is a medical or ambulance service, which it is not. Emergency Alert did not admit violating the law but promised to modify its solicitation and sales practices, allow us to monitor them, and allow certain current customers to cancel their contracts and get refunds if they certify that they were misled or deceived by the company's solicitations. Nothing was wrong with the firm's product, which is attached to a consumer's phone and can be activated to alert local ambulances and medical services. At issue were the company's alleged scare tactics and misrepresentations by its sales force. For example, callers from the firm allegedly claimed they were volunteers from a hospital and said the consumers would be visited by a "medical consultant," who really was just a salesperson. These salespeople also allegedly warned the elderly customers that they could become paralyzed or die if they failed to buy the alert device.

In another case involving the elderly, Health Care Associates (HCA), a durable medical equipment dealer that no longer does business in Maryland, has agreed to create a $3,500 restitution fund for consumers to whom it sold products after leading them to believe that HCA's sales personnel had some connection with Medicare and the equipment the customers were ordering would be "free." HCA previously had also led consumers to believe that the firm had physicians on its staff who evaluated the equipment being sold and determined that it was proper for the customer's condition.

Our Health Clubs Registration Unit had a very busy year. We resolved an action taken against the largest health club chain ever accused of violating Maryland's health club law. The 23 Spa Lady outlets in the State have agreed to post $148,000 worth of security to protect the membership fees of their customers, as well as give two months of free memberships to some 400 consumers who joined the clubs during a period last year when the facilities were operating without the required bonding. Spa Lady also will pay $10,000 to the Consumer Protection Division for consumer education projects. Spa Lady had allowed thousands of dollars in members' advance payments to go unprotected by failing to renew a $300,000 bond.

On the recreational front, questionable promotional activities led this year to administrative charges against a Pennsylvania-based developer of campground facilities and a Virginia-based marketer of vacation time-share developments in Ocean City and Western Maryland.

We accused Outdoor World Corporation, a campground firm based in Bushkill, Pa., of luring Marylanders to its out-of-state facilities by mailing more than 4.5 million allegedly deceptive fliers to consumers here, promising them expensive prizes, and then pressuring those who responded into purchasing costly memberships in the campgrounds. Maryland law specifically requires promoters of such projects to tell consumers that they need not submit to a sales pitch nor pay any money for a "prize," but we allege that Outdoor World's developer failed to tell consumers that. We have received complaints from some 700 Marylanders who went to these facilities in Pennsylvania and Virginia. Often we allege, they were subjected to lengthy, high-pressure pitches and given no opportunity to eat or rest or consult among themselves or with relatives or financial advisors.

In another recreational real estate case, H. Lloyd Hensley, owner of 10 realty companies including the Hensley Group, Inc., in Alexandria, Va., allegedly enticed more than 25,000 families a year to visit time-share developments in Maryland by sending them false and misleading promotions featuring promises of valuable prizes.

So often the promoters of dubious products and services take advantage of consumers by trafficking in dreams of one sort or another, offering bogus bargains and empty opportunities. In one sad case this past year, we issued charges against Couture Modeling, of Owings Mills, which we allege defrauded at least 69 would-be fashion models who paid up to $1,375 for a portfolio of photographs and entry into the modeling world but got nothing for their money. According to the charges, Couture falsely claimed that it was the largest commercial modeling employment agency in the U.S.; that it could give customers an opportunity to earn as much as $500 a day as models, and that it placed 87% to 88% of its customers in modeling jobs. We are seeking an injunction preventing Couture from continuing its allegedly illegal activities, plus pay full restitution for all consumers who file a valid claim against it.

Civil

During 1989, our Civil Division dealt with such diverse issues as challenges to and alleged violations of Maryland's Minority Business Enterprise (MBE) law, an attack on the State's new anti-takeover statute, opposition to the light rail line, a deceptive "charity" promotion, more than $10 million owed to the State's Higher Education Loan Corporation, and an unusual conflict between the State's duty to protect children versus a possible defendant's right against self-incrimination that went all the way to the U.S. Supreme Court.

The high court now has heard our argument on whether a Baltimore woman, Jacqueline Bouknight, can be compelled to reveal her young son's whereabouts or be kept in jail on contempt charges until she does. The Baltimore Juvenile Court cited her for contempt in April 1988 and ordered her jailed until she revealed where her son, Maurice, is now. The child has been missing since late 1987, when he was returned to Bouknight by the city's Department of Social Services, which earlier had placed him in foster care because he had been abused.

The Maryland Court of Appeals ruled in December 1988 that the juvenile court's contempt order was unconstitutional because if the child had been injured or murdered, the only way Bouknight could be freed would be to subject herself to possible criminal prosecution in violation of her Fifth Amendment rights. Chief Justice William Rehnquist subsequently issued an emergency order to keep Bouknight in jail until the Supreme Court can decide the case.

In representing the State Department of Human Resources on behalf of the missing child (who would now be 3), we urged the Supreme Court to overturn the Court of Appeals' finding. We contend that to deny juvenile courts the right to hold parents in contempt as a means of protecting their children would remove from the juvenile court the single most important power it has. This case has attracted national attention, with 27 other states filing friend-of-the-court briefs in support of our position. The National Governors' Association, the League of Cities, and the National Youth Law Center also have filed briefs on our behalf.

In another case involving children, the Court of Appeals recently ruled that State regulators acted properly in ordering the Bo Peep Day Nursery in Bel Air to close because of allegations about the physical and sexual abuse of children there. In a unanimous, 41-page ruling, the Court of Appeals reversed a decision last March by the Harford County Circuit Court that had voided the State's revocation of Bo Peep's license following hearings in August and September 1987, as well as May and June 1988. The circuit court had held that the attorneys for Bo Peep's owner, Deborah S. Cassilly, had not been allowed to have more extensive examinations of the children who allegedly were abused. We argued successfully that Bo Peep was afforded all of the protections that ordinarily satisfy due process requirements in contested administrative law cases.

We currently are seeking court approval of a plan to give handicapped children the $67,000 proceeds of a lawsuit settlement stemming from a 1987 case against the promoter of a circus performance that was supposed to help disabled children. In January 1988, Richard G. Garden, director of Mass Media, Inc., a promoter of the "Toby Tyler" circus between 1984 and 1986, was found to have violated Maryland's charitable solicitations law and consumer protection statute by using the names of Baltimore and Washington area charities to unlawfully solicit donations and falsely represent that the money obtained by selling tickets to the circus would help handicapped youngsters. In fact, few if any tickets were given to the children who were supposed to receive them, and the number of tickets sold actually exceeded the number of seats available. Once court approval of our distribution plan is obtained, the funds will go directly to 39 children who have been identified by the state's Developmental Disabilities Administration as in need of specialized care.

Challenges to some of our laws and mass transit plans have kept the Civil Division busy in 1989. We are vigorously defending the Minority Business Enterprise (MBE) law, which has been challenged by the Maryland Highway Contractors Association (MHCA), and, in an unrelated action, by F.A. Taylor & Sons,Inc., a Baltimore roofing contractor, against which we have obtained an indictment for violating the law. We also have succeeded in turning aside a suit filed by Realty Acquisition Corporation against Maryland's Business Combination Act and Control Share Act. Realty Acquisition, a Louisiana-based real estate investment firm, was pursuing a hostile takeover bid against Property Trust of America, a Texas-based real estate firm organized under Maryland law. The U.S. District Court in Baltimore agreed with our argument that Maryland's anti-takeover laws do not conflict with federal securities laws or the Constitution, and also do not discriminate against the holders of shares in Maryland corporations.

We also have succeeded in persuading the U.S. Court of Appeals for the District of Columbia to uphold a federal district court's dismissal of a suit by a Lake Roland neighborhood group, the Robert E. Lee Park Defense Fund, seeking an injunction against continued work on the first 22.4-mile section of the Central Light Rail Transit line from Hunt Valley to Glen Burnie. A U.S. District Court judge in Washington also rejected another effort by the same neighborhood group to stop work on the light-rail system until the State prepares a federal environmental impact statement. The neighborhood group says it will continue pursuing its legal challenge to the project.

As deft as the Assistant Attorneys General in the Civil Division have been in defending against challenges to our State laws, they also have been successful in overturning a federal statute that worked to Maryland's detriment. The U.S. District Court in Baltimore has held unconstitutional an amendment to the 1987 Omnibus Budget Reconciliation Act that allowed the U.S. Secretary of Education to withhold $10.7 million owed to the Maryland Higher Education Loan Corporation. The ruling effectively requires that the money be turned over to the State as reimbursement for funds paid to the lender of loans on which students have defaulted. The federal court ruled that the amendment in question violated the Fifth Amendment's ban on the taking of property without just compensation and issued a permanent injunction against enforcement of it.

In the disputed law, Congress earmarked reserves held by non-profit student loan agencies such as Maryland's as funds that could be used to reduce the federal deficit. The law permitted federal officials to disallow otherwise valid claims on federally guaranteed student loans. We argued successfully that the claims which Maryland's student loan corporation submitted last summer and fall stemmed from loans made before the disallowance law took effect, were backed by the federal government then, and ought to be reimbursed. The federal government has refused to reimburse an estimated $200 million to state agencies such as Maryland's for defaulted student loans it previously guaranteed. The $10.7 million ordered paid to Maryland is the sixth largest amount owed.

Securities

Most often the marketers of unregistered securities are people you have never heard of, but our Securities Division this past year found itself investigating a well-known radio talk show host -- and ultimately obtaining an order to freeze his assets.

Recently, the Baltimore Circuit Court gave talk show host Alan Christian until January to hire an attorney and produce some $677,000 that listeners invested in a company called Atlantic Coast Radio, Inc., which he said would purchase WITH-AM and establish some sort of radio network. Earlier, the court had frozen Christian's personal assets, as well as the assets of two of his associates, Grace Starmer and Dale Andrews, who are vice presidents of the broadcasting business

Christian heads. The court also appointed Deputy State Treasurer Louis Stettler III to act as receiver of the company.

Our investigation indicates that between 800 to 900 Marylanders have invested approximately $677,000 in Atlantic Cost Radio, which had failed to obtain approval from the Securities Division to market investments, as required by law, and also allegedly used unlicensed salespeople to sell its securities. In addition, the company's letters soliciting funds from investors failed to comply with the disclosure requirements of the State's securities law. The investment registration process requires firms selling securities to describe their businesses in detail and provide similarly detailed disclosure material to potential investors. Prior to the court order and appointment of the receiver, no one associated with Atlantic Coast Radio ever responded to our order to show that the investors' money, plus interest, had been placed in an escrow account, as the law requires.

Among the Securities Division's other accomplishments this past year was the successful conclusion of a lengthy legal battle with the Internal Revenue Service over the assets of Tyson J. Burrus, a one-time seller of phony securities and certificates of deposit who bilked would-be investors of more than $1.6 million early in 1983. Now restitution totalling some $350,000 will soon be distributed to Marylanders who were defrauded by the bogus securities scheme operated by Burrus and a co-defendant, David Coleman.

Burrus and Coleman offered investors opportunities to put money into questionable and unregistered business schemes, including oil drilling businesses, mining enterprises, and phantom investments in actual real estate developments. Circuit Courts in Baltimore and Prince George's counties froze the assets of Burrus and Coleman at our request, and the $350,000 in Burrus's assets were handed over to the federal bankruptcy court in Rockville for distribution to his victims. The IRS filed a priority claim to the money, however, leading to a lengthy dispute finally resolved in our -- or more properly, the investors' -- favor. Burrus and Coleman both went to jail for their part in the scheme.

Maryland also is among 10 states to which Drexel Burnham Lambert, Inc. has agreed to pay a total of $975,000 in fines so as to retain its license to do business in the State and settle administrative charges stemming from the federal government's probe of insider trading on Wall Street. The New York-based investment firm will pay $200,000 to Maryland as part of the settlement negotiated by a three-member panel of the North American Securities Administrators Association. Earlier this year, Drexel pleaded guilty to six felonies and agreed to pay $650 million in penalties in order to resolve fraud allegations resulting from the insider trading probe.

Medicaid Fraud

I believe there is no better way to emphasize the seriousness with which our office views all forms of drug abuse than to take the lead in obtaining the conviction of a doctor who violated not only the law but the very principles of his profession. That is why this past spring I took the unusual action of personally prosecuting a Prince George's County physician for Medicaid fraud and illegally dispensing potentially dangerous drugs to people who did not need them.

The physician, Dr. Samuel R. Lewis, of Mitchelville, promised to pay a total of $52,500 in fines and restitution and to surrender his license to practice medicine in Maryland and the District of Columbia. He pleaded guilty to willfully violating his profession's standards and the law by prescribing unnecessary drugs and defrauding Medicaid by billing it for services he did not perform. He had been employed fulltime as a physician at the District of Columbia General Hospital.

I presented a statement of facts to the court that revealed that our Medicaid Fraud Control Unit initiated an undercover probe of Lewis in March 1988, after receiving tips from former patients of the doctor that they never received any medical services from him but regularly bought prescriptions for potentially dangerous sedatives and diet pills at his Baltimore office. On one occasion, one of our investigators obtained prescriptions for himself and a female investigator who had not even gone to the doctor's office. Lewis became a reliable source for numerous Medicaid patients seeking abusable prescription drugs. As I told the court, a physician who provides known drug abusers with prescriptions for controlled dangerous substances is as much a threat to society as the drug pusher standing on the street corner dealing in illicit drugs.

Last spring we also obtained an order for $75,000 in fines and restitution from Marion B. Temple, a Silver Spring social worker who pleaded guilty to falsifying records and overbilling the State by $20,000. More recently, a $25,000 fine and suspended one-year sentence was imposed on Dr. Albert Chalom, an East Baltimore gynecologist, who provided unnecessary prescription drugs to female patients, some of whom allegedly had to lie on an examination table in their underwear while he fondled them or rubbed his body against theirs during questionable physical examinations. He either refused to write a prescription or prescribed a less-desired drug if the patients refused to submit to these examinations. In most cases, he bilked Medicaid for the office visits, even though Medicaid regulations specifically forbid the use of office visits solely for the purpose of receiving prescription drugs.

These are just a few of the Medicaid fraud cases we investigated and prosecuted this year.

Criminal Appeals

Advances in medical technology, innovative courtroom procedures, and basic constitutional questions were among the issues with which the Criminal Appeals Division dealt this year and, in one major case, will be arguing before the U.S. Supreme Court.

We have asked the high court to void the decision by the Maryland Court of Appeals to reverse the child abuse conviction of Sandra A. Craig, a Howard County day care provider who was found guilty in 1987 of sexually abusing a 6-year-old girl at Craig's now-defunct pre-school in Clarksville. The Court of Appeals ruled that the trial court violated Craig's right to confront her accusers by employing a Maryland law that allowed four child witnesses to testify by closed-circuit television during Craig's trial. I am planning to personally appear before the Supreme Court to defend that law and the use of it in Craig's case.

The Court of Appeals said that such alleged child abuse victims must physically confront the person charged with abusing them before the State can invoke the 1985 law that permits children to testify by TV in cases when they would suffer "serious emotional distress" if required to appear in the courtroom. We believe that to subject young children to a potentially traumatizing experience in order to see how thoroughly traumatized they will be would defeat the whole purpose of this law.

The legislature could not have intended such a result, and the Constitution, in our view, does not require it.

In an unrelated child abuse case last month, the Court of Appeals reversed a Court of Special Appeals ruling and re-instated the conviction of a Cecil County man, holding that defendants in such cases do not have an automatic right to review records compiled about them by social service agencies. The Court of Special Appeals had ruled that the Cecil County Circuit Court had incorrectly refused to give the defense all of the social services records on the accused, William Frederick Runge, who was convicted of abusing his three children.

The Court of Appeals ruled that the lower appellate court misinterpreted the word "may" in the law, which says such records are confidential but may be released to someone who is an alleged child abuser or the parent of an abused child. The statute does not require the release to alleged abusers of all the records concerning them, the Court of Appeals ruled. The Court concluded that the confidentiality statute was designed to provide only for immunity against criminal prosecution of a custodian who releases confidential social services information under certain statutorily defined circumstances. The law does not give rise to a substantive right on the part of a criminal defendant to acquire information for his defense.

A new State law, which goes into effect January 1, will make evidence gathered by the new scientific procedure of DNA fingerprinting admissible at criminal trials to prove or disprove identity.

Last June, the Court of Special Appeals showed itself to be well aware of this new procedure by upholding the use of DNA fingerprint analysis in the Montgomery County Circuit Court trial of Kenneth Cobey on sexual assault charges. Scientific analysis showed a match between Cobey's DNA structure, as revealed by his blood, with the DNA extracted from semen stains found on the victim's clothing. We argued that expert testimony and supporting documentation offered at Cobey's trial demonstrated the acceptance and reliability of the scientific method used to identify Cobey's DNA.

In an unusual case of first impression here in Maryland, the Court of Appeals last July recognized the "born alive rule" and held that under the common law of Maryland, the crime of manslaughter may be committed when an infant, born alive, dies shortly thereafter as a result of wounds criminally inflicted on the infant's pregnant mother. A Baltimore Circuit Court jury had found Andre Williams guilty of two counts of manslaughter in the death of Jewell Lyle, who was nine-months' pregnant when she was fatally wounded by an arrow Williams apparently fired at someone else. Lyle's baby was born alive before she died, but the infant died 17 hours later as a result of the injury inflicted on Lyle. With this case, Maryland joins a number of other jurisdictions in recognizing the "born alive rule" for criminal prosecutions.

The Court of Appeals last spring also upheld the constitutionality of the 1987 Maryland law that provides for a sentence of life without parole in the case of convicted contract murderer Michael Gregory Woods, the first defendant sentenced to life without parole under the new law. In making this finding, the State's highest court held that the same procedural safeguards required prior to imposition of the death penalty are not necessary in cases where the State is seeking a sentence of life without parole. Before imposing a death sentence, a judge or jury must consider carefully defined aggravating and mitigating circumstances in a separate proceeding. The Court ruled that the legislative history of the law showed that the General Assembly created the life without parole sentence as an alternative to the death penalty and gave trial judges broad discretion to impose it. It is "perfectly apparent," the Court found, that the legislature did not intend to apply the "sentencing scheme" employed in death penalty cases to those involving life without parole, and that life without parole could be imposed "under traditional sentencing procedures."

Antitrust

Allegedly restrictive trade practices that harmed the State, merchants, and individual consumers in such diverse fields as credit cards and soft drinks were dealt with by the Antitrust Division during a typically busy year.

Last spring, the Mid-Atlantic Coca-Cola Bottling Company in Columbia and General Cinema Beverages of Washington, D.C., Inc., a Pepsi-Cola distributor, agreed to pay a total of $80,000 to settle allegations that they conspired to fix prices of canned and bottled soft drinks sold to State and county government facilities in Maryland between 1984 and 1985. General Cinema has agreed to pay $20,000 to settle charges it fixed the price of Pepsi-Cola sold to government outlets in Montgomery, Prince George's, Charles and St. Mary's Counties, and Mid-Atlantic agrees to pay $60,000 to settle similar allegations in those counties, as well as in Baltimore City and Baltimore County. Neither firm admitted conspiring with the other to fix the prices of soft drinks sold to the State and its subdivisions, but both have pleaded guilty to price-fixing charges in federal courts and been fined $1 million each for fixing the prices of soda sold to retailers in the Washington metropolitan area.

Maryland is among a dozen states that filed suit this summer in New York federal court against Visa USA and Master Card International, alleging that they are violating federal and state antitrust laws by conspiring to monopolize the potentially multi-billion-dollar market for debit cards. Purchases made with debit cards are paid for with funds obtained electronically from the cardholder's bank account. Conceivably these debit cards could transform the retail industry.

Our lawsuit accuses the two credit card companies of engaging in a two-year conspiracy to eliminate competition in the potentially lucrative debit card market so that they can introduce their own debit card, "Entree," in a way that will not harm the highly profitable credit card business of their member banks. We allege that this ongoing conspiracy, involving a joint venture between Visa and Master Card, plus the takeover of the country's two largest networks of automated teller machines and the largest debit card network, has harmed Maryland merchants and consumers by stifling innovation in the field and undermining competition in the market for debit cards and traditional credit cards. The charges in this case follow a joint 18-month investigation, with Maryland and the other states filing separate suits seeking an injunction against the "Entree" joint venture and an order ending the firms' alleged antitrust violations.

Department of the Environment

The Attorney General's Office remains ever-vigilant in its effort to protect Maryland's environment, and we have undertaken a number of significant enforcement actions this past year aimed at achieving that goal. Last spring we filed a 15-count lawsuit in Anne Arundel County

Circuit Court seeking a record $1.3 million civil penalty against Easton Petroleum, Inc., J.E. Meintzer and Sons, and Martin Taylor, executive vice president of both Glen Burnie-based petroleum firms, alleging that the companies failed to stem widespread leaks from their underground oil and gasoline storage tanks.

This suit contends that mismanagement and neglect of the firm's underground storage systems led to the leakage of nearly 33,000 gallons of gasoline or oil at separate sites in Anne Arundel, Baltimore, Carroll, Montgomery and Talbot counties. The suit also seeks a court order requiring Easton and Meintzer to pay clean-up costs that may run to $600,000.

The suit was filed following a year-long investigation by the Department of the Environment's Hazardous and Solid Waste Administration in conjunction with our office. We cite nine gasoline and petroleum storage facilities where inspectors found leaks beginning in March 1988, but which the defendants failed to correct despite a departmental order to do so.

In another case, Baltimore City recently agreed to pay $59,000 to the State to settle fines for violating orders to remove tons of accumulated sludge from the Back River Waste Water Treatment Plant. A total of $88,000 in fines had been assessed since last spring, when the State began imposing a $1,000-a-day penalty on the city for each of 48 days in which it allegedly failed to comply with a sludge removal agreement, and a $10,000-a-day fine for four days in July when the agreement was violated. The Back River plant processes 180 million gallons of raw sewage every day, generating about 550 tons of wet sludge as a byproduct. The city had been ordered to remove more than 100,000 tons of sludge that was left in the open air. The city since has met the November 30 deadline for removing 211,000 tons of sludge from Back River.

Environmental Crimes

This year our Environmental Crimes Unit filed the first criminal charges alleging violations of the State's sediment and stormwater laws. Accused in the criminal information filed in St. Mary's County Circuit Court are Interstate General Company L.P. (IGC), a real estate development firm, and two of its officers, John Bolmer, vice president of home building, and Raymond Keeney, vice president of land development. The charges allege that IGC, a developer of more than 9,000 acres of residential and commercial property in St. Mary's and Charles counties, discharged sediment into State waters and unlawfully cleared land between April 26 and June 16 of this year. Sedimentation can clog stormwater management facilities and cause flooding, while statutes regulating land clearance are aimed at controlling soil erosion and protecting aquatic life, which can be threatened by soil and other particles that wash into rivers and streams.

The illegal dumping or discharging of hazardous wastes is a constant threat to the environment that can come not only from private firms and individuals but from municipalities as well. This summer the city of Cambridge agreed to pay $8,000 in fines for discharging untreated waste into the Choptank River in violation of State water pollution laws. The city failed to begin removing chlorine from water it poured in the Choptank, as it had agreed to do by May 1988, and it also failed to tell State environmental officials about the discharges from the town's sewage treatment plant and did not monitor the amount of waste local industries put into the sewer system.

In a case involving the private polluting of public waters, a complaint filed in Baltimore Circuit Court is seeking more than $15,000 in civil penalties and clean-up costs from Eastern Carriers, Inc., of Hockstein, Delaware, for allegedly dumping 212,000 gallons of fuel into the Chesapeake Bay in August 1988. We charge that the release of oil, diesel fuel and gasoline into the waters near Point Lookout, caused when an unmanned tank barge owned by the firm ruptured at the mouth of the Potomac River, was the second largest spill ever in the Bay and created conditions that indicate damage to aquatic resources there.

Nearly two years of investigation by the State Police, the Division of Environmental Health Services of Charles County, and our Environmental Crimes Unit have led to criminal charges being lodged against George S. Rhodes, owner of Smitty's Trailer Park, a 35-house facility in Charles County, accusing his firm, R&F Enterprises, of dumping untreated sewage into a swamp that ultimately feeds into the Wicomico River. We charge that between May 1988 and this past March, the trailer park's septic systems illegally discharged raw sewage into the swamp, threatening it and ultimately the river with pollution.

And yet another lengthy investigation has resulted in an indictment against George R. Adams, president of Adams Company and Sons, a painting and crane operating firm in Salisbury, on charges of illegally transporting and disposing of hazardous paint wastes -- first in the Northwood Industrial Park and then on Johnson Road in Salisbury.

Natural Resources

Negotiations by Assistant Attorneys General representing the Department of Natural Resources finally cleared the way this summer for resumption of the Ocean City Beach Replenishment Project. A settlement was reached with the last beach front property owner whose refusal to grant a required easement had blocked Phase II of this multi-million dollar endeavor. He was the last of 13 property owners whose refusal to grant the State the easements on their land led to a 1987 lawsuit that all of them have now agreed to settle. A total of 234 easements originally were sought from approximately 5,000 owners, with all but the 13 property owners and their spouses agreeing to give the State the easements at no cost.

Assessments and Taxation

Concluding a three-year old dispute, the State will seek more than $1.2 million in back property taxes from the Burning Tree Club in Bethesda, based on a reassessment of the club's 244-acre Montgomery County property since July 1, 1986, when a new law went into effect denying a longstanding tax break to the club because its all-male membership policy violated the State's Equal Rights Amendment.

Maryland law gives country clubs lower tax rates in return for preserving open space, but Burning Tree was the only one of 22 facilities given such a tax reduction to maintain an all-male membership policy. It challenged the 1986 law, and in 1987 the Anne Arundel County Circuit Court overturned the statute. Last March, however, the Court of Appeals reversed the circuit court's ruling and in October the U.S. Supreme Court refused to review the case.

General Services

The State has been awarded a $409,000 judgment in its suit against the architects, masonry contractors and suppliers of insulating concrete involved in the construction of the 500-bed, medium security correctional institution in Jessup. The roofs of that facility leaked from the start and eventually failed.

Evidence presented in Baltimore County Circuit Court showed what caused the roofing defects and how the architects were professionally negligent and breached their contract. The masonry subcontractors were cited for failures in how they performed their work.

Separate litigation in 1986 resulted in payment of an additional $600,000 from the general contractor, which means the state's total recovery in this matter has been more than $1 million.

That is just one more indication of how the state's interests have been protected and served this year by the staff of the Attorney General's Office in these and many other departments and divisions.

All Marylanders can be proud of the energy, dedication and skill of the attorneys and support personnel who work on their behalf in the Attorney General's Office. I also wish to thank you and your staff for the assistance we have received from you throughout 1989.

J. Joseph Curran, Jr.
Attorney General

CASES IN WHICH THE OFFICE OF THE ATTORNEY GENERAL HAS PARTICIPATED

CALENDAR YEAR 1989

Supreme Court of the United States	38
United States Court of Appeals for the Fourth Circuit	218
Other United States Courts of Appeal	12
TOTAL	268
United States District Court for the District of Maryland	1,208
Other United States District Courts	57
TOTAL	1,264
Court of Appeals of Maryland (Includes Petitions for Certiorari and Answers to Petitions)	
Civil Appeals	104
Criminal Appeals	143
TOTAL	247
Court of Special Appeals of Maryland	
Civil Appeals	239
Criminal Appeals	1,117
TOTAL	1,356

Circuit Courts of Maryland	5,245
District Courts of Maryland	2,262
Maryland Tax Court	1,183
Workmen's Compensation Hearings	11,179
Miscellaneous Administrative Hearings	3,420

7,121 of these cases have been completed
7,804 are in the process of trial/litigation
8,703 new cases have been opened

FINANCIAL STATEMENT
OFFICE OF THE ATTORNEY
For the Fiscal Year 1989

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	$ 13,947,687

Program 001 - Legal Counsel & Advice

Appropriation	$ 2,997,481
Budget Amendments	93,015
Total funds available	$ 3,090,496

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	$ 1,473,878
Additional Salary Related Expenses	
Overtime	16,773
Miscellaneous Adjustments	16,460
Fringe Benefits	351,846
Other Adjustments/Turnover	(146,922)

Total Additional Expenses	$ 238,157
Total Salaries and Related Expenses	$ 1,712,035
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	1,178,105
Total Other Expenses	$ 1,378,461
TOTAL EXPENDITURES - 001	$ 3,090,496

Program 002 - Division of Asbestos

Appropriation	$ 911,387
Budget Amendments	17,182
Total Funds Available	$ 928,569
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 & Legislative (3)	40,460
Total Salaries	$ 335,210

Additional Salary Related Expenses	
Overtime	23,143
Fringe Benefits	85,938
Total Additional Expenses	$ 109,081
Total Salaries & Related Expenses	$ 444,291
Other Expenses	
Technical & Special Fees	135,587
Communication	11,801
Travel	14,073
Contractual Services	255,071
Supplies & Materials	1,671
Equipment - Additional	8,000
Fixed Charges	58,075
Total Other Expenses	$ 484,278
TOTAL EXPENDITURES - 002	$ 928,569

Program 003 - Division of Savings and Loan

Appropriation	$ 906,976
Budget Amendments	13,997
Less Reversion	(424,406)
Total Funds Available	$ 496,567
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 & Legislative (1)	15,114
Total Salaries	$ 287,226
Additional Salary Related Expenses	
Overtime	316
Fringe Benefits	74,657
Other Adjustments/Turnover	876
Total Additional Expenses	$ 75,849
Total Salaries & Related Expenses	$ 363,075
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	48,988
Total Other Expenses	$ 133,492
TOTAL EXPENDITURES - 003	$ 496,567

Program 004 - Division of Securities

Appropriation	$ 612,535
Budget Amendments	25,952
Total Funds Available	$ 638,487
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	23,165
Office Secretary III (1)	41,464
Stenographer, Law & Legislative (2)	17,066
Typist Clerk IV (1)	14,546
Total Salaries	$ 418,892
Additional Salary Related Expenses	
Additional Assistance	1,202
Overtime	822
Miscellaneous Adjustments	3,464
Fringe Benefits	116,232
Other Adjustments/Turnover	2
Total Additional Expenses	$ 121,722
Total Salaries & Related Expenses	$ 540,614
Other Expenses	
Technical and Special Fees	15,648
Communication	7,406
Travel	1,139
Motor Vehicle Operation & Maintenance	(178)
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	$ 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 & 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	$ 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 & Legislative 92)	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	$ 125,185
Total Salaries and Related Expenses	$ 593,406
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	$ 277,792
TOTAL EXPENDITURES - 006	$ 871,198

Program 008 - State's Attorneys' Coordinator

Appropriation	$ 186,264
Budget Amendments	5,172
Total Funds Available	$ 191,436

Salaries	
State's Attorneys' Coordinator (1)	51,700
Administrative Aide I	23,398
Total Salaries	$ 75,098
Additional Salary Related Expenses	
Overtime	347
Fringe Benefits	20,390
Total Additional Expenses	$ 20,737
Total Salaries and Related Epenses	$ 95,835
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	1,053
Total Other Expenses	$ 95,601
TOTAL EXPENDITURES - 008	$ 191,436

Program 009 - Medicaid Fraud Control Unit

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

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 & Legislative (3)	57,346
Total Salaries	$ 750,864
Additional Salary Related Expenses	
Miscellaneous Adjustments	2,256
Fringe Benefits	196,130
Total Additional Expenses	$ 198,386
Total Salaries & Related Expenses	$ 949,250
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 Attorney General VII, General Counsel (3)	146,997
Asst Attorney 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 & 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	$ 160,294
TOTAL EXPENDITURES - 014	$ 1,291,422

Program 015 - Criminal Appeals Division

Appropriation	$ 957,099
Budget Amendments	42,412
Total Funds Available	$ 999,511
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 Attorney General V, General Counsel (8)	220,026
Asst Attorney General IV, General Counsel (1)	35,762
Administrative Aide I (1)	22,629
Office Secretary III (1)	31,729
Stenographer, Law & Legislative (3)	48,396
Office Secretary II (1)	17,749
Total Salaries	$ 645,576
Additional Salary Related Expenses	
Overtime	52
Miscellaneous Adjustments	4,166
Fringe Benefits	176,318
Other Adjustments/Turnovers	13,262
Total Additional Expenses	$ 193,798
Total Salaries & Related Expenses	$ 839,374
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	1,656
Total Other Expenses	$ 160,137
TOTAL EXPENDITURES - 015	$ 999,511

Program 016 - Criminal Investigations Division

Appropriation	$ 613,387
Budget Amendments	24,408
Total Funds Available	$ 637,795
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 Attorney 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 & Legislative (2)	26,946
Total Salaries	$ 422,553
Additional Salary Related Expenses	
Additional Assistance	(585)
Overtime	707
Miscellaneous Adjustments	42
Fringe Benefits	113,253
Other Adjustments/Turnovers	18,173
Total Additional Expenses	$ 131,590

Total Salaries & Related Expenses	$ 554,143
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	2,584
Total Other Expenses	$ 83,652
TOTAL EXPENDITURES - 016	$ 637,795

Program 017 - Educational Affairs Division

Appropriation	$ 680,445
Budget Amendments	27,520
Less Reversion	(1,461)
Total Funds Available	$ 706,504
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 Attorney 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 & Legislative	18,699
Total Salaries	$ 405,092

Additional Salary Related Expenses	
Overtime	112
Miscellaneous Adjustments	16,649
Fringe Benefits	114,909
Other Adjustments/Turnovers	12,985
Total Additional Expenses	$ 144,655
Total Salaries & Related Expenses	$ 549,747
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	1,609
Total Other Expenses	$ 156,757
TOTAL EXPENDITURES - 017	$ 706,504

Program - 018 Correctional Litigation Division

Appropriation	$ 490,056
Budget Amendments	20,575
Total Funds Available	$ 510,631
Salaries	
Asst Attorney General VII, General Counsel (1)	51,954
Asst Attorney General VI, General Counsel (5)	192,419
Asst Attorney General V, General Counsel	28,996
Administrative Aide I (1)	22,629
Stenographer, Law & Legislative (2)	36,461
Total Salaries	$ 332,459

Additional Salary Related Expenses	
Overtime	139
Fringe Benefits	89,809
Other Adjustments/Turnovers	11,557
Total Additional Expenses	$ 101,505
Total Salaries & Related Expenses	$ 433,964
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	214
Total Other Expenses	$ 76,667
TOTAL EXPENDITURES - 018	$ 510,631
Total FY 89 Expenditures	$ 13,947,687

OFFICIAL OPINIONS

OF THE

ATTORNEY GENERAL OF MARYLAND

OF

MARYLAND

OPINIONS PUBLISHED

IN FULL

See also page 327 for synopses of additional Opinions

ABORTIONS

State Regulation - *Webster v. Reproductive Health Services* - *Webster* Decision Does Not Change Status of Current Maryland Law

July 20, 1989

The Honorable Barbara A. Hoffman
The Honorable Leo E. Green
Senate of Maryland

The Honorable Samuel I. Rosenberg
Maryland House of Delegates

You have requested our opinion concerning the effect of *Webster v. Reproductive Health Services,* 109 S.Ct. 3040 (1989), the Supreme Court's recent abortion decision, on Maryland's existing laws restricting abortions.

For the reasons stated below, we conclude as follows:

The *Webster* decision does not change the status of Maryland's current laws on abortion. Those restrictions that are unconstitutional and unenforceable as a result of prior Supreme Court decisions remain so. To be sure, future Supreme Court decisions, including decisions in cases now pending before the Court, might well change the constitutional status of Maryland's laws.[1] But until they do, the only proper course is to await the actual decisions before concluding that these laws are once again enforceable.

---

[1] In a separate request dated July 13, 1989, Senator Hoffman and Delegate Rosenberg have posed a number of questions about the potential effect of three abortion cases to be heard by the Supreme Court at its next term. *See* 57 *U.S.L.W.* at 3851-52. We shall discuss these questions in an opinion to be issued later.

I

Maryland's Restrictions on Abortion

In 1968, five years before the Supreme Court's landmark decision in *Roe v. Wade*, 410 U.S. 113 (1973), the General Assembly enacted a series of provisions "relating generally to the termination of human pregnancy in this State." Chapter 470, Laws of Maryland 1968. These provisions were not substantively changed when they were incorporated into the Health-General Article ("HG" Article) in 1982.[2] Nor have they been repealed or significantly amended since.

After *Roe*, its companion case of *Doe v. Bolton*, 410 U.S. 179 (1973), and several later Supreme Court cases overturning state restrictions on abortion, the courts and this office concluded that various provisions of Maryland law were unconstitutional. Without repeating the prior analysis, we shall summarize the status of the most important of these provisions.

First, the 1968 legislation directly limited the circumstances under which an abortion was permissible.[3] HG §20-208(a) permits an abortion only "if one or more of the following conditions exist":

> (1) continuation of the pregnancy is likely to result in the death of the mother;
>
> (2) there is a substantial risk that continuation of the pregnancy would gravely impair the physical or mental health of the mother;

---

[2] The legislative history supports the view that the reenactment of these provisions was intended merely to maintain the status quo, necessarily including "existing judicial gloss." Bill Review Letter on House Bill 1/Senate Bill 616 (March 20, 1981). *See also* General Revisor's Note to HG Title 20, Subtitle 1, Part II (1982 vol. at 303).

[3] This restriction presumably was intended to be enforced against doctors and hospitals by licensing authorities; there is no criminal sanction for performing an abortion for a reason other than those specified.

(3) there is a substantial risk of the birth of the child with grave and permanent physical deformity or mental retardation;

(4) the pregnancy resulted from a rape committed as a result of force or bodily harm or threat of force or bodily harm and the State's Attorney of Baltimore City or the county in which the rape occurred has informed the hospital abortion review authority in writing over his signature that there is probable cause to believe that the alleged rape did occur.

The Court of Special Appeals held that these restrictions on decisionmaking concerning abortion "conflic[t] with the decisions of the Supreme Court" in *Roe v. Wade* and *Doe v. Bolton* and therefore were unconstitutional. *Coleman v. Coleman*, 57 Md. App. 755, 760, 471 A.2d 1115 (1984). Earlier, the Attorney General had reached the same conclusion. 62 *Opinions of the Attorney General* 3, 7 (1977).

Second, the legislation imposed a more severe limitation on abortions in the third trimester. Under HG §20-208(b)(1), an abortion of a live fetus after the 26th week of gestation is permissible only if continuation of the pregnancy is likely to result in the death of the woman. Because this provision prohibits third trimester abortions that are necessary to protect the health of the woman, the Attorney General concluded that this provision is unconstitutional under *Roe*. 62 *Opinions of the Attorney General* at 8.

Third, HG §20-208(a) requires all abortions to take place "in a hospital accredited by the Joint Commission for Accreditation of Hospitals and licensed by the State Board of Health and Mental Hygiene . . . ." In addition, §14-504(a)(23) of the Health Occupations Article subjects to discipline any physician who performs an abortion outside of an accredited hospital. Unlike the other abortion restrictions discussed in this opinion, the requirement that all abortions be performed in hospitals carries a criminal sanction. *See* HG §20-

210(a)(3).[4] Because the Supreme Court had struck down laws requiring first and second trimester abortions to be performed in hospitals, the courts and the Attorney General concluded that the Maryland provisions could not be enforced. *Vuitch v. Hardy*, 473 F.2d 1370, 1371 (4th Cir. 1973); *State v. Ingel*, 18 Md. App. 514, 521, 308 A.2d 223 (1973); 70 *Opinions of the Attorney General* at 15; 62 *Opinions of the Attorney General* at 9. *See City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 438-39 (1983); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 481-82 n.6 (1983); *Doe v. Bolton*, 410 U.S. at 193-95.[5]

Finally, HG §20-103 requires, with some narrow exceptions, a physician to give notice to the parents or guardian of a minor prior to performing an abortion. Largely because the provision "offers no alternative procedure whereby an unemancipated minor may demonstrate that she is mature enough to make an informed decision without parental involvement or that, although immature, notification would not be in her best interests," the Attorney General concluded that this notification requirement is unconstitutional. 70 *Opinions of the Attorney General* 3, 12 (1985). *See City of Akron v. Akron Center for Reproductive Health, Inc.; Bellotti v. Baird*, 443 U.S. 622 (1979).

---

[4] HG §20-210(a)(3) also imposes criminal penalties on anyone other than a licensed physician who performs an abortion. This provision, with its counterpart in HG §20-208(a), is constitutional. *See State v. Ingel*, 18 Md. App. 514, 519 (1973).

[5] HG §20-208(b)(2) requires that all abortions be approved in writing "by a hospital abortion review authority appointed by the hospital." This provision was also determined to be inconsistent with *Doe v. Bolton*, 410 U.S. at 198. *State v. Ingel*, 18 Md. App. at 520; 62 *Opinions of the Attorney General* at 9.

II

Webster v. Reproductive Health Services

A. Introduction

We begin with what the *Webster* decision actually held.[6]

A majority of the Supreme Court upheld the constitutionality of provisions of Missouri law that made it unlawful for (i) a public employee to perform an abortion not necessary to save the life of the mother and (ii) a public facility to be used for such an abortion. In a portion of his opinion that reflected the views of a Court majority, Chief Justice Rehnquist wrote that, because the Court had already sustained the constitutionality of a state's refusal to fund abortions directly, "it strains logic to reach a contrary result for the use of public facilities and employees. If the State may 'make a value judgment favoring childbirth over abortion and ... implement that judgment by the allocation of public funds' ... surely it may do so through the allocation of other public resources, such as hospitals and medical staff." 109 S.Ct. 3052 (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)).[7]

---

[6] The Supreme Court found it unnecessary to consider two provisions of Missouri's law. The Court held that the controversy over a provision relating to "encouraging or counseling a woman to have an abortion not necessary to save her life" was moot. 109 S. Ct. at 3053. In addition, a majority of the Court concluded that it was not required to pass on the constitutionality of the preamble to the Missouri law, which stated the Missouri legislature's value judgment that "the life of each human being begins at conception." *See* 109 S.Ct. at 3049.

[7] For the last several years, the General Assembly through budget language has limited the circumstances under which Medicaid funds may be used for abortions. *See, e.g.*, Chapter 14 of the Laws of Maryland 1989 (appropriation item 32.17.01.03). Comparable restrictions are in the regulations of the Medicaid program. COMAR 10.09.02.04G. Such restrictions on Medicaid funding of abortions are constitutional. *See Bayne v. Secretary of State*, 283 Md. 560, 573 and 576 n.7, 392 A.2d 67 (1978); 62 *Opinions of the Attorney General* 11, 12 (1977). *See also* 63 *Opinions of the Attorney General* 60 (1978).

On the most important issue in the case, the constitutionality of a provision relating to testing to determine fetal viability, the Court was split. Although five Justices agreed that the provision was constitutional, no single rationale commanded a majority. Because this aspect of *Webster* is most pertinent to an assessment of the current status of Maryland's laws, we examine the respective opinions in some detail.

B. *The Plurality Opinion*

The plurality opinion by Chief Justice Rehnquist, in which Justices White and Kennedy joined, described the provision as follows:

> The viability-testing provision of the Missouri Act is concerned with promoting the State's interest in potential human life rather than in maternal health. [It] creates what is essentially a presumption of viability at 20 weeks, which the physician must rebut with tests indicating that the fetus is not viable prior to performing an abortion. It also directs the physician's determination as to viability by specifying consideration, if feasible, of gestational age, fetal weight, and lung capacity.[8]

---

[8] The testing provision, Mo. Rev. Stat. §188.029, is as follows:

> Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions. In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical record of the mother.

The plurality construed this language "to require only those tests that are useful to making subsidiary findings as to viability." 109 S.Ct. at 3054.

109 S.Ct. at 3055. The testing requirement serves the following unchallenged provision of Missouri law: "No abortion of a viable unborn child shall be performed unless necessary to preserve the life or health of the woman." Mo. Rev. Stat. §188.030.[9]

The plurality identified two consequences of the testing provision that led the lower courts, applying the Supreme Court's precedents, to hold it unconstitutional. First, the testing provision "undoubtedly does superimpose state regulation on the medical determination of whether a particular fetus is viable." 109 S.Ct. at 3056. *See Colautti v. Franklin*, 439 U.S. 379, 396 (1979). Second, "[t]o the extent that the viability tests increase the costs of what are in fact second-trimester abortions, their validity may also be questioned ...." *Id. See Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. at 434-35.

The plurality rejected these criticisms, and with it rejected what it called "the rigid trimester analysis of the course of a pregnancy enunciated in *Roe*[, which] has resulted in subsequent cases like *Colautti* and *Akron* making constitutional law in this area a virtual Procrustean bed." 109 S.Ct. at 3056. To the plurality, the state has a fundamental interest in protecting potential human life throughout pregnancy. Id. In order to meet the plurality's constitutional standard, a state requirement related to abortion need only "permissibly furthe[r] the State's interest in protecting potential human life ...." 109 S.Ct. at 3057. Missouri's viability determination provision satisfied that minimal test and, hence, was constitutional.[10]

---

[9] This provision is constitutional even under *Roe*: "No one contests that under the *Roe* framework the State, in order to promote its interest in potential human life, may regulate and even proscribe non-therapeutic abortions once the fetus becomes viable." 109 S.Ct. at 3070 (Blackmun, J., dissenting).

[10] Because the Missouri testing provision was related to that state's interest in protecting potential human life, rather than the state's interest in protecting maternal health, the plurality had no occasion to discuss the scope of state authority in furtherance of the latter interest. However, there is no reason to doubt that the plurality would apply the same permissive test to state regulations said to further the protection of maternal health.

The plurality acknowledged that its holding "will allow some governmental regulation of abortion that would have been prohibited under the language of cases such as *Colautti v. Franklin* ... and *Akron v. Akron Center for Reproductive Health, Inc.* ...." 109 S.Ct. at 3058. However, the plurality expressly disavowed any effort "to revisit the holding of *Roe*" and concluded that "we leave it undisturbed," albeit "[t]o the extent indicated in our opinion, we would modify and narrow *Roe* and succeeding cases." *Id.*

C. Scalia Opinion

Justice Scalia agreed that the Missouri testing provision was constitutional but rejected the plurality's reasoning, which he characterized as "the most stingy possible holding ...." 109 S.Ct. at 3065. He would simply overrule *Roe v. Wade*, with the consequence that each state could adopt whatever abortion restrictions it wanted, so long as they were rationally related to the legitimate state interests in protecting potential human life and protecting maternal health.

D. O'Connor Opinion

The crucial fifth vote to sustain the constitutionality of the Missouri testing provision was that of Justice O'Connor. She disagreed with the approach of the plurality, observing that it had "proceeded in a manner unnecessary to deciding the question at hand." 109 S.Ct. at 3060. There was no need to narrow *Roe* or any other decision, in her view, because "I do not understand these viability testing requirements to conflict with any of the Court's past decisions concerning state regulation of abortion." *Id.* "No decision of this Court," Justice O'Connor pointed out, "has held that the State may not directly promote its interest in potential life when viability is possible." 109 S.Ct. at 3062.

Furthermore, it was clear to Justice O'Connor "that requiring the performance of examinations and tests useful to determining whether a fetus is viable, when viability is possible, and when it would not be medically imprudent to do so, does not impose an undue burden on a woman's abortion decision." *Id.* This "undue burden" analysis, which Justice O'Connor developed at length in her dissent in *Akron*, is in her view the correct approach to assessing state regulation of abortion generally. Although this standard evidently would permit states to regulate abortion more extensively than in the past, exactly where Justice O'Connor draws the line is not clear.[11] Indeed, in her view, the burden of the testing required under the Missouri law was so "margina[l]" as to present no conflict with the Court's opinion in *Akron. Id.*

Hence, Justice O'Connor's concurrence in *Webster* provides little guidance about her view of state restrictions not presented by the *Webster* case itself. "When the constitutional invalidity of a State's abortion statute actually turns on the constitutional validity of *Roe v. Wade,*" she wrote, "there will be time enough to reexamine *Roe*. And to do so carefully." 109 S.Ct. at 3061.

E. Dissenting Opinions

Justice Blackmun, with whom Justices Brennan and Marshall concurred, would have interpreted the Missouri testing provision (as the lower courts did) to "requir[e] the physician to undertake whatever tests are necessary to determine gestational age, weight, and lung maturity, regardless of whether these tests are necessary to a finding of viability, and regardless of whether the tests subject the pregnant

---

[11] In *Akron,* Justice O'Connor explained the standard as follows in her dissent:

> [T]he *Roe* right is intended to protect against state action 'drastically limiting the availability and safety of the desired service,' against the imposition of an 'absolute obstacle' on the abortion decision, or against 'official interference' and 'coercive restraint' imposed on the abortion decision. That a state regulation may 'inhibit' abortions to some degree does not require that we find that the regulation is invalid.

462 U.S. at 464 (citations omitted without elipses).

In *Webster*, Justice Scalia criticized the "undue burden" standard as one that "'offers no guide but the Court's own discretion,'" and thereby "merely adds to the irrationality of what we do today." 109 *S.Ct.* at 3066 n.* (*quoting Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J. dissenting)).

woman or the fetus to additional health risks or add substantially to the cost of an abortion." 109 S.Ct. at 3070. Thus construed, the provision is irrational and hence unconstitutional even under the lenient rational basis standard of review. *Id.*[12] On the other hand, "[i]f, as the plurality appears to hold, the testing provision simply requires a physician to use appropriate and medically sound tests to determine whether the fetus is actually viable when the estimated gestational age is greater than 20 weeks ..., then [the dissenters saw] little or no conflict with *Roe.*" *Id.*

More generally, Justice Blackmun observed that, "Today, *Roe v. Wade*, ... and the fundamental constitutional right of women to decide whether to terminate a pregnancy, survive but are not secure." 109 S.Ct. at 3067. Because of the plurality's "proposed revolutionary revision in the law of abortion ...," the "signs" about *Roe's* future "are evident and ominous ...." 109 S.Ct. at 3079. Newly enacted restrictions on abortion "will satisfy the plurality's non-scrutiny, until sometime, a new regime of old dissenters and new appointees will declare what the plurality intends: that *Roe* is no longer good law." 109 S.Ct. at 3077.

III

Impact on Maryland Statutes

A. *Holding and Rationale of Webster*

When we examine the impact of a Supreme Court decision, the starting point of our analysis is the holding of the case. Sometimes, a Maryland statute is so similar to one actually before the Supreme Court that the Court's holding directly affects the status of the Maryland law. So, for example, certain provisions of Maryland's abortion laws were so similar to those held unconstitutional by the Supreme Court in *Doe v. Bolton* that the Attorney General needed only to cite the Supreme

---

12 Justice Stevens agreed with this analysis. 109 S.Ct. at 3080. His separate opinion went on to explain why, in his view, the Missouri preamble (*see* note 6 above) violated the First Amendment.

Court case in support of his conclusion that these laws were unconstitutional. *See* 62 *Opinions of the Attorney General* at 7 and 9.

By contrast, the precise holding in *Webster* has no effect on Maryland law. Maryland has no provision akin to the Missouri provisions upheld in *Webster*.

Beyond the exact holding of a Supreme Court decision, we must also consider the reasoning that led to particular result. The Court's rationale in determining the constitutional status of another state's law might be so plainly pertinent to a Maryland law that we can apply the decision, even if the respective laws are not identical. So, for example, this office concluded that the parental notification requirements in HG §20-103 were unconstitutional, applying the analysis in several Supreme Court decisions that discussed other states' parental notification schemes. *See* 70 *Opinions of the Attorney General* at 12.

By contrast, we cannot determine that the status of Maryland's abortion laws has changed by considering the reasoning in the various opinions in *Webster*. As we explain in Part II above, no rationale commanded the support of a majority of the Justices; neither the plurality nor Justice O'Connor went further than what they separately considered to be necessary to sustain the Missouri provisions.

It has been suggested that, in effect, *Webster* authorizes the states to regulate abortion however they wish after the 20th week of gestation. Letter to Attorney General Curran from Senator Francis X. Kelly and Delegate Timothy F. Maloney (July 10, 1989). We do not think that the Court's approval of Missouri's 20th-week testing requirement gives rise to that conclusion, however.

The purpose of testing after 20 weeks is to determine whether the fetus is actually older, and therefore potentially viable.[13] If it is viable, Missouri prohibits an abortion except for therapeutic reasons, a restriction permissible under *Roe*.[14] But *Webster*, particularly in light of Justice O'Connor's concurrence, does not support the suggestion that states are now free to limit abortions after the 20th week without regard to the possible viability of the fetus.

B. Implications of Webster

Webster surely has a dimension beyond its fragmented discussion of the particular provisions of Missouri's law. We do not doubt that *Webster* is the precursor of a new constitutional doctrine on abortion, one that will be markedly more open to state regulation than the doctrine of *Roe* and its progeny.

Yet this is an anomalous moment in the development of the law of abortion. Because the plurality in *Webster* was just that - a plurality, not a majority - Justice Blackmun was right when he observed that "[f]or today, at least, the law of abortion stands undisturbed." 109 S.Ct. at 3079. Justice O'Connor, whose position is crucial, was at pains to make clear her view that the *Webster* case could have and should have been decided merely by applying past precedent. Her concurrence in *Webster* permits no more than guesswork about her position when other, more stringent restrictions on abortion come

---

13 As the plurality pointed out: "The District Court found that 'the medical evidence is uncontradicted that a 20-week fetus is *not* viable,' and that '23 1/2 to 24 weeks gestation is the earliest point in pregnancy where a reasonable possibility of viability exists.' But it also found that there may be a 4-week error in estimating gestational age, which supports testing at 20 weeks." 109 S.Ct. at 3055 (citations omitted without elipses, emphasis in original).

14 *See* note 9 above and accompanying text. By contrast, the comparable Maryland provision, HG §20-208(b)(1), prohibits third-trimester therapeutic abortions except if the life of the woman is endangered - that is, even if an abortion is necessary to preserve the health of the woman.

before the Court.[15] Quite simply, we cannot conclude that a majority of the Justices has yet arrived at a consensus about the legal principles that will determine the constitutionality of abortion restrictions.

What responsibility does the Attorney General of Maryland have when faced with this extraordinary instability in the law? To be sure, we are often called upon to give legal advice that amounts to a prediction about future court decisions. In the absence of dispositive precedent, we apply the familiar tools of legal reasoning to reach a conclusion about the state of the law - in effect, to predict what the courts will say the law is, if and when they get a case on point.

The problem of Maryland's abortion laws, however, is far different. It is not that we have no binding law on the subject. Quite the contrary: *Roe* and the cases flowing from it continue to be the law, and, notwithstanding *Webster*, they continue to render Maryland's abortion restrictions unconstitutional so long as they are the law.

We think that this present fact is not changed by the possibility that a future case might alter the constitutional status of Maryland's laws. If we were, by speculative vote-counting, to transform a future possibility into a present reality, in effect we would be doing what the Supreme Court itself did not do in *Webster* - overrule *Roe* and its progeny. We would, moreover, be presuming to do what a federal or state court may not do - overrule Supreme Court cases before the Court itself does so. "Needless to say, only this Court may overrule one of its precedents. Until that occurs, [the prior decision] is the law ...." *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533,

---

[15] Justice O'Connor's disinclination to join the plurality in *Webster* is surprising, given that in her dissent in *Akron* she was just as critical of *Roe's* trimester approach as is the Webster plurality: "[T]here is no justification in law or logic for the trimester framework adopted in *Roe* ...." *Akron*, 462 U.S. at 459 (O'Connor, J., dissenting). Moreover, in *Akron*, she expressed much the same willingness as the plurality in Webster to depart from the doctrine of *stare decisis* in the abortion area. *Compare Akron*, 462 U.S. at 458-59 *with Webster*, 109 S.Ct. at 3056. We do not know what her apparent caution in *Webster* implies about her views in future cases.

535 (1983). *Cf.* 67 *Opinions of the Attorney General* 48, 50-53 (1982).[16]

Under these circumstances, we believe that the proper course for those who apply or interpret the law is a conservative one. If the Supreme Court has held that a state statute violates a right guaranteed by the United States Constitution, and a comparable Maryland statute has been held unconstitutional through application of that Supreme Court decision, the statute should not once again be enforced through criminal prosecutions or regulatory sanctions unless the Supreme Court tells us unmistakably that its prior decision is no longer good law. Speculation about what the Court might do next year or the year after is not a sufficient basis on which to go beyond the limits of the law today.[17]

Our caution about allowing future possibilities to displace presently binding holdings is reinforced by the fact that the Supreme Court will soon issue more abortion rulings, on matters much closer to provisions in Maryland law. The Supreme Court has granted review in one case, *Turnock v. Ragsdale*, No. 88-790, that involves the constitutionality of a law imposing on abortion clinics regulatory standards like those that hospitals must meet. *See* 57 U.S.L.W. at 3851. The Court's disposition of this case might well reflect a change in the law sufficient to change the status of Maryland's hospitalization requirement. The two other cases granted review, *Ohio v. Akron Center for Reproductive*

---

[16] One federal appeals court has expressed the view (in a case *not* involving constitutional limits on governmental action) that if "events subsequent to the last decision by the higher court approving [a] doctrine - especially later decisions by that court ... - make it almost certain that the higher court would repudiate the doctrine if given a chance to do so, the lower court is not required to adhere to the doctrine." *Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731, 734 (7th Cir. 1986) (Posner, J.). Even if this view were applicable to the question of whether a state may transgress constitutional limits established in prior cases because it predicts the overruling of those cases, which we doubt, nevertheless Judge Posner has articulated "a high standard [that] will rarely be met." 806 F.2d at 741. Given the continuing uncertainty about Justice O'Connor's views, we cannot say that it is "almost certain" that the Supreme Court would find Maryland's restrictions constitutional.

[17] In practical terms, an effort now to enforce restrictions rendered unconstitutional by *Roe* and its progeny carries with it the risk of significant financial exposure. We believe that the lower courts would find such an effort unconstitutional. If the current restrictions were *not* ultimately upheld by the Supreme Court, the State would be required to pay the attorneys' fees of those aggrieved by the State's action.

Health, No. 88-805, and the twin appeals styled *Hodgson v. Minnesota* and *Minnesota v. Hodgson*, No. 88-1125 and No. 88-1309, involve parental notification statutes. *See* 57 U.S.L.W. at 3851-52. Again, if the Supreme Court upholds the constitutionality of these state requirements by overruling prior cases, Maryland's parental notification system might well become enforceable.

But this possibility is not a sufficient basis, in our view, for us responsibly to conclude that the State should now ignore federal and State court decisions that render the Maryland restrictions discussed in this opinion unenforceable. Accordingly, we conclude that the status of the State's current abortion restrictions has not changed as a result of *Webster*.[18]

Finally, we counsel caution about the enactment of new legislation that assumes the overruling of prior Supreme Court cases. On the one hand, *Webster* certainly removes any federal constitutional impediment to the enactment of a law like Missouri's, which requires medically reasonable testing to determine viability and prohibits nontherapeutic abortions of fetuses determined to be viable. The General Assembly is free to move in that direction if it chooses to do so as a policy matter.

On the other hand, *Webster* is not a sufficient basis on which to conclude that a wide range of other possible abortion laws could be made effective. Other requirements or restrictions, inconsistent with *Roe* and the later cases left unreversed by *Webster*, might or might not become constitutional depending upon the exact nature of future Supreme Court decisions. If such legislation were enacted and made effective prior to the Supreme Court's hypothesized recasting of the law of abortion, we might be able to conclude that the bills were not "clearly unconstitutional," our standard for bill review, because they

---

[18] In a letter of advice late last year, Assistant Attorney General Kathryn M. Rowe discussed the effect on these laws of a total overruling of *Roe v. Wade*. Letter to Delegate Samuel I. Rosenberg (October 6, 1988). Although we agree with Ms. Rowe's analysis and conclusions, the *Webster* decision did not overrule *Roe;* hence, the premise of her letter has not occurred.

In light of our conclusion, we need not and do not consider whether any provision of the Maryland Declaration of Rights would affect renewed enforcement of the abortion restrictions, should the United States Constitution no longer render them unenforceable.

might ultimately be sustained if present trends continue. But we would also have to advise that the laws would not then be enforceable. If proposed legislation on abortion is outside current constitutional limits and is thus predicated on a further change in constitutional doctrine, it may be prudent for the bill to have an appropriately delayed effective date.

J. Joseph Curran, Jr.,
Attorney General

Jack Schwartz
Chief Counsel
Opinions and Advice

Editor's Note:

In Chapter 1 (Senate Bill 162) of the Laws of Maryland 1991, the General Assembly substantially revised Maryland's Law on abortion; except for the parental notification provision, the restrictions discussed in Part I of this opinion are repealed by Chapter 1. The effectiveness of Chapter 1 has been suspended, however, by the filing of a referendum petition. Chapter 1 will be approved or disapproved by the voters at the November 1992 general election.

Abortions - State Regulation - Parental Notification - Revival of Currently Unenforceable Laws if *Roe v. Wade* Is Overruled

November 30, 1989

The Honorable Barbara Hoffman
The Honorable Samuel I. Rosenberg
General Assembly of Maryland

In the Supreme Court's current term, it will consider two cases dealing with parental notification requirements prior to a minor's abortion: *Ohio v. Akron Center for Reproductive Health*, No. 88-805; and *Hodgson v. Minnesota*, Nos. 88-1125 and 88-1309.[1] You have requested our opinion on the possible effect of the decisions in those cases on Maryland's laws restricting abortions. Specifically, you ask:

1. What would be the effect on Maryland's laws if the Supreme Court upheld the state laws at issue in those cases without overruling *Roe v. Wade*, 410 U.S. 113 (1973)?

2. What would be the effect on Maryland's laws if *Roe v. Wade* is overruled?

3. If any Maryland abortion laws rendered unenforceable by *Roe v. Wade* were to become enforceable as a result of the decisions in the new cases, what steps would this office take to enforce the Maryland laws?

4. If a Supreme Court decision effectively reviving part or all of Maryland's abortion laws were issued after the adjournment of the 1990 Session of the General Assembly, and if an enactment of the 1991 Session dealing with abortion were petitioned to referendum, would the

---

[1] Until a few days ago, the Supreme Court had before it a third case, *Turnock v. Ragsdale*, 841 F.2d 1358 (7th Cir. 1988), *cert. granted* 109 S.Ct. 3239 (1989) (No. 88-790). This case involved the constitutionality of various Illinois regulations affecting clinics at which abortions are performed. It was to have been argued on December 5, 1989. However, the parties have announced that they have settled the case. Baltimore *Sun*, Nov. 23, 1989 at 19A, col. 1. Hence, the Supreme Court will neither hear nor decide it.

revived Maryland laws remain effective until after the general election of 1992?[2]

For the reasons given below, we conclude as follows:

1. Because Maryland's parental notification requirement differs from the laws at issue in the two pending cases, and more generally because we cannot predict what principles the Supreme Court might adopt to determine the constitutionality of abortion restrictions if it does not overrule *Roe v. Wade*, we cannot predict what effect its decisions in these cases might, in those circumstances, have on Maryland's currently unenforceable statutes.

2. If *Roe v. Wade* were to be overruled, Maryland's currently unenforceable abortion laws could be applied to all abortions performed after the date of the Supreme Court's decision.[3]

3. This office would not have primary responsibility for enforcement of the abortion restrictions, should they be revived. The State's Attorneys would be responsible for prosecuting violations of the one criminal provision at the trial level, and the enforcement of the noncriminal provisions would be in the hands of the State Board of Physician Quality Assurance and the State Board of Examiners of Nurses.

4. Any enactment regarding abortion passed in the 1991 Session of the General Assembly and petitioned to referendum must be submitted to the voters at the general election in 1992, and operation of the enactment would be suspended until 30 days after its approval by the voters, unless the enactment is an emergency measure. If,

---

[2] You have also asked whether the Supreme Court has scheduled oral argument on the new cases and when decisions in those cases are likely to be announced. The arguments in the two cases occurred on November 29, 1989. We cannot predict when the Court will announce its decisions. If the Court decides the cases on relatively narrow grounds, it might issue its decisions in the spring of 1990. If the Court uses these cases to write more broadly about a state's power to regulate abortion, we think it more likely than not that the announcements would not be made until the end of the Court's term - that is, in June or early July 1990, well after the end of the 1990 Session of the General Assembly.

[3] We thus agree with advice provided to Delegate Rosenberg by Assistant Attorney General Kathryn M. Rowe on October 6, 1988.

meanwhile, Maryland's prior abortion laws had been revived, those laws would remain in effect during the referendum process.

I

The Pending Cases

A. *Ohio v. Akron Center for Reproductive Health*

1. *Challenged State Law*

This case concerns a parental notification requirement for the performance of an abortion on an unemancipated minor.[4] The Ohio statute at issue requires that the person performing the abortion give at least 24 hours' personal notice or 48 hours' notice by both certified and ordinary mail to the woman's parent, guardian, custodian, or other specified family member, unless either the person entitled to notice has given written consent to the abortion or a juvenile court has authorized the minor to consent to the abortion. *Akron Center for Reproductive Health v. Slaby*, 854 F.2d 852, 875 (6th Cir. 1988).[5]

The judicial authorization procedure, or "judicial bypass," requires the minor to specifically make either or both of two allegations: (i) that she is mature and well-informed enough to decide whether to have an abortion or (ii) that her parent, guardian, or custodian has engaged in a pattern of abuse of her or that notification is otherwise not in her best interest. 854 F.2d at 871. The court may consider both allegations only if both are actually made, and the minor must prove her allegations by clear and convincing evidence. 854 F.2d at 872.

---

[4] An unemancipated minor is a minor who lives with and is financially dependent upon a parent or guardian.

[5] The person who is to perform an abortion on an unemancipated minor may give the

Failure of the court to hold a hearing and enter judgment within five business days after the minor files her petition is deemed a constructive order permitting her to consent to the abortion without notification; likewise, the failure of an appellate court to act promptly on an appeal filed by a minor is deemed constructive authorization.

2. *Holding of Court of Appeals*

The United States Court of Appeals for the Sixth Circuit first considered Ohio's contention that a judicial bypass procedure is not constitutionally required for a parental notification requirement, unlike a parental consent requirement. Relying on *Ballotti v. Baird,* 443 U.S. 622 (1979), and its progeny, the court concluded that judicial authorization must be available, because a notification requirement may not constitutionally be imposed on a mature minor or a minor whose best interests do not include parental notification. 854 F.2d at 861.[6]

Despite the inclusion of the bypass procedure, however, the court concluded that the Ohio parental notification statute is unconstitutional. The requirement that the attending physician give the notice is invalid, in the court's view, because it does not advance the state's interest in providing an opportunity for parental involvement more than would allowing notification by another qualified, responsible person. 854 F.2d at 862.

Moreover, several provisions of the bypass procedure itself unduly burden the minor's right to an abortion. The pleading requirement, which the court characterized as a "procedural trap," increases the risk that a minor will be deprived of a full opportunity to establish her entitlement to proceed without parental notification and is unjustified by any state interest. 854 F.2d at 862-63.[7] The requirement that the minor establish her entitlement to proceed without parental notification by clear and convincing evidence significantly increases the risk of

---

[6] For a detailed discussion of the Supreme Court cases involving parental consent and notification, *see* 70 *Opinions of the Attorney General* 3, 8-12 (1985).

[7] Ohio contended that a minor claiming to be mature and well-informed enough to independently make the decision regarding abortion should also be mature enough to file the appropriate petition - a contention the court dismissed as absurd. 854 F.2d at 863.

erroneous deprivation of a mature minor's constitutional right to proceed without parental intervention. 854 F.2d at 864.

Moreover, the judicial bypass procedure does not adequately protect the anonymity of a minor because she must sign her full name at the end of the petition and, unless she is represented by an attorney, provide an address where she can be reached throughout the proceedings. 854 F.2d at 865. Further, the procedure is not sufficiently expeditious because, if an appeal is necessary, the procedure may span up to 22 days. 854 F.2d at 867-68.

Finally, the provision for a "constructive" judicial authorization may leave a minor and her doctor with no tangible evidence of her entitlement to an abortion without parental notification. Because performing an unauthorized abortion would expose the physician to criminal and civil liability and to disciplinary sanctions, a physician would be unwilling to proceed under those circumstances. 854 F.2d at 868.[8]

B. Hodgson v. Minnesota

1. Challenged State Law

The Minnesota statute at issue in this case requires a physician or the physician's agent to provide 48 hours' notice in person or by certified mail of a contemplated abortion upon an unemancipated minor to the parents, guardian, or conservator of the minor. Notice to the parents must be to both, unless one parent is deceased or cannot be located. *Hodgson v. Minnesota*, 853 F.2d 1452, 1453-54 (8th Cir. 1988).

---

[8] The statute provides that a physician who violates the parental notification requirement is guilty of a misdemeanor for a first offense or a felony for a subsequent offense and is liable to the woman and her parents, guardian, or custodian for compensatory and punitive damages. 854 F.2d at 878. In addition, the violation is a ground for the state medical board to limit, suspend, revoke, or refuse to grant or reinstate the physician's license, to reprimand the physician, or to place the physician on probation. 854 F.2d at 878-79.

The statute was intended to require parental notification in virtually all cases, with no provision for judicial authorization of an abortion.[9] However, a judicial authorization procedure was enacted conditionally, to take effect only if enforcement of the notice requirement without that alternative were restrained or enjoined. The judicial authorization procedure in general terms requires a prompt and confidential determination of whether the minor is mature and capable of giving informed consent to an abortion or whether an abortion without notification to both parents would be in her best interests, with a right to court-appointed counsel and an expedited confidential appeal. 853 F.2d at 1454 n.4.

2. *Holding of Court of Appeals*

The United States Court of Appeals for the Eighth Circuit, sitting en banc, held that the notification requirement would be unconstitutional without the judicial bypass procedure. 853 F.2d at 1456-57. However, it upheld the statute in all other particulars.[10]

The court held that the requirement of notice to both parents, even when the minor lives with only one parent or when the minor has voluntarily consulted with one parent, is constitutional because the minor may seek judicial authorization to proceed without notice to one or both parents. 853 F.2d at 1464-65. The court also held that the 48-hour waiting period does not unduly burden the minor's right to an abortion because the waiting period may run concurrently with the scheduling of the abortion. 853 F.2d at 1465. In the court's view, both of these requirements foster the state's interest in ensuring the involvement of both parents in the minor's abortion decision. Finally, the Eighth Circuit rejected the plaintiffs' contention that the notification requirement violates the equal protection rights of minors who wish

---

[9] The notice would not be required, however, if an immediate abortion were necessary to save the woman's life or if she declared that she was a victim of sexual abuse, neglect, or physical abuse. In the latter case, her physician must notify the proper authorities of her declaration. 853 F.2d at 1454 n.5.

[10] A panel of the Eighth Circuit had previously held that the statute was unconstitutional because the two-parent notification requirement did not serve the state's interest in protecting minors or promoting family communication and because the 48-hour waiting period was unreasonable. 853 F.2d at 1453.

abortions by singling out abortion as the only medical procedure requiring third-party notification. 853 F.2d at 1466.[11]

II

Maryland Statutes

A. Parental Notification Requirement

Under §20-103(a) of the Health-General Article ("HG" Article), a physician ordinarily may not perform an abortion on an unmarried minor without giving prior notice to a parent or guardian of the minor. Notice is not required if (i) the minor does not live with a parent or guardian and an attempt to give notice is unsuccessful or (ii) the physician judges that notice may lead to physical or emotional abuse of the minor. HG §20-103(b) and (c).

Unlike the statute at issue in *Hodgson,* HG §20-103 would not require notification to both parents. Nor does HG §20-103 impose a particular waiting period after notification, as do the statutes at issue in both *Hodgson* and *Akron Center.*

However, HG §20-103 makes no provision for a procedure whereby a minor may demonstrate that she is mature or that notification would not be in her best interest. In 70 *Opinions of the Attorney General* at 12, the Attorney General concluded that this statute is unconstitutional because of that lack.

B. Other Abortion Restrictions

Other Maryland statutes concerning abortion are also unconstitutional under *Roe* and its progeny:

---

[11] The plaintiffs also asserted that the requirement impermissibly discriminates between minors who are able to notify both of their parents and those who are not able to do so. That assertion was not raised at the trial, and therefore the court did not consider it.

1. Reasons for an abortion

HG §20-208(a) prohibits any abortion unless (i) continuation of the pregnancy threatens the woman's life; (ii) there is substantial risk that the woman's physical or mental health would be gravely impaired; (iii) there is substantial risk of the birth of a child with grave and permanent physical deformity or mental retardation; or (iv) the pregnancy resulted from forcible rape and the State's Attorney provides a written statement that there is probable cause to believe that the alleged rape did occur. This statute was held unconstitutional in *Coleman v. Coleman*, 57 Md. App. 755, 760, 471 A.2d 1115 (1984). *See also* 62 *Opinions of the Attorney General* at 7.

HG §20-208(b)(1) prohibits any abortion after the 26th week of gestation unless the pregnancy threatens the woman's life or the fetus is dead. This statute is unconstitutional because it does not permit abortions necessary for the woman's health. 62 *Opinions of the Attorney General* at 8.

2. Hospitalization requirement

Under HG §20-208(a), all abortions must be performed "in a hospital accredited by the Joint Commission for Accreditation of Hospitals and licensed by the State [Department] of Health and Mental Hygiene ...." HG §20-210(a) makes it a misdemeanor to perform or assist in an abortion other than in an accredited and licensed hospital. Under §14-504(a)(23) of the Health Occupations Article ("HO" Article), any physician who performs an abortion "outside a licensed hospital" is subject to disciplinary action by the Board of Physician Quality Assurance.

HG §19-301(f) defines "hospital," in part, to mean a facility that admits or retains patients for overnight care. Thus, these statutes purport to prohibit the performance of abortions in outpatient clinics of any kind.

Applying the Supreme Court's decisions in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) and *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983), the Attorney General concluded that these provisions are unconstitutional as applied to abortions performed during the first and second trimesters. 70 *Opinions of the Attorney General* 3, 15 (1985). *See also* 62 *Opinions of the Attorney General* 3, 6 (1977).

3. Review requirement

HG §20-208(b)(2) prohibits any abortion unless it has been authorized in writing by the abortion review authority of the hospital where the abortion is to be performed. The Attorney General concluded that this provision is unconstitutional under *Doe v. Bolton*, 410 U.S. 179, 198 (1973). 62 *Opinions of the Attorney General* at 9.

4. Recordkeeping requirements

HG §§4-201(e), 4-205, 4-213, 4-217, and 4-222 require that abortions be reported on "fetal death certificates" to the Department of Health and Mental Hygiene and the appropriate county registrar. The records are open to inspection by local public officials, surviving relatives, and researchers at the Hall of Records. HG §§4-205, 4-217, and 4-222. The Attorney General concluded that these recordkeeping requirements are unconstitutional to the extent that they permit disclosure of the fetal death certificate. 70 *Opinions of the Attorney General* at 17-18.

III

Effect on Maryland Laws If *Roe v. Wade* Is Not Overruled

The Supreme Court in its last term upheld a Missouri law requiring testing to determine fetal viability before the performance of an abortion at or after 20 weeks of gestation. *Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989). In considering the impact of that decision on Maryland's law, we commented: "We do not doubt that *Webster* is the precursor of a new constitutional doctrine on abortion, one that will be markedly more open to state regulation than the doctrine of *Roe* and its progeny." 74 *Opinions of the Attorney General* 3, 14 (1989). Yet because no single rationale for the decision in *Webster* commanded a majority of the justices, we were unable to predict "the legal principles that will determine the constitutionality of abortion restrictions." *Id.*

By the same token, we are unable to predict what, if any, effect *Akron Center* or *Hodgson* might have on Maryland's laws if the laws at issue in those cases are upheld without overruling *Roe v. Wade*. We do not know whether the Court will focus solely on the discrete problem of parental notification, or whether it will write more broadly about the states' power to regulate abortions. And, if the Court does use these cases to address abortion restrictions generally, we also do not know whether a majority of the Court will yet be able to agree on a single doctrine. Under these circumstances, we believe that we should refrain from speculating on what the Supreme Court might or might not do.

IV

Effect on Maryland Laws if *Roe v. Wade* Is Overruled

A. *Introduction*

Roe v. Wade established the federal constitutional right of a woman, in consultation with her physician, to choose to terminate a pregnancy. Subsequent Supreme Court decisions that have invalidated particular abortion restrictions have done so because the restrictions infringed or unduly burdened the exercise of that federal right. *E.g.*, *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) (invalidating parental consent requirement). Consequently, if *Roe v. Wade* were completely overruled, the United States Constitution would impose no limit on the power of a state to restrict - or, indeed, to prohibit altogether - the performance of abortions.[12]

---

[12] A state's abortion restriction would merely need to be rational to satisfy equal protection requirements. Presumably, the state's interest in protecting fetal life would suffice in most cases - except, perhaps, if a law prohibited an abortion needed to save the life of the mother.

B. Maryland Constitution

No reported decision has concluded that the Maryland Constitution itself grants a right of abortion in addition to that granted by the federal Constitution. To the contrary, every reported Maryland case that has considered the constitutional right has addressed it solely as a matter of federal constitutional law. *See Bayne v. Secretary of State*, 283 Md. 560, 577 n.7, 392 A.2d 67 (1978); *Coleman v. Coleman*, 57 Md. App. 755, 471 A.2d 1115 (1984); *State v. Ingel*, 18 Md. App. 514, 308 A.2d 223 (1973).

Courts in other states have concluded that their state constitutions grant a right to abortion. The Supreme Court of California, for example, four years before the decision in *Roe v. Wade*, concluded that the California and federal constitutions imply "[t]he fundamental right of the woman to choose whether to bear children ...." *People v. Belous,* 80 Cal. Rptr. 354, 359 (Cal. 1969). The California court did not identify a specific provision of the state constitution as the source of that right, but based its conclusion on cases acknowledging a privacy or liberty interest in matters related to marriage and family, such as *Griswold v. Connecticut,* 381 U.S. 479 (1965).

Three years after the decision in *Belous,* the California Constitution was amended to provide explicit protection for a broad right of privacy that encompasses a right to abortion "at least as broad as that described in *Roe v. Wade.*" *Committee to Defend Reproductive Rights v. Myers,* 172 Cal. Rptr. 866, 883 (Cal. 1981).[13]

Article I, ¶1 of the New Jersey Constitution declares that all persons "have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty ... and of pursuing and obtaining safety and happiness." The Supreme Court of New Jersey has held that this provision protects the right of privacy, including a right of abortion. *Right to Choose v. Byrne,* 450 A.2d 925, 933 (N.J. 1982).

---

[13] Article I, §1 of the California Constitution now declares the existence of "inalienable rights," including the rights of "pursuing and obtaining safety, happiness, and privacy." *City of Santa Barbara v. Adamson,* 164 Cal. Rptr. 539, 540 n.1 (Cal. 1980).

Most recently, the Supreme Court of Florida has held that the right of abortion is protected by that state's Constitution. *In re T. W.*, No. 74, 143 (October 5, 1989). That decision is based on Article I, §23 of the Florida Constitution, declaring that "[e]very natural person has the right to be let alone and free from governmental intrusion into his private life ...." Slip op. at 4.

The Maryland Constitution includes no explicit protection of the right of privacy; nor does it include a declaration of "natural and unalienable rights" to life, liberty, and the pursuit of safety and happiness like that of the New Jersey constitution. To be sure, the Maryland Court of Appeals might conclude that Article 24 of the Maryland Declaration of Rights protects the right of abortion, as the Supreme Court concluded that the Fourteenth Amendment protects that right. *Roe v. Wade,* 410 U.S. at 153. *See Crawford v. State,* 281 Md. 431, 404 A.2d 244 (1979) (Article 24 is equivalent to Fourteenth Amendment).[14] But the Court of Appeals has not yet identified any right of privacy protected by the Maryland Constitution. Under these circumstances, we have no basis on which to conclude that Article 24 would prevent the revival of Maryland's previously enacted abortion restrictions.

Neither do we think that the Maryland Equal Rights Amendment, Article 46 of the Maryland Declaration of Rights, would prevent the revival of those restrictions. We are aware of only one state court decision holding that a law restricting access to abortion violated an equal rights amendment. In *Doe v. Maher,* 515 A.2d 134, 159 (Conn. Super. 1986), a trial court held that a state regulation prohibiting Medicaid funding for abortions that were medically necessary, but not necessary to preserve the woman's life, violated that state's E.R.A. The state medicaid program paid all other necessary medical expenses, including all men's expenses "associated with their reproductive health, for family planning and for conditions unique to [their] sex ...." Thus, in the court's view, the regulation embodied a classification based on pregnancy. Because pregnancy is a condition unique to women, the court concluded that such a classification necessarily is based on sex.

---

[14] Article 24 of the Maryland Declaration of Rights provides "[t]hat no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."

515 A.2d at 159. The regulation, in that court's view, violated the Connecticut E.R.A. because it was not justified by a compelling state interest. 515 A.2d at 162.

We think it unlikely that the Maryland courts would adopt the reasoning of *Doe v. Maher*. To be sure, laws restricting abortions directly affect only women and thus would appear to fall within the ambit of the E.R.A., which "flatly prohibits gender-based classifications ... in the allocation of benefits, burdens, rights and responsibilities as between men and women." *Burning Tree Club., Inc. v. Bainum*, 305 Md. 53, 64, 501 A.2d 817 (1985) (opinion of Murphy, C. J.).[15] However, the E.R.A. does not require absolute equality of treatment in all circumstances:

> Disparate treatment on account of physical characteristics unique to one sex is generally regarded as beyond the reach of equal rights amendments. *See, e.g., Brooks v. State*, 24 Md. App. 334, 330 A.2d 670, *cert. denied*, 275 Md. 746 (1975), holding that it does not violate the E.R.A. to punish only men for rape as principals in the first degree because only men can commit that crime.

305 Md. at 64 n.3.[16] *See also* Comment, *Comparable Worth and the Maryland E.R.A.*, 47 Md. L. Rev. 1129, 1172 (1988) (laws based on physical characteristics would survive even if E.R.A. is absolute because basis for those laws' differentiation is not individual's sex but physical characteristic possessed by only one sex). *Accord* Brown, Emerson, Falk, and Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 871, 873 (1971) (proposed federal E.R.A. would permit law relating to wet nurses or regulating donation of sperm, because law would deal only with characteristic exclusive to one sex).

---

[15] However, it might also be argued that a law like HG §20-210, which criminalizes performing or assisting in an abortion other than by a licensed physician in a licensed and accredited hospital, is not gender-based because the criminal sanction applies equally to members of both sexes.

[16] To the same effect as *Brooks* are *People v. Green*, 514 P.2d 769 (Colo. 1973); *People v. Medrano*, 321 N.E. 2d 97 (Ill. App. 1974); *State v. Craig*, 545 P.2d 649 (Mont. 1976); and *Finley v. State*, 527 S.W. 2d 553 (Tex. Crim. App. 1975).

Thus, the Maryland E.R.A. prohibits disparate treatment of men and women based on generalizations about differences between "most" or "average" men and women. *See State v. Burning Tree Club, Inc.*, 315 Md. 254, 295-96, 554 A.2d 366 (1989). However, it does not reach distinctions based on immutable, inarguable physical characteristics never found in one sex.

In short, the very feature that led the Connecticut court to find a violation of that state's E.R.A. - the statutory classification's basis on a physical characteristic unique to one sex - would appear to put a restriction on abortion outside the reach of Maryland's E.R.A.

C. Effect on State Statutes

An unconstitutional enactment is invalid and unenforceable; indeed, the enactment may be void ab initio - "as inoperative as though it had never been passed." *Norton v. Shelby County,* 118 U.S. 425, 442 (1886). *See e.g., State v. Ingel*, 18 Md. App. at 522-23 (giving fully retroactive effect to *Roe v. Wade* with respect to criminal provisions of state law). In this sense, it does not matter whether the General Assembly expressly repeals an unconstitutional enactment. *See Johnson v. State,* 271 Md. 189, 195, 315 A.2d 524 (1974); *Hutchinson v. State,* 1 Md. App. 362, 371-72, 230 A.2d 352 (1967).

Nonetheless, so long as the enactment is not repealed, it is not abolished but merely suspended. *Home Utilities Co. v. Revere Copper & Brass, Inc.*, 209 Md. 610, 619, 122 A.2d 109 (1956). *See also Jawish v. Morlet,* 86 A.2d 96, 97 (D.C. 1952).[17] If the basis of the enactment's invalidity is later removed, the enactment is again fully effective. For example, a Maryland statute held invalid because it conflicted with the Sherman Act was revived by a subsequent amendment of the Sherman Act, without the need for reenactment by

---

[17] It has sometimes been said that a statute may become a nullity through long disuse. *See United States v. Elliott*, 266 F. Supp. 318, 325 (S.D.N.Y. 1967) (citing commentators). However, this doctrine of desuetude does not appear to have been adopted in Maryland. To the contrary, the Court of Appeals has long held that failure to enforce a penal statute does not repeal it. *State v. Mellor*, 140 Md. 364, 373, 117 A. 875 (1922). *See also Gibson v. State*, 204 Md. 423, 438, 104 A.2d 800 (1954) ("[T]he fact that the reason for a statute has ceased to exist, of course, does not mean that the statute is no longer in force ....").

the General Assembly. *Home Utilities Co.,* 209 Md. at 619. By the same token, if *Roe v. Wade* were overruled, all unrepealed statutes restricting abortions would again be effective.

However, we think that any revived restrictions on abortions would be applicable only to abortions performed after the date of a decision overruling *Roe v. Wade.*[18] *Cf. Jawish v. Morlet,* 86 A.2d at 97 (revived statute "is valid from its first effective date").

In *Perkins v. Eskridge*, 278 Md. 619, 637, 366 A.2d 61 (1976), the Court of Appeals concluded that the question whether an enactment declared unconstitutional is thereby invalidated retroactively must be determined in light of the circumstances of the case. The effect of a revived statute must likewise be determined in light of the circumstances, bearing in mind that "statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct." *Lemon v. Kurtzman*, 411 U.S. 192, 199 (1973).

Because violation of the revived abortion restrictions would subject health care providers to administrative or criminal sanctions, we conclude that those restrictions could not be applied retroactively to abortions performed in reliance on *Roe* and its progeny. *See Gee v. Mass Transit Admin.*, 75 Md. App. 253, 260-61, 540 A.2d 1194 (1988) (statute affecting substantive rights does not apply retroactively).

---

[18] Supreme Court Rule 52.3 provides that the judgment of the Court is not ordinarily sent to the lower court until the expiration of 25 days after the date of the decision. However, the sending down of the judgment is merely a routine matter of directing the lower court to take any steps necessary to carry the Supreme Court's decision into effect in the particular case decided. *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 428 (1978). That is, the Court's decision itself declares the substance of the law; sending down the judgment is but a procedural step directing the final disposition of the particular case before the Court in accordance with that substantive law. Hence, the Court's decision states what the law is as of the date of the decision and should be adhered to from that date.

V

Enforcement of Abortion Restrictions

Of the abortion restrictions that are presently unconstitutional, only HG §20-210 is a criminal enactment: It provides that any person who performs, assists, or in any way facilitates the termination of a pregnancy other than by a licensed physician in a licensed and accredited hospital is subject to a fine of $5,000, three years' imprisonment, or both.

As in the case of virtually all other criminal statutes, the prosecution of violations of HG §20-210 at the trial level would be the responsibility of the State's Attorneys in the various counties and Baltimore City. *State v. Aquilla,* 18 Md. App. 487, 493, 309 A.2d 44 (1973). The State's Attorneys are independent constitutional officers, vested with full discretion to determine whether or not to prosecute in any case. *Murphy v. Yates*, 276 Md. 475, 495, 348 A.2d 837 (1975).

The other provisions restricting abortions carry no criminal sanctions. However, health care providers whose conduct violated the restrictions would be subject to discipline. The Board of Physician Quality Assurance may reprimand, place on probation, or suspend or revoke the license of a physician who "[p]erforms an abortion outside a licensed hospital." HO §14-504(a)(23). The statute setting out the grounds for discipline of nurses is less specific. In our view, however, the Board of Examiners of Nurses may conclude that a nurse's participation in an illegal abortion is an "act that is inconsistent with generally accepted professional standards ...." HO §7-313(a)(8).

The two boards themselves would have the responsibility to determine what action to take in response to an overruling of *Roe v. Wade*. Actions could include the issuance of bulletins or other publications to notify licensees of the change in the status of the abortion laws, as well as discipline of particular health care providers in response to complaints or criminal proceedings. Additionally, the licensing bodies could determine to await the outcome of the General Assembly's consideration of the matter before imposing sanctions on a licensee.

VI

Effective Date of Amendments to Abortion Laws

Your final question concerns the effective date of an enactment pertaining to abortions if the enactment were petitioned to referendum.

Article XVI, §2 of the Maryland Constitution provides that, if a law is petitioned to referendum, it ordinarily "shall not become a law or take effect until thirty days after its approval ... at the next ensuing election held throughout the State for Members of the House of Representatives of the United States." However, if the law was enacted as an emergency measure, it "shall remain in force notwithstanding such petition, but shall stand repealed thirty days after having been rejected by a majority of the qualified electors voting thereon."

Under these provisions, a nonemergency law regarding abortions enacted in the 1990 Session and petitioned to referendum could not take effect until December of 1990. A nonemergency enactment of the 1991 Session petitioned to referendum could not take effect until December of 1992, for Article XVI, §2 does not authorize a vote on a referendum other than at a Statewide election for members of the House of Representatives. *See also* Article 33, §22-1(a) (elections for House of Representatives held in November 1966 and every second year thereafter).

During the period when an enactment has been suspended by its referral to the voters, the state of the law on the referred matter is necessarily as though the enactment had not been passed. Hence, if the Supreme Court overrules *Roe v. Wade* next year, the restrictions on abortion discussed in Part II of this opinion would be in effect until at least 30 days after the November 1990 election, assuming that new legislation on abortion enacted in the 1990 Session were petitioned to referendum. Similarly, the revived laws would remain in effect until at least 30 days after the November 1992 election, assuming that new legislation on abortion were not enacted until the 1991 Session and were petitioned to referendum.

At the same time, the pendency of a referendum would not prevent the General Assembly from again enacting legislation on the same subject - including emergency legislation that would take immediate effect. In 1961 the General Assembly enacted a law regulating savings and loan associations, which was then petitioned to referendum at the 1962 election. At a special session held in June 1961, the General Assembly enacted an emergency measure identical in substance to the referred law. The Court of Appeals held the emergency measure valid and effective. *First Continental Savings & Loan Ass'n v. Director, State Dep't of Assessments & Taxation*, 229 Md. 293, 302, 183 A.2d 347 (1962). In light of the General Assembly's express right under Article XVI, §2 to enact emergency legislation not subject to suspension pending a referendum, and the lack of any express prohibition against legislating on referred matters, "the right of referendum ... was not frustrated - only the right to suspend the operation of the law pending the vote thereon." 229 Md. at 304.

VII

Conclusion

In summary, we conclude as follows:

1. Because Maryland's parental notification requirement differs from the laws at issue in the two cases now pending in the Supreme Court, and more generally because we cannot predict what principles the Supreme Court might adopt to determine the constitutionality of abortion restrictions if it does not overrule *Roe v. Wade*, we cannot predict what effect its decisions in these cases might, in those circumstances, have on Maryland's currently unenforceable statutes.

2. If *Roe v. Wade* were to be overruled, Maryland's currently unenforceable abortion laws could be applied to all abortions performed after the date of the Supreme Court's decision.

3. This office would not have primary responsibility for enforcement of the abortion restrictions, should they be revived. The State's Attorneys would be responsible for prosecuting violations of the criminal provisions at the trial level, and the enforcement of the noncriminal provisions would be in the hands of the State Board of Physician Quality Assurance and the State Board of Examiners of Nurses.

4. Any enactment regarding abortion passed in the 1991 Session of the General Assembly and petitioned to referendum must be submitted to the voters at the general election in 1992, and operation of the enactment would be suspended until 30 days after its approval by the voters, unless the enactment is an emergency measure. If, meanwhile, Maryland's prior abortion laws had been revived, those laws would remain in effect during the referendum process.

J. Joseph Curran, Jr.
Attorney General

C. J. Messerschmidt
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

Editor's Note:

The two Supreme Court decisions referred to in this opinion were issued in 1990. *Ohio v. Center for Reproductive Health*, 110 S.Ct. 2972 (1990); *Hodgson v. Minnesota*, 110 S.Ct. 2926 (1990). Neither decision resulted in a change in the status of Maryland law. *See* 75 *Opinions of the Attorney General* ___ [Opinion No. 90-041 (August 30, 1990)].

In Chapter 1 (Senate Bill 162) of the Laws of Maryland 1991, the General Assembly substantially revised Maryland's law on abortion; except for the parental notification provision, the restrictions discussed in Part I of this opinion are repealed by Chapter 1. The effectiveness of Chapter 1 has been suspended, however, by the filing of a referendum petition. Chapter 1 will be approved or disapproved by the voters at the November 1992 general election.

ADMINISTRATIVE LAW

Hearings - Maryland Automobile Insurance Fund - MAIF Contested Cases Need Not Be Conducted By Administrative Law Judges In Office of Administrative Hearings

August 11, 1989

Ms. Martha C. Roach, Executive Director
Maryland Automobile Insurance Fund

You have requested our opinion on the applicability of Chapter 788 (Senate Bill 658) of the Laws of Maryland 1989, "Office of Administrative Hearings," to certain hearings of the Maryland Automobile Insurance Fund ("MAIF"). Specifically, you have asked whether this new law, which becomes generally effective on January 1, 1990, requires these proceedings to be conducted by an administrative law judge ("ALJ") in the Office of Administrative Hearings.

For the reasons stated below, we conclude that, although MAIF is not exempt from Chapter 788, it does not "emplo[y] or engag[e] one or more hearing officers" within the meaning of the statute. Thus, MAIF contested cases are not subject to the requirements of the new law.

I

Chapter 788

Chapter 788 establishes an independent Office of Administrative Hearings, consisting of ALJs appointed by a Chief Administrative Law Judge to conduct contested cases in proceedings before certain administrative agencies. The legislation adds a new Subtitle 16 to Title

9 of the State Government Article ("SG" Article). SG §9-1601(a) expressly exempts certain enumerated agencies from the statute.[1]

In addition, SG §9-1601(c) authorizes the Governor to temporarily exempt other agencies until July 1, 1994. Otherwise, however, the new statute applies to "each agency that employs or engages one or more hearing officers to adjudicate contested cases ...." SG §9-1601(b). The term "contested case," although not defined in the new law itself, evidently has the same meaning as in the Administrative Procedure Act. *See* SG §10-201(c).

Section 2(a) of the legislation provides that by January 1, 1990, an agency subject to the statute "that employs one or more hearing officers to adjudicate contested cases shall transfer the positions" to the new office. Section 2(c) prohibits agencies from appointing or authorizing a hearing officer to hear contested cases without the approval of the Chief Administrative Law Judge, but also states that:

> This subtitle shall not ... prevent a board, commission or agency head authorized to conduct a contested case hearing from doing so without the use of a hearing officer or administrative law judge.

II

Applicability to MAIF

In our view, SG §9-1601(a) specifies all of the agencies automatically exempt from the legislation.[2] Because MAIF is not expressly mentioned as exempt under this subsection, it is not per se

---

[1] Specifically, SG §9-1601(a) states that the law "does not apply to": the Governor, the Comptroller, the Inmate Grievance Commission, Inmate Adjustment Hearing Officers, the Public Service Commission, the Workers' Compensation Commission, the Parole Commission, the Health Services Cost Review Commission, and the Health Resources Planning Commission.

[2] Of course, an agency may seek the Governor's approval to be exempted temporarily from the statute.

exempt from the statute.[3] Nevertheless, if MAIF does not "employ or engage" hearing officers, it would not be subject to the statute for this reason.

You have indicated that MAIF conducts contested cases in two instances: appeals of executive director decisions regarding the rejection or certain cancellation of insurance under Article 48A, §243D(b); and denials of authority to producers under Article 48A, §243B(g)(2), as amended by Chapter 503 of the Laws of Maryland 1989. In the first instance, hearings are conducted before "a special board composed of two members of the board of trustees and the Commissioner of Insurance or his designee." In the latter case, as a result of the 1989 legislation, hearings will be conducted before "a member of the board of trustees".[4]

In neither situation is the adjudicatory authority a hearing officer "engage[d] or employe[d]" by MAIF. Section 2(c) of Chapter 788 specifically preserves a board's power to hear its own cases.[5] We believe the same would be true of a single member of a board designated by law to hear cases. Such a board member exercises the authority of the board. *Cf. Howard County Metro. Comm'n v. Westphal*, 232 Md. 334, 340, 193 A.2d 56 (1963). Moreover, he or she could not be considered an employee of the board subject to

---

[3] As introduced, Senate Bill 658 reflected the recommendations of the Governor's Task Force on Administrative Hearing Officers. The Final Report of the Task Force, dated June 28, 1988, noted that "all presently existing hearing officers, with the exception of highly unique agencies such as the Workmen's Compensation Commission, the Public Service Commission, and the Inmate Grievance Hearing Examiners within the Division of Correction ... shall be organized into one independent office within the Executive Department." Report at 24. Although MAIF may be a "highly unique agency", unlike the above agencies it was not expressly exempted from the operation of the legislation.

[4] Chapter 503 of the Laws of Maryland 1989 supersedes MAIF rules specifying that such hearings are to be conducted before a hearing officer. COMAR 14.07.03.05A.

[5] In addition to the express language of Section 2(c), the history of the statute indicates that it was not intended to apply to hearings conducted by boards themselves. During the 1989 Session, the Attorney General's Office gave oral advice that Property Tax Assessment Appeals Board members were not subject to the legislation because board members hear their own cases without resort to a hearing officer.

"transfer" to the new Office of Administrative Hearings pursuant to Section 2(a) of Chapter 788.

III

Conclusion

In summary, it is our opinion that MAIF does not employ or engage hearing officers within the meaning of Chapter 788 and, thus, its hearings are not required to be conducted by ALJs under the new statute.

J. Joseph Curran, Jr.
Attorney General

Robert A. Zarnoch
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

ALCOHOLIC BEVERAGES

Licensees - Duty To Prevent Underaged Persons From Consuming Or Possessing Alcohol

August 10, 1989

Edmond B. O'Connell, Esquire
Counsel for the Prince George's County Board of License Commissioners

You have requested our opinion on whether 59 *Opinions of the Attorney General* 39 (1974) correctly reflects the law governing the responsibility of an alcoholic beverage licensee for allowing the possession of alcoholic beverages by underaged persons on the licensed premises.

For the reasons stated below, we conclude that a licensee is subject to sanctions for permitting the consumption or possession of alcoholic beverages in licensed premises by anyone under the age of 21 years, even if the alcoholic beverages were obtained by someone over that age. To the extent that 59 *Opinions of the Attorney General* 39 suggests the contrary, it is hereby overruled.

I

The 1974 Opinion

59 *Opinions of the Attorney General* 39 (1974) was primarily an interpretation of Article 2B, §118(a) of the Maryland Code, which in pertinent part provided at the time as follows:

> No licensee under the provisions of this article, or any of his employees, shall sell or furnish any alcoholic beverages at any time to a minor under twenty-one years of age, except that the age shall be eighteen years for beer and light wine, either for his

> own use or for the use of any other person .... Any person violating any of the provisions of this subsection shall be guilty of a misdemeanor ...; provided, however, that any person charged with selling or furnishing any alcoholic beverages to a minor under twenty-one years of age, except that the age shall be eighteen years for beer and light wine, shall not be found guilty of a violation ... if such person established ... that he used due caution to establish that such minor under twenty-one, or eighteen years of age where beer or light wine is sold or furnished, was not, in fact a minor....

The Attorney General described the problem posed to him as follows: "We understand that certain licensees, alarmed by what they deem to be the implications of this section, feel a need to protect themselves from possible prosecution or license revocation or suspension stemming from circumstances over which they have little or no control, *e.g.*, a charge arising out of the possession by an 18 year old of liquor which was neither purchased by him nor served to him but was in fact purchased by a companion of legal age who passed the liquor to the 18 year old without the knowledge or consent of the licensee or any employee of the licensed establishment."

The Attorney General concluded that "neither [§118(a)] nor any other provision of law will support charges against an *innocent* licensee or employee when a person 21 years old or older, who has been served liquor for his own use, passes it to a person under 21 at the same or a different table or at the bar or anywhere else in the licensed establishment." 59 *Opinions of the Attorney General* at 40 (emphasis in original). By "innocent," the Attorney General meant that the licensee neither knew of nor consented to the underaged person's obtaining of the liquor. *Id.*[1] This conclusion was a predicate to a discussion in the balance of the opinion intended to encourage licensees to allow persons 18 through 21 years of age full access to licensed premises. 59 *Opinions of the Attorney General* at 42-45.

---

[1] The Attorney General suggested extremely limited circumstances under which the licensee would be on notice of a possible violation - "for example, where liquor is found in the possession of an 18 year old at the bar of a liquor establishment with none present except the Licensee or his employees." 59 *Opinions of the Attorney General* at 41.

II

Effect of Article 2B, §118(d)

In an opinion two years ago, we wrote as follows concerning the precedential value of prior opinions and our standards for overruling them:

> Although the opinions of this office do not have the binding effect of judicial decisions, nevertheless they "serve as important guides to those charged with the administration of the law." *Mitchell v. Register of Wills*, 228 Md. 305, 310 (1962). In the absence of judicial decisions, Attorney General opinions promote steady application of the law. Accordingly, this office stands by its precedent, much as a court would.... We do not overrule a prior opinion simply because we might have resolved a close question the other way, were we first presented with it. *See* 67 *Opinions of the Attorney General* 98, 99 (1982). At the same time, we will not perpetuate a significant mistake in legal reasoning. We are also prepared to recognize that a prior opinion has been eroded by changed circumstances.

72 *Opinions of the Attorney General* 200, 202 (1987).

In this instance, we believe that the 1974 opinion embodies "a significant mistake in legal reasoning." While we do not disagree with the opinion's analysis of §118(a), its conclusion that "[no] other provision of law" imposes a duty on the licensee is wrong.

In 1974, as today, §118 contained the following provision, not discussed in the 1974 opinion:

> No licensee, proprietor, or operator of any establishment dispensing alcoholic beverages shall permit the consumption or possession of any alcoholic beverages other than beer or light wine by a person under the age of twenty-one years or the consumption or possession of beer or light wine by

> any person under eighteen years upon said premises no matter by whom such alcoholic beverages shall have been purchased or from whom obtained. Anyone violating this subjection shall be deemed guilty of a misdemeanor and upon conviction shall be fined not more than fifty dollars [$50.00] in addition to any other penalties as provided under this article.

Former Article 2B, §118(g). This provision, modified to reflect the reestablishment of a uniform drinking age of 21 years, now appears as Article 2B, §118(d).[2]

In our view, this provision imposes on a licensee a duty to supervise the premises, to assure that underaged persons do not consume or possess alcoholic beverages. It is no defense to a violation of this subsection that the alcohol was first obtained by someone of legal age or that the licensee was unaware of the violation.

Authority from other states supports this conclusion. In *Ballesteros v. Alcoholic Beverage Control Appeals Board*, 44 Cal. Rptr. 633 (Cal. App. 1965), the statute in question provided that: "Any licensee ... who permits a person under the age of 21 years to enter and remain in the licensed premise without lawful business therein is guilty of a misdemeanor." 44 Cal. Rptr. at 636. The California court found that the licensee was guilty of a violation when the bartender failed to check the age of a patron under 21 who accompanied a group of other patrons over 21: "In the present case it is apparent that the bartender, who was the only one in charge of the barroom and was very busy selling beverages to the many patrons who were crowding around the bar, was inactive or passive with respect to his affirmative duty to ascertain the age of [the patron]. Such passive conduct on his part amounts to 'permitting' [the patron] to be present in the barroom." 44 Cal. Rptr. at 637.

---

[2] The present wording is as follows:

> No licensee, proprietor or operator of any establishment dispensing alcoholic beverages shall permit the consumption or possession of any alcoholic beverages by a person under the age of twenty-one years upon said premises no matter by whom such alcoholic beverages shall have been purchased or from whom obtained. A violation of this subsection is a misdemeanor punishable by fine of not more than $50 in addition to any other penalities provided under this article.

Similarly, in *Clowns Den, Inc. v. Canjar,* 518 P.2d 957 (Colo. App. 1973), the licensee was accused of violating a regulation instructing that licensees "shall not permit within or upon the licensed premises" various forms of improper behavior. The licensee charged with a violation of this provision claimed "that the word 'permit' in this context denotes knowing acquiescence or consent and that, therefore, it was necessary to allege and prove actual knowledge by the [licensee] of the conduct in question." 518 P.2d at 958. Looking to the purpose of the statute, the Colorado court rejected this argument: "[W]e hold that to have 'permitted' a violation of the regulation, the [licensee] need not have had actual knowledge of the specific activities constituting the violation." 518 P.2d at 959. *See also Mundell v. Dep't of Alcoholic Beverage Control,* 27 Cal. Rptr. 62 (Cal. App. 1962); *B.P.O. of Elks v. Board of Liquor Control,* 155 N.E.2d 523 (Ohio Ct. Comm. Pleas 1957); *Texas Liquor Control Board v. Floyd,* 117 S.W.2d 530 (Tex. App. 1938).[3]

We have no doubt that ensuring compliance with the prohibition in §118(d) would have posed practical problems for licensees at a time when persons between 18 and 21 years of age were authorized to buy some kinds of alcoholic beverages, but not others.[4] This practical difficulty, together with an evident desire to ensure that 18 to 21 year olds would be able to enjoy their new privilege, might have led to the oversight in the 1974 opinion. But, as a matter of proper statutory construction, the 1974 opinion erroneously failed to give effect to the restriction in former §118(g), now §118(d), and, to that extent, must be overruled.

---

[3] Courts have given a similar reading to the word "permits" in other contexts. In *United States v. Denver & R.G.R. Co.,* 249 F. 464 (8th Cir. 1918), the court rejected the defense of lack of knowledge of a company charged with violating a prohibition against "permitting" employees to perform excess service. "It was bound to see to it that the agent did not remain on duty for an excess period. If it failed to discharge that duty, it 'permitted' the employee to perform the excess service, and was liable to the penalty affixed by the statute." 249 F. at 466. *See also, e.g., Brodsky v. California State Board of Pharmacy,* 344 P.2d 68 (Cal. App. 1959).

[4] Perhaps in recognition of this difficulty, the General Assembly imposed a much less severe sanction for violations of §118(d) than of §118(a) - a $50 maximum fine, instead of a maximum fine of $1,000 and imprisonment for up to two years, or both.

III

Conclusion

In summary, it is our opinion that Article 2B, §118(d) subjects a licensee to sanctions if the licensee permits anyone under the age of 21 to consume or possess alcoholic beverages in the licensed premises, even if the licensee neither knew of nor consented to the underaged person's obtaining of the alcohol. A licensee who allows persons under 21 on the premises has an affirmative duty to safeguard against a violation of §118(d).

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

ASSESSMENTS & TAXATION

Country Club Preference - Scope Of Ban On Discrimination - Antidiscrimination Provision Applies To Members' Privileges As Well As To Membership Itself

September 29, 1989

The Honorable Laurence Levitan
Senate Of Maryland

You have requested our opinion on the proper interpretation of §8-214(a) of the Tax-Property Article ("TP" Article), which prevents a country club receiving a tax preference under TP §8-212 through §8-218 from "allow[ing] or practic[ing] discrimination based on race, color, creed, sex or national origin in granting membership or guest privileges." Specifically, you have asked whether this ban on discrimination applies to "internal operations, housekeeping rules, and practices approved by the membership" of a club, such as all-male tee times, men's grills, and men's and women's tournaments. Essentially, you have asked whether the law applies only to discriminatory denials of membership and not to any "privilege" of membership or use of club facilities.[1]

---

[1] On August 1, 1989, Assistant Attorney General Kaye Brooks Bushel, on behalf of a team of State lawyers involved in investigating clubs to determine compliance with §8-214(a), wrote a number of clubs stating:

> Under the law in Maryland, you may not continue to reserve club facilities for exclusive use by one sex or the other. Thus, it is not permissible to have Men's Day or Ladies' Day on the golf course. This does not mean, however, that you may not reserve course time under the auspices of a Member's Day and a Spouse's Day, *so long as* these designations are not intended to promote discrimination. If, on Spouse's Day, only women happen to play golf, there would be no violation of the law as long as there was no club policy to exclude men from the course on that day. Furthermore, it is impermissible for a club to establish or continue a policy that permits preferred tee times based on sex. A permitted practice is an occasional female or male member-guest tournament, particularly when played under the rules of a recognized golf association.

(continued...)

In our opinion, TP §8-212(a) applies to discrimination in members' privileges to use club facilities, as well as in the grant or denial of membership itself.

I

State v. Burning Tree

In *State v. Burning Tree Club, Inc.*, 315 Md. 254, 294, 554 A.2d 366 (1989), the Court of Appeals invalidated under the State's Equal Rights Amendment an exception to TP §8-214(a) that allowed clubs to engage in sex discrimination on certain days or at certain times ("the periodic discrimination provision").[2] At the same time, the Court rejected all constitutional attacks on the ban on discrimination itself and noted that, as a result of its decision, "Burning Tree is not the only club ... that will be forced to change its policies or lose its tax benefit." 315 Md. at 273.

Specifically, the Court noted that, except for the unconstitutional "periodic discrimination" provision, "the prohibition against sex discrimination is otherwise applicable to all members of the class in such matters as membership, *facilities*, dues, etc." 315 Md. at 274 (emphasis added). The Court stated that the invalid exemption

---

[1](...continued)

> Several clubs have eating facilities or card rooms which are designated as "Men's Grill," "Ladies' Grill," "Men's Card Room," or "Ladies' Card Room." This designation by the club or the actual reservation of these facilities for a single sex is a violation of the law, regardless of the number of such facilities available at the Club. If you have two grills or card rooms, however, it is not a violation if the men or the women tend to gravitate to one or the other; what is not permitted is an official club policy of exclusion of one sex from these facilities.

(Emphasis added.) Essentially, you have raised the issue of whether the prohibitions noted in Assistant Attorney General Bushel's letter go beyond the requirements of TP §8-214. For reasons stated in this opinion, we agree with the view of the law contained in her August 1 letter.

[2] In *Burning Tree Club v. Bainum*, 305 Md. 53, 501 A.2d 817 (1985), the court had likewise invalidated a provision additionally exempting from TP §8-214(a) any country club whose facilities "are operated with the primary purpose of serving or benefiting members of a particular sex ...." That provision was repealed by Chapter 334 of the Laws of Maryland 1986.

permitted "the segregation of *facilities* on the basis of sex" and allowed "a club to engage in periodic sex discrimination in any of its *facilities* for any reason at all." 315 Md. at 295 and 296 (emphases added).

Similarly, in *Burning Tree v. Bainum*, 305 Md. 53, 501 A.2d 817 (1985), Chief Judge Murphy, in discussing a question of severability, said that:

> [T]he net effect of [the 1974 statute] seems to be to prohibit a country club from continuously excluding, based on sex, members or their guests from using some part, but less than all of the *club's facilities or services*. An example of a facility fully within Chapter 870's prohibition would be a bar serving exclusively one sex at all times.

305 Md. at 81 (emphasis added).[3]

II

Statutory Construction

The language of TP §8-214(a) clearly supports the court's interpretation of the scope of that provision. When the exemption for Burning Tree (invalidated in *Bainum*) was originally enacted with the 1974 ban on sex discrimination, the General Assembly provided that the prohibition did not apply "to any club whose *facilities are operated* with the primary purpose ... to serve or benefit members of a particular sex ...." Chapter 870, Laws of Maryland 1974 (emphasis added). And the periodic discrimination exemption struck down in 1989, because it was enacted at the same time and served a similar purpose, also clearly applied to exclusion from the use of facilities.

To qualify for the tax preference, a club must have a "clubhouse" and restrict its "facilities" primarily to members, family, and guests.

---

[3] In *State v. Burning Tree*, 315 Md. 254 (1989), the State argued that Chief Judge Murphy's opinion in *Bainum* did not speak for a majority of the Court on the issue of serverability. This position was rejected by Judge Eldridge in the 1989 decision. *See* 315 Md. at 298, n. 13.

TP §8-212. In our view, it would not be a reasonable construction to read the preferential assessment statute as requiring such facilities to exist for qualification for the tax preference and at the same time, after the *Burning Tree* decision, sanctioning discrimination on the basis of race, color, creed, sex, or national origin in their use.[4]

Finally, the legislative history of the 1986 amendment to the tax preference statute is particularly compelling. Individuals and groups, such as the Conference of Private Organizations ("CONPOR") told the General Assembly that if the periodic discrimination provision were eliminated from the law, "*all* activities, programs and practices which differentiate on the basis of sex must be prohibited." *See* CONPOR Comments to the Maryland Senate Committee on Budget and Taxation in Opposition to Senate Bill No. 483 (February 28, 1986) (emphasis added). Similarly, this lobbying group noted that:

> Among the commonly followed practices of Maryland golf clubs which, therefore, would be affected by S.B. 483 are:
>
> (1) Saturday/Sunday tee times for men only
>
> (2) "Ladies Days" for female golfers
>
> (3) All male member-guest tournaments
>
> (4) All female member-guest tournaments
>
> (5) Any other kind of club tournament for males or females when the course is closed to members of the opposite sex
>
> (6) Tennis, hockey, badminton times (or tournaments) reserved for one sex or the other
>
> (7) Men's or ladies' grills

---

[4] We believe it is most unlikely that the word "privileges" was intended to apply only to guests and not members - to afford guests greater protection under the law than members. Moreover, the value of a woman's "membership" to play golf would be significantly diminished if a club could abridge her right to use the clubhouse, restroom, and food facilities.

(8) Professional or amateur tournaments at the club for women or men only (e.g. the Kemper Open, Maryland State Amateur Tournaments, etc.)

Id.[5] Arguments such as this certainly persuaded the General Assembly to leave the invalid exemption in the law. However, now that the Court of Appeals has eliminated it, we have no choice but to conclude that TP §8-214(a) bans discrimination in the use of club facilities, including such privileges of membership as prime tee time and ladies' and men's days and use of restaurant facilities.

III

Conclusion

In our opinion, TP §8-214(a) applies to discrimination in members' privileges to use club facilities, as well as in the grant or denial of membership itself. Hence, the Attorney General's enforcement authority extends to eliminating discrimination in the use of club facilities.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions and Advice

---

[5] Assistant Attorney General Kaye Brooks Bushel's August 1, 1989 letter did not suggest that all the practices mentioned in the CONPOR Comments are per se illegal, particularly tournaments. In fact, under the rationale of the letter, with which we agree, such events as the Kemper Open would clearly be permissible.

BUDGETARY ADMINISTRATION

Constitutional Law - "Legislating In The Budget" - Condition Not Directly Related To Appropriation Item

June 9, 1989

The Honorable Earl F. Seboda
Secretary of General Services

You have requested our opinion concerning the validity of a particular condition attached to the appropriation for the construction of a State office complex in Crownsville. Specifically, you ask about a condition related to the transfer and subsequent use of the property known as Whitney's Landing Farm.

For the reasons stated below, we conclude that this condition is "legislating in the budget" and, hence, is beyond the General Assembly's constitutional prerogative. Therefore, the condition should be treated as directory only.

I

Budget Bill Language

In the budget bill for fiscal year 1990, Chapter 14 (House Bill 350) of the Laws of Maryland 1989, the General Assembly appropriated $23,000,000 to the Board of Public Works, to "[d]esign/build a State office complex in Crownsville on State-owned land ...." Appropriation Code 23.05.02.01, item 003. This appropriation was made subject to several conditions, including the one that prompted your request for an opinion:

> Further provided that the Department of Health and Mental Hygiene shall complete arrangements for the transfer of the balance of the Whitney's Landing Farm Property located along Evergreen and Sunrise

> Beach roads (not earmarked for use by the Maryland Veterans Cemetery) to the Department of Natural Resources for use for open space, recreation and local community recreation and parks facilities.

As we understand the facts, the Whitney's Landing Farm property, although owned by DHMH and used in the past as a source of farm products for Crownsville State Hospital, is not part of the Hospital grounds proper and does not lie near any portion of land that was a potential site for the office building.[1] The site chosen for the complex is located on the hospital grounds, southwest of Route 178. The Farm property is about five miles away from this site, on the other side of Route 178.

The history underlying this budget condition confirms that the status of the Farm property has for some while been the subject of public scrutiny, quite apart from the issue of whether a State office complex should be built at Crownsville. Correspondence dating back to 1986 reflects the interest of Anne Arundel County in acquiring "that portion of Whitney's Landing Farm located south of Sunrise Beach Road comprising approximately one hundred six (106) acres. The property is being sought to expand [the county's] Arden-on-the-Severn Park." Letter from Joseph J. McCann, Director of the Anne Arundel County Recreation and Parks Department, to Secretary of Natural Resources Torrey C. Brown (September 11, 1986). Judging from later correspondence, Anne Arundel County officials were frustrated by delays in the process. That is, DHMH was taking longer than the county wanted to determine whether the Farm property was surplus and, if it was, to transfer it to the Department of Natural Resources for subsequent use as park land. Another letter from Mr. McCann to Secretary Brown, dated December 2, 1988, reflects the county's unhappiness over the slow pace:

---

[1] At the time that the budget bill was passed, the exact site of the Crownsville office complex had not finally been determined. In fact, one budget condition required a consideration of sites other than the grounds of the Crownsville State Hospital. The condition related to Whitney's Landing Farm was applicable only "if the building is to be located on the grounds of the Crownsville State Hospital ...." However, as we understand it, no possible building site was at or near the Farm property. For this reason, we need not consider whether the validity of the budget condition is to be assessed as of the time of the budget bill's enactment or as of the time of site selection.

> For over a year now, the Anne Arundel County Recreation and Parks Department has been attempting to lease or purchase from the State of Maryland, some additional land, known to us as Whitney's Landing Farm, for community recreation. While your office has been sympathetic, we still are unable to report any progress on our efforts. The purpose of this letter is to request your personal review of the matter so that I may advise County Executive Lighthizer and our citizens of your decision on this matter. It has been difficult because we have been dealing with three separate agencies. Therefore, I am hoping this communication will help resolve the matter once and for all.[2]

Apparently the problem was not resolved by the time of the 1989 Session of the General Assembly, for the budget condition in question reflects a legislative effort, in Mr. McCann's words, to "resolve the matter once and for all." The appropriation for the Crownsville office complex, affecting as it did one parcel of DHMH land in the Crownsville area, was a seemingly apt vehicle for instructing DHMH to complete the transfer of the Farm property.

II

Requirement of Direct Relationship to Appropriation Item

Under Article III, §52(6) of the Constitution, the General Assembly has the power to "strike out or reduce items" related to the Executive Branch in the annual budget bill. As an adjunct to its power to strike out or reduce items, the General Assembly also may "condition or limit the use of money appropriated, or the use of the facility for which the money is appropriated ...." *Bayne v. Secretary of State*, 283 Md. 560, 574, 392 A.2d 560 (1978).

The exercise of the authority to condition or limit items of appropriation is subject to certain restraints, however, lest the General

---

[2] Copies of this letter were sent to the 33rd District delegation, including to Senator Cade, a member of the Senate Budget and Taxation Committee.

Assembly engage in inpermissible "legislating in the budget." In the phrasing of the Court of Appeals, the authority may be exercised "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." *Bayne*, 283 Md. at 574. *See* 63 *Opinions of the Attorney General* 60 (1978).

In our view, the condition related to Whitney's Landing Farm does not satisfy the first of these requirements. It is not "directly related to the expenditure of the sum appropriated ...."[3]

When the General Assembly appropriated funds for the Crownsville office building, it certainly had the authority to attach conditions designed to ameliorate the environmental and other effects of the project. Indeed, in one respect it did so: The General Assembly instructed the State Highway Administration to "exert every reasonable effort to improve road access into the site, minimizing the impact on local traffic patterns, especially on Crownsville Road and the Generals Highway (Route 178)." This condition is unquestionably valid. Likewise, had the General Assembly attached a condition requiring the preservation of open space around the building or other measures to protect the immediate vicinity against the adverse effects of the project, we would not question the condition's validity.

The Farm property, however, is not the site of the project. It is not adjacent to it. Instead, it is five miles away. The office complex project itself has no effect, one way or the other, on the Farm property. The only link between the farm property and the building site is that both are now held by DHMH for the use of Crownsville State Hospital. Although the two are thus not wholly unrelated, in our view this connection is too attentuated to meet the constitutional requirement.

---

[3] In light of this conclusion, we need not and do not consider whether the condition "in essence, amend[s] substantive legislation" - that is, the authority of the Board of Public Works to transfer property from one unit of the Executive Branch to another. §10-304(b) of the State Finance and Procurement Article.

In 37 *Opinions of the Attorney General* 139 (1952), Attorney General Hammond considered the validity of a condition attached at the end of the appropriations for the Department of Research and Education. The condition required that a particular pier at Solomon's Island, known as the Solomon's Steamboat Wharf, "shall be opened and held open to general public use and shall not be held or restricted to the exclusive use of the Department of Research and Education." Chapter 15, Laws of Maryland, 1952. Attorney General Hammond concluded that this condition, unrelated to any appropriation for the Steamboat Wharf, was directory only:

> The Legislature was not appropriating money in 1952 for the purchase of the Steamboat Wharf, nor was it appropriating money specifically for its use. The condition the Legislature sought to attach bore no reasonable relation to the appropriation or use of the money involved as money. If the policy which the Legislature sought to establish by the language is one which should be a policy of this State, the Legislature can pass a law to that effect which would be subject to the Governor's veto and the other constitutional restrictions which relate to the passage of all laws. It cannot make a law in the way it attempted to do in the Budget Bill, and thus by-pass the method of law making set up in the Constitution.

37 *Opinions of the Attorney General* at 142.

The next year, the General Assembly sought to achieve the same result through a similar condition attached to the appropriation for the Department of Research and Education:

> Provided that no part of this appropriation shall be available to the Department of Research and Education unless the pier at Solomon's Island originally known as the Solomon's Steamboat Wharf shall be opened and held open to the general public use and shall not be held or restricted to the exclusive use of the Department of Research and Education.

Chapter 661, Laws of Maryland 1953. Again, however, the Attorney General rejected this attempt to use the budget bill as a vehicle for legislating the status of the pier. Attorney General Rollins wrote: "[W]e rule that the language seeking to open the Solomon's Steamboat Wharf to the general public use is ineffective. The Department need not fulfill the conditions set forth in order to have available to it the appropriations provided." 38 *Opinions of the Attorney General* 110, 111 (1953). In another opinion that year, Attorney General Rollins pointed out the difference between "the attempt to enact general legislation concealed within the Budget Bill," like the Steamboat Wharf provisions, "from the valid conditions which the General Assembly may impose upon the expenditure of moneys appropriated. The line of demarcation between what is valid and what is invalid is the determination of whether or not the condition or limitation is directly related to the expenditure of the appropriation." 38 *Opinions of the Attorney General* 112, 113 (1953).[4]

In the condition related to the Whitney's Landing Farm property, the General Assembly is attempting to do essentially the same thing as it sought to do in the conditions concerning the Steamboat Wharf - legislate the status of a parcel of State-owned land through a condition in the budget bill, even though there is no appropriation related to that parcel of land. For the reasons stated in the Steamboat Wharf opinions, such an attempt is not constitutionally permissible.

The status of Whitney's Landing Farm is not directly related to the Crownsville office project. The appropriation item for the office project was simply a ready vehicle for achieving a legislative solution to the perceived problem of delay in converting the Farm property to park use. However laudable this goal, the Constitution does not allow the budget bill to be used in this manner. Accordingly, the condition

---

[4] Attorneys General Finan and Burch later reiterated the principle that a condition or limitation must be "directly related to the expenditure of the sum appropriated." 46 *Opinions of the Attorney General* 13, 15 (1961); 61 *Opinions of the Attorney General* 454, 459 (1976); 63 *Opinions of the Attorney General* 60, 73 (1978).

regarding the Farm property must be regarded as directory, rather than mandatory.[5]

III

Conclusion

In summary, it is our opinion that the budget condition regarding the transfer of the Whitney's Landing Farm property attached to the appropriation for the Crownsville office complex is not legally binding. It should be viewed, instead, as directory only.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions and Advice

---

[5] Although we need not decide the question of severability, there is no indication that the General Assembly would not have appropriated the funds for the office building had it known that the condition regarding the Farm property would be directory rather than the mandatory. *See State v. Burning Tree Club, Inc.*, 315 Md. 254, 296-97, 554 A.2d 336 (1989) (standards for severability).

That the condition is directory does not mean that the agencies may simply ignore it. *In re James S.*, 286 Md. 702, 707, 410 A.2d 586 (1980); 73 *Opinions of the Attorney General* 57, at 64-65 (1988). Rather, they should give it careful, good-faith consideration.

CHESAPEAKE BAY CRITICAL AREA COMMISSION

Local Programs - Review And Approval - Status Of Somerset County's Program

April 17, 1989

The Honorable Lewis R. Riley
Senate Of Maryland

The Honorable Norman H. Conway
The Honorable Daniel M. Long
Maryland House of Delegates

Together with the late Delegate Pilchard, you requested our opinion concerning the applicability of §8-1809(d)(2) of the Natural Resources Article ("NR" Article") to the critical area program of Somerset County. Specifically, you ask whether the Somerset County program was "deemed approved" under that paragraph.

For the reasons stated below, we conclude that, although the Chesapeake Bay Critical Area Commission had the discretion to screen local program submissions for completeness prior to the beginning of the 90-day period that the statute provides for Commission review, in the case of Somerset County the Commission exceeded the bounds of its discretion. In our opinion, Somerset County's program was "deemed approved" as submitted by the county. However, we should not be understood to be addressing the program's compliance with substantive elements of the Critical Area Law and its implementing regulations.[1]

---

[1] *See* text accompanying note 6 below.

I

Statutory Background

In two prior opinions, this office discussed in detail the purposes of the Chesapeake Bay Critical Area Law and the procedures of the Critical Area Commission. 73 *Opinions of the Attorney General* 57 (1988); 72 *Opinions of the Attorney General* 14 (1987)]. Under this law, "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).

These local programs are at the core of the overall effort to protect the Bay. In NR §8-1808(b), the General Assembly mandated that:

> 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.

A local program must comply with requirements in both the statute and the Commission's criteria. NR §8-1809(i). The statute specifies eleven elements that, "[at] a minimum," would make a program "sufficient" to meet the statutory goals. NR §8-1808(c). The criteria, in turn, elaborate upon the required elements of a local jurisdiction's program. *See generally* COMAR 14.15.

To assure that the overall program goals would be realized "in a consistent and uniform manner," the General Assembly established in

NR §8-1809 a detailed schedule for local program development. "Within 760 days after criteria adopted by the Commission become effective, there shall be in effect throughout the Chesapeake Bay Critical Area programs approved or adopted by the Commission." NR §8-1809(f). Local jurisdictions were given the option of either developing their own programs or letting the Commission do so, and a schedule for preparation and approval was set forth as follows in NR §8-1809:

> (c) If a local jurisdiction states its intent to develop a program, it shall prepare a proposed program and submit it to the Commission within 270 days after the effective date of the criteria adopted under §8-1808 of this subtitle. However, if the local jurisdiction submits evidence satisfactory to the Commission that it is making reasonable progress in the development of a program, the Commission may extend this period for up to an additional 180 days. Before submission of a program to the Commission within the time allowed by this subsection, a local jurisdiction shall hold at least one public hearing on the proposed program, for which 2-weeks notice shall be published in a newspaper of general circulation in the local jurisdiction.
>
> (d) (1) Within 30 days after a program is submitted, the Commission shall appoint a panel of 5 of its members to conduct, in the affected jurisdiction, a public hearing on the proposed program.
>
> (2) Within 90 days after the Commission receives a proposed program from a local jurisdiction, it shall either approve the proposal or notify the local jurisdiction of specific changes that must be made in order for the proposal to be approved. If the Commission does neither the proposal shall be deemed approved.
>
> (3) A changed proposal shall be submitted to the Commission in the same manner as the original proposal, within 40 days after the Commission's notice. Unless the Commission approves a changed

> proposal or disapproves a changed proposal and states in writing the reasons for its disapproval within 40 days, the changed proposal shall be deemed approved.

Your question concerns one aspect of the procedures by which the Commission was to review a local jurisdiction's program. Under NR §8-1809(c), "[i]f a local jurisdiction states its intent to develop a program, it shall prepare a proposed program and submit it to the Commission within 270 days after the effective date of the [Commission's] criteria ...."[2] Then, "[w]ithin 90 days after the Commission receives a proposed program from a local jurisdiction, it shall either approve the proposal or notify the local jurisdiction of specific changes that must be made in order for the proposal to be approved. If the Commission does neither the proposal shall be deemed approved." NR §8-1809(d)(2).

II

Submission of Somerset County's Program

On March 15, 1988, a representative of Somerset County delivered the county's proposed program to the Commission. Five weeks later, on April 26, 1988, the late Judge Solomon Liss, then Chairman of the Commission, sent the following letter to the President of the Board of County Commissioners for Somerset County:

> This is to formally acknowledge submittal of the Somerset County Chesapeake Bay Critical Area Program on March 15, 1988 to the Commission. This is also to inform you that the Somerset County Critical Area Program has been determined to be complete as to the required elements in Section 8-1808 of the Law and 14.15.10 and 14.15.11 of the criteria. Therefore, as of the date of this letter, the 90-day review period by the Commission will begin.

The 90th day after March 15, 1988, was June 13. By that date, the Commission had taken no action. However, on June 29, 1988 -

---

[2] The Commission's criteria, which were approved by the General Assembly, became effective on May 13, 1986.

more than 90 days after March 15, but within 90 days of Judge Liss' April 26 letter - the Commission disapproved certain aspects of the county's proposed program. The issue, then, is whether the county's program had been "deemed approved" under NR §8-1809(d)(2) prior to the Commission's partial disapproval on June 29.

III

Mandatory Nature of Deadline

In attempting to construe the phrase "[w]ithin 90 days after the Commission receives a proposed program from a local jurisdiction," our guiding principle is to achieve a result consistent with the goal of the General Assembly. *See Kaczorowski v. City of Baltimore*, 309 Md. 505, 525 A.2d 628 (1987). Although the legislative history contains no material related to this question, we do draw guidance from the context in which NR §8-1809(d)(2) appears.

Unquestionably, the General Assembly sought to compel a Commission decision, one way or the other, about the adequacy of a local jurisdiction's program within the fixed period of 90 days. The default language - "If the Commission [takes no action] the proposal shall be deemed approved" - is meant to force Commission action within the 90-day deadline. This time limit is not merely directory. *See Scherr v. Braun*, 211 Md. 553, 128 A.2d 388 (1957).[3]

One important goal of the Critical Area Law was to have measures to protect the Bay in place by a set date, "[w]ithin 760 days after criteria adopted by the Commission become effective ...." NR §8-1809(f). Moreover, the statute sets out a timetable for steps in local program development, including the Commission's review, consistent with this overall deadline. *See* Part I above.

As we explained in detail last year, the Commission's review process was a demanding one. The Commission was required to assess each program element to determine if it comported with the applicable

---

[3] In *Scherr*, the Court of Appeals held that the following provision was mandatory, not directory: "The failure of the [circuit] court to determine an appeal within a period of 30 days after the record has been filed in court by the local [liquor] board ... shall constitute an automatic affirmance of the local board's decision ...." 211 Md. at 566.

provisions of the statute and the criteria. *See* 73 *Opinions of the Attorney General* at 61. If the Commission concluded that a program element was deficient, it was empowered to direct a change in that element. Nevertheless, despite the formidable nature of the task, the Commission was required to decide whether there were any deficiencies within 90 days. In light of the statutory scheme and its underlying purpose, the Commission was not permitted to allow itself extra time for this review. We do not understand the Commission, in its practice or interpretation, to have contended otherwise.

IV

Screening for Program Completeness

When the first local programs were submitted to the Commission, the Commission's counsel were asked whether a program wholly lacking one or more of the elements mandated in NR §8-1808(c) or in the criteria was sufficient to trigger the 90 day period for Commission action provided by NR §8-1809(d)(2). Counsel advised the Commission that when the General Assembly required a local jurisdiction to submit "a proposed program," it meant a program containing all of the minimum and mandatory program elements. If a program submission failed this test, counsel advised, the 90 days for Commission action from receipt of "a proposed program" would not start. Thus, counsel advised that the Commission's proposal to subject initial program submissions to a "completeness review" was supported by the law. We think that this advice was correct.

First, the reference in NR §8-1809 to submission of "a proposed program" must be read in the context of other provisions of the law, described in Part I above, that delineate what a "program" must include "at a minimum." There is nothing in NR §8-1809 to suggest that a "proposed program" could consist of anything less than the minimum elements set forth in NR §8-1808(b) and the Commission's criteria.

Second, to read the references to "proposed program" in NR §8-1809(c) and (d) to mean anything less than a program containing all of the minimum elements would frustrate the intent of other provisions in NR §8-1809. For example, a local jurisdiction was required by NR §8-1809(c) to hold a public hearing on its proposed program before submitting it to the Commission. But if a "proposed program" contained less than all of the minimum program elements, the public would have been deprived of an opportunity to comment on the missing elements.

Third, if the Commission had been required to act within 90 days on a proposed program lacking some of the minimum elements, the Commission would have had no choice but to disapprove the program. However, this would have meant that upon receipt of a corrected program, the Commission would have had only 40 days to review the entire program (NR §8-1809(d)(3)), not the 90 days contemplated by NR §8-1809(d)(2). The need to act on a whole program in so truncated a time period would also have obviated the Commission's only public hearing, required by NR §8-1809(d) to be held by a panel within 30 days of the original submission of a program. Since perhaps the bulk of a program would not yet have been submitted, that hearing might have been a futile exercise. In short, a reading of the act that would have forced so foreshortened a review process is inconsistent with the statutory objective. *See Bank America Corp. v. Board of Governors*, 596 F.2d 1368 (9th Cir. 1979).[4]

Moreover, although we are aware of no Maryland case on point, cases from other jurisdictions support the Commission's practice. In *Allard v. Thalheimer*, 358 A.2d 395 (N.H. 1976), the New Hampshire Supreme Court construed a similar statutory scheme. Under New Hampshire law, a person seeking approval of a subdivision plat was to submit it to the local planning board. The statute required the planning board to "act to approve or disapprove [the plat] within 90 days; ... otherwise such plat shall be deemed to have been approved ...." N. H. Rev. Stat. Ann. §36:23 (1969). The plaintiff purported to submit a plat, but the planning board rejected it because it did not meet a regulatory requirement that lot sizes be shown in square feet. The court held: "In these circumstances the master properly rejected the

---

[4] This case involved another automatic approval statute. Under 12 U.S.C. §1843(c), an application by a bank holding company to engage in certain nonbanking activities "shall be deemed to have been granted" if the Board of Governors of the Federal Reserve System fails to act on the application "within the 91 day period which begins on the date of submission to the Board of the complete record on that application ...." The Ninth Circuit observed that "we must interpret the 91 day rule in a way which gives the Board an adequate opportunity to discover and evaluate 'possible adverse affects such as undue concentration of resources, decreased or unfair competition, conflicts of interest,' and the like, so that the Board can 'insure that the activities of these companies do not result in harm to the public ....'" 596 F.2d at 1376-77 (quoting substantive provisions of the law).

plaintiff's claim that he submitted the plat ...." 358 A.2d at 396. *Accord Lake Erie Power & Light Co. v. Telling-Belle Vernon Co.*, 14 N.E.2d 947, 952 (Ohio 1937) (filing requirement for regulatory approval not satisfied if key contractual term is omitted). *See also Kornbluth v. Savannah*, 398 F. Supp. 1266, 1268 (E.D.N.Y. 1975) (claim under Tort Claims Act not properly "presented" when physician's statements were omitted); *Matthews v. Kern*, 22 N.Y.S.2d 621, 622 (Sup. Ct. 1942) (improperly filled out citizenship application not a "filing").

Finally, even if the Commission's decision to engage in "completeness reviews" were viewed as debatable, it was a reasonable interpretation of the statute, entitled to deference. "[T]he view taken of a statute by administrative officials soon after its passage is strong, persuasive influence ... and should not be disregarded except for the strongest and most urgent reasons." *Holy Cross Hosp. v. Health Services Cost Review Comm'n*, 283 Md. 677, 685, 393 A.2d 181 (1978).

V

Effect of Completeness Determination

Although the Commission had the power to return to a local jurisdiction an incomplete program without having initiated the 90-day review period, however, the situation involving Somerset County poses a different question: When the Commission screens a program for completeness and determines that it *is* complete, was the Commission permitted to treat the 90-day review period as beginning on the date of its determination of completeness? We think not.

Just as an incomplete program was never properly "submitted" or "received" and therefore never initiated the 90-day review period, so a complete program *was* "submitted" and "received" and therefore did initiate the 90-day review period. There is nothing in the language of the statute or its underlying policy that would permit the Commission, in effect, to grant itself more than 90 days to review a complete program. *See Madison at Merrick, Inc. v. Leonard*, 253 N.Y.S.2d 44

(Sup. Ct. 1964).[5] Indeed, one out-of-state case expressly approves a procedure for "preapplication review" of subdivision applications, much like that of the Commission - but only if the reviewing agency adheres strictly to the statutory deadline for review once the application is "final." *Savage v. Town of Rye*, 415 A.2d 873, 875 (N.H. 1980). *See also Tuscarora Forests, Inc. v. Fernmanagh Bd. of Supervisors*, 471 A.2d 137, 138 (Pa. Cmwlth. 1984) (incomplete subdivision plan justifies agency inaction "pending submission and review of a revised plan containing more complete information").

VI

Status of Somerset County Program

In our view, the Commission exceeded the permissible bounds of its discretion in its handling of the Somerset County program. It took five weeks for the Commission to determine that the Somerset County program was complete, and then it sought to take the full 90 day review period in addition. But, as explained in Part V above, the screening that we believe was permissible under the statute did not permit this result.

Unquestionably, the Commission's resources were severely taxed by the demands of the review process, at a time when the proposals of many jurisdictions were pending. We do not doubt the Commission's good faith in its processing of the Somerset County proposal.

Good faith alone is not enough, however. The Commission was not empowered effectively to extend the 90-day deadline in NR §8-1809(d)(2) by five weeks. Instead, the Commission was obliged to disapprove any element of Somerset County's program by the 90th day

---

[5] In this case, a county ordinance required the planning commission to act on a proposed subdivision plat within 45 days, if the plat was filed "in accordance with the regulations of the county planning commission." A developer complied with all the regulatory requirements and then sought mandamus when the board failed to act within 45 days. The board sought to defend its inaction by arguing that action was not required until after a public hearing, which the board had the power to schedule. The board's argument, if accepted, would have effectively allowed it to extend the 45-day review period indefinitely. The court rejected the board's argument: "It was certainly not the Legislative intent to empower the County Planning Commission to set up a procedural 'roadblock', and thus negate the clear intent of a Legislative enactment ...." 253 N.Y.S. 2d at 46.

from the Commission's receipt of the program, which the Commission determined was complete. The Commission's disapproval after that date was ineffective, for the county's program had already been "deemed approved."

To be sure, this approval by operation of law is not identical to approval by the Commission. As we pointed out in Part I above, the Critical Area Law mandates local program compliance with elements in the statute and with the Commission's criteria. *See* NR §§8-1808(b),(c), and (d) and 8-1809(i). There now exists no determination that the Somerset County program is "sufficient to meet the goals" of the Critical Area Law. NR §8-1808(c).

The Critical Area Law does not spell out the consequences of approval by default under NR §8-1809(d)(2). Certain procedural effects are clear: For example, the Commission may not itself adopt a program for Somerset County under NR §8-1810. Moreover, any modification in the county's program would be an "amendment" under NR §8-1809(g) and (h), rather than a "proposed change" under NR §8-1809(e).

Apart from these specific matters, the statute is silent and thus leaves some important matters in doubt. If the Commission's attempted (albeit legally ineffective) partial disapproval of June 29, 1988, reflects instances in which Somerset County's program fails to meet statutory or regulatory requirements, actions taken under the program might well be subject to legal challenge in the future.[6]

We understand that the Commission and Somerset County have had discussions aimed at modifications in the county's program. The conclusion in this opinion is certainly not a reason for any lessening of this cooperative endeavor.

---

[6] Under the Environmental Standing Act, any person "may bring and maintain an action for mandamus or equitable relief, including declaratory relief against any officer or agency of the State or political subdivision to perform a nondiscretionary ministerial duty imposed upon them under an environmental statute ... [or] regulations, ... or for their failure to enforce an applicable environmental quality standard for the protection of the air, water, or other natural resources of the State, as expressed in a statute ... [or] regulation ...." NR §1-503(b).

VII

Conclusion

In summary, it is our opinion that the Chesapeake Bay Critical Area Commission was authorized to screen the program submissions of local jurisdictions to determine whether a submission contained all elements required by statute and regulations. A proposed program that was incomplete was not subject to Commission review under NR §8-1809(d). However, if a program was found to be complete, the Commission was required to act on the proposal within 90 days of its receipt or else the program was "deemed approved."

Because Somerset County's program was found to be complete and yet was not acted upon within 90 days of its receipt, that program has been approved by operation of law. However, this mode of approval by default entails uncertainty over whether the program has complied with all of the requirements of the statute and regulations. In light of the significant legal risk to which a noncomplying program would be exposed, we recommend that Somerset County and the Commission continue their efforts to agree on amendments to the program.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

CONSTITUTIONAL LAW

Child Care - First Amendment - Establishment Clause - Exemption Of Religiously-Affiliated Child Care Centers From Licensing Would Not Violate Establishment Clause

January 17, 1989

The Honorable Patrick J. Scannello
Maryland House of Delegates

You have requested our opinion on whether the Establishment Clause of the First Amendment permits the General Assembly to exempt child care centers affiliated with religious organizations from an otherwise generally applicable licensing requirement.

For the reasons stated below, we conclude that an exemption from licensing for religiously-affiliated child care centers would be constitutional.

I

Child Care Regulation

At its 1988 Session, the General Assembly enacted comprehensive legislation for the regulation of child care facilities. This law, Chapter 247 (House Bill 767) of the Laws of Maryland 1988, was intended to "streamlin[e] the regulatory process for child care by consolidating certain regulatory authority in the Department of Human Resources."

In general, "a person shall be licensed by the Department [of Human Resources] before the person may operate a child care center in this State." §5-574(a) of the Family Law Article ("FL" Article). The key term "child care center" means "an agency, institution, or establishment that, for part or all of a day, or on a 24-hour basis on a regular schedule, and at least twice a week, offers or provides child care to children who do not have the same parentage except as otherwise provided for in law or regulation." FL §5-570(c)(1). The term includes "a nonpublic nursery school in which an instructional program is offered or provided for children between 2 to 4 years old." FL §5-570(c)(2). However, the term excludes both "a nonpublic kindergarten in which an instructional program is offered or provided for children who are at least 5 years old" and "a nonpublic elementary school in which an instructional program is offered or provided for children who are in grades 1 through 8." FL §5-570(c)(3).

The statute does not contain a general exemption for child care centers operated by religious organizations. Rather, it has two more limited exemptions pertaining to religious organizations. The licensure requirement does not apply to:

> (i) the instructional program, curriculum, or teacher, principal, or administrator qualifications of a nursery school or child care center that is operated by a religious organization in a school building exclusively for children who are enrolled in that school; or
>
> (ii) a nonpublic nursery school operated by a religious organization that has been issued a certificate of approval by the State Department of Education.[1]

FL §5-574(b)(2).

In sum, under current law, a child care center affiliated with a religious organization must obtain a license if it falls within the definition of "child care center" and is not approved by the State Department of Education. The Department of Human Resources's licensing process addresses those aspects of a child care center's program that are not related to its educational component, to ensure the center's compliance with environmental, health, and safety standards. *See* COMAR 10.05.01.

---

[1] "A school operated by a bona fide church organization is not required to be approved by the State Department of Education. However, such a school may apply for a certificate of approval, and, if approved, shall comply with [the State Department of Education's] regulations." COMAR 13A.09.09.01C.

II

Constitutionality of Regulation

In our view, the State may require licensing of child care centers affiliated with religious organizations in furtherance of the State's interest in the well-being of children. This form of State regulation does not violate the Free Exercise Clause of the First Amendment. As one federal court recently put it, "the licensure requirement [for preschools] effectively advances a compelling, indeed paramount, state interest - protection of the health and safety of young children." *North Valley Baptist Church v. McMahon*, 696 F.Supp. 518, 527 (E.D. Cal. 1988). *See also, e.g., Kansas ex rel. Pringle v. Heritage Baptist Temple, Inc.*, 236 Kan. 544, 693 P.2d 1163 (1985); *Department of Social Serv. v. Emmanuel Baptist Pre-School*, 150 Mich. App. 254, 388 N.W.2d 326 (1986), *remanded in part* 418 N.W. 2d 94 (Mich. 1988).[2]

III

Constitutionality of Exemption

The fact that the State *may* regulate religiously-affiliated child care centers without offending the Free Exercise Clause does not mean that the State *must* do so. In our view, the General Assembly is constitutionally free to exempt from licensing child care centers affiliated with religious organizations, if it should choose to do so as a policy matter.

"The limits of permissible State accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." *Walz v. Tax Commission*, 397 U.S. 664, 673

---

[2] In a letter of advice, Assistant Attorney General Nancy B. Shuger concluded that the licensing of religiously affiliated child care centers required by Chapter 247 was constitutionally permissible, "because the license is designed to address the State's compelling interest in assuring the health and safety of children in child care without interfering in the nature or content of the religious program provided." Letter to Senator Victor Cushwa (June 23, 1988). Earlier, during the consideration of House Bill 767, Assistant Attorney General Kathryn M. Rowe advised that "the State may subject day care centers run by religious organizations to regulation of their disciplinary policies without running afoul of the free exercise clause." Letter to Delegate Carol S. Petzold (Feb. 29, 1988). We reaffirm these conclusions.

(1970)U.S. 664, 673 (1970). As the Supreme Court recently observed, "[t]here is ample room under the Establishment Clause for 'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'" *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987) (quoting *Walz v. Tax Commission,* 397 U.S. at 669).

In *Amos*, the Supreme Court upheld the constitutionality of an exemption for religious organizations in Title VII of the Civil Rights Act of 1964. Title VII, among other provisions, generally prohibits discrimination in employment on the basis of religion. However, religious organizations are exempt from this prohibition.

The Supreme Court held that this exemption satisfied the three-part test set out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), for analyzing claimed violations of the Establishment Clause.[3] First, the Supreme Court held that a legislative purpose "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions" is a permissible secular purpose. 483 U.S. at 334. Second, the exemption did not have the forbidden effect of advancing religion. Although the exemption obviously "*allows* churches to advance religion, which is their very purpose," the exemption did not mean that "the *government itself* has advanced religion through its own activities and influence." 483 U.S. at 337 (emphasis in original). Finally, the exemption "effectuates a more complete separation of" church and state and thus avoids impermissible entanglement. 483 U.S. at 339.

Applying the reasoning in *Amos*, the Fourth Circuit upheld the constitutionality of Virginia's exemption of religiously-affiliated child care centers from licensing requirements:

> [W]e do not discern any distinctions that would justify a result in this case different from that reached in *Amos*. Indeed, if an exemption is permissible in the context of employment practices ..., one can only be

---

[3] This office has frequently considered the application of the *Lemon* criteria. *See, e.g.*, 73 *Opinions of the Attorney General* 68 (1988) ; 69 *Opinions of the Attorney General* 100 (1984); 67 *Opinions of the Attorney General* 26 (1982); 65 *Opinions of the Attorney General* 186 (1980); 59 *Opinions of the Attorney General* 209 (1974).

> more solidly justified where it acts to prevent state interference with church programs that provide education and care for children.

Forest Hills Early Learning Center, Inc. v. Grace Baptist Church, 846 F.2d 260, 264 (1988). *See also, e.g., Pre-School Owners Association v. Department of Children and Family Services*, 119 Ill. 2d 268, 518 N.E.2d 1018, 1023-25 (1988). A similar exemption in Maryland would likewise be constitutional, in our view.[4]

IV

Conclusion

In summary, it is our opinion that the General Assembly is constitutionally free to exempt child care centers operated by religious organizations from licensing.[5] Such an exemption is not constitutionally required, however. Thus, the matter is a policy decision for the General Assembly.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

---

[4] In a letter of advice, Assistant Attorney General Kathryn M. Rowe reached a similar conclusion in light of the *Forest Hills* decision. Letter to Delegate Donald B. Elliott (June 1, 1988).

[5] We note that you and two of your colleagues have prefiled legislation, House Bill 206, that would exempt from licensing "an institution operated by a bona fide church organization, including the Amish and Mennonite church parochial schools."

Constitutional Law - Equal Protection - Procurement Law - Minority Business Enterprise ("MBE") Program - State's MBE Program Is Constitutional, Applying Supreme Court's Decision in *City of Richmond v. J. A. Croson Co.*

February 22, 1989

The Honorable Curtis S. Anderson
House of Delegates

On behalf of the Maryland Legislative Black Caucus, you have requested our opinion concerning the Supreme Court's recent decision in *City of Richmond v. J. A. Croson Co.*, 109 S.Ct. 706 (1989). This decision held that Richmond's minority set-aside requirement for public contracts was invalid under the Equal Protection Clause.[1] Specifically, you ask us to assess the impact of *Croson* on Maryland's Minority Business Enterprise ("MBE") program, Title 14, Subtitle 3 of the State Finance and Procurement Article ("SF" Article).

In one major respect, we point out at the outset, Maryland's MBE program is unaffected by *Croson*. The basic objective of the statute is to assist businesses owned by those who are "disadvantaged socially or economically." Nothing in *Croson* prevents the State from seeking to have a reasonable share of its contracting dollars go to these businesses. This goal does not itself involve race-based classifications.[2]

But in important respects the Maryland MBE program does take account of race or ethnicity. The General Assembly has provided that those who belong to certain specified groups - blacks, Hispanics, and other minorities - are, by virtue of this characteristic alone, to be defined as "disadvantaged socially or economically." SF §14-301(e)(1)(ii)1-6. In order to obtain the benefits of the MBE program,

---

[1] The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws."

[2] Moreover, nothing in *Croson* affects the State's compliance with federal affirmative action requirements. *See* note 7 below and accompanying text.

a black or Hispanic or other minority group member need make no further showing of social or economic disadvantage. This aspect of the State's MBE program is subject to strict scrutiny review under *Croson*.

To survive strict scrutiny, the race-based remedial aspect of the program must be linked to evidence enabling the General Assembly to have inferred that members of these minority groups had suffered past discrimination in State procurement. Under *Croson*, the General Assembly may use race as a component of its MBE program only if it had before it concrete evidence that qualified minority businesses received a disproportionately low share of State contract dollars. That is, the General Assembly is permitted to infer discrimination from evidence that qualified minority businesses represented x percent of all qualified businesses but received significantly less than x percent of State contract dollars.

If the General Assembly had sufficient evidence of past discrimination against minority-owned business, it then could fashion a remedy to rectify the discrimination. This remedy may entail race-conscious classifications only if the General Assembly considered race-neutral remedies, judged them to be inadequate, and adopted only those racial classifications necessary to remedy the identified discrimination.

This State's current MBE law was first enacted in 1978. It is not easy to reconstruct a complete picture of what was before the General Assembly when it considered and enacted this law.

Nevertheless, we have identified the key elements of the legislative record. On the basis of this record, and applying what we understand *Croson* to be mandating, we conclude as follows:

1. The General Assembly had sufficient probative evidence to infer that minority-owned businesses in Maryland, able and willing to participate in State contracts, had been denied the opportunity to do so as a result of racial discrimination. Therefore, the General Assembly served a compelling State interest when it determined to include these businesses within the scope of the remedial program.

2. The General Assembly properly tailored the remedy to overcome this discrimination. It considered, but rejected, the argument that race-neutral remedies alone were sufficient to correct the problem.

The particular remedy chosen - a flexible goal applicable to the entire category of those "disadvantaged socially or economically," including but not limited to specified minority groups - is no more stringent than is necessary.

3. Accordingly, although we cannot predict the ultimate result of litigation, we can and will defend the constitutionality of the current MBE statute.

4. Nevertheless, we strongly recommend that the General Assembly itself superintend - or, if it is more practicable, delegate to an Executive Branch agency the task of superintending - a detailed study of the current need for racial classifications in the MBE program. If a current and more sophisticated analysis of minority participation in State contracting showed a continuing need for this particular race-based remedy, the State's decision to use such remedies could be defended more easily.

I

Background Of *Croson*

The MBE program at issue in *Croson* required each nonminority prime contractor to whom the City of Richmond awarded a construction contract to subcontract at least 30 percent of the contract's dollar amount to one or more MBEs. A waiver of the requirement would be granted only if the prime contractor had made every feasible attempt to comply and a sufficient number of qualified MBEs to meet the requirement were unavailable or unwilling to participate in the contract. For the purpose of this requirement, an MBE was defined as a business at least 51 percent owned and controlled by black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut citizens of the United States. 109 S.Ct. at 707.

The J. A. Croson Company, a nonminority prime contractor, challenged the constitutionality of Richmond's MBE requirement after Croson lost a contract on which it had been the sole bidder. Croson had found only one local MBE interested in supplying the plumbing fixtures specified by the contract - the participation Croson had determined would be necessary to meet the MBE requirement. Apparently because of the manufacturers' unfamiliarity with the minority firm, that firm's price for the fixtures was seven percent above the market price. Croson requested that the city either waive the MBE requirement or allow Croson to raise the overall contract price to reflect the additional cost of using the minority firm. The city denied both requests and determined to rebid the contract. 109 S.Ct. at 715.

After extended litigation, a divided panel of the Fourth Circuit struck down the Richmond set-aside program. *J. A. Croson Co. v. Richmond*, 822 F.2d 1355 (4th Cir. 1987). The Supreme Court affirmed the Fourth Circuit in the decision that we analyze below.

II

Supreme Court Opinion

The Supreme Court's decisions in previous cases dealing with governmental minority-preference programs intended to remedy the present effects of past discrimination have been marked by considerable diversity of opinion among the justices. *See Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Wygant v. Jackson Board of Education*, 476 U.S. 267 [106 S.Ct. 1842] (1986). In *Croson*, however, a clear majority of the Court agreed on the major points.[3]

A. *Standard of Review*

As in any case raising an equal protection challenge to a law, the first question to be decided by the Court in *Croson* was the standard by which the Court should assess the law's constitutionality. The Court held that race-conscious remedial legislation is subject to strict scrutiny

---

[3] The lead opinion was written Justice O'Connor, and the analysis of the Richmond ordinance contained in Parts III-B and IV was joined by Chief Justice Rehnquist and Justices White, Stevens, and Kennedy. Part III-A of Justice O'Connor's opinion, which held that race-conscious remedies are subject to strict judicial scrutiny, was joined only by Chief Justice Rehnquist and Justices White and Kennedy. However, Justice Scalia's separate concurrence explicitly agreed with that conclusion. Opinion of Scalia, J., at 735. Consequently, this opinion treats Parts III-A, III-B, and IV of Justice O'Connor's opinion as the majority opinion of the Court.

review, just as strict scrutiny has always been applied to all other race-based classifications.

In the majority's view, strict scrutiny is necessary to ensure that classifications based on race are reserved for genuinely remedial use:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.

109 S.Ct. at 721. The Court thus expressly adopted the view of the plurality in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 273 [106 S.Ct. 1842, 1846] (1986) that "the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." *Croson*, 109 S.Ct. at 721.[4] Thus, "for the first time, a majority of [the Supreme] Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures." Dissenting opinion of Marshall, J., at 752.

It is particularly important to note in this regard that none of the justices who concurred in this part of the judgment drew any distinction between programs, like that of the City of Richmond, that embody rigid minority set-aside requirements for all contracts and programs that embody flexible requirements that state contracting authorities strive to achieve stated goals of minority participation. As the dissent pointed out, "the majority has gone beyond the facts of this case to announce

[4] Justice Stevens did not directly join this part of the opinion written by Justice O'Connor. However, Justice Scalia, in his concurrence, explicitly agreed with the plurality "that strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is 'remedial' or 'benign.'" Opinion of Scalia, J., at 735. Justice Scalia would have gone further than the plurality, to hold that a state may adopt race-based measures only when that is necessary to eliminate the State's own maintenance of a system of racial discrimination. Opinion of Scalia, J. at 737.

a set of principles which unnecessarily restrict the power of governmental entities to take race-conscious measures to redress the effects of prior discrimination." Dissenting opinion of Marshall, J., at 752.

Strict scrutiny review has been said to be "'strict' in theory and fatal in fact," while laws subjected to "rational basis" review have been seen as receiving "minimal scrutiny in theory and virtually none in fact." Gunther, *The Supreme Court, 1971 Term - Forward: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972). *See also Regents of University of California v. Bakke*, 438 U.S. 265, 361-62 (1978) (Brennan, J. concurring and dissenting). However, the *Croson* opinion sets out guidance about the kind of evidentiary underpinning needed to sustain a race-conscious MBE program. Slip op. at 729. Hence, unless the Court's majority was disingenuous, some programs that take race into account will survive even strict scrutiny review.[5]

There are two prongs to strict scrutiny analysis. "First, any racial classification 'must be justified by a compelling governmental interest.' ... Second, the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.'" *Wygant*, 476 U.S. at 274 [106 S.Ct. at 1846] (citations omitted).

B. Compelling State Interest

To justify the enactment of a race-conscious remedy, the government must have a "strong basis" in evidence for its conclusion that "identified discrimination" makes the remedy necessary. 109 S.Ct. at 724 (internal quotations omitted).

At the outset, the majority rejected any claim that an MBE program may be justified by a desire to remedy the effects of generalized past discrimination against minorities in the construction

---

[5] Indeed, as *Croson* is applied in future cases, "strict scrutiny" might turn out to be a label for review that, in practice, is proportional to the remedial device in question. Programs with rigid, race-determinative quotas, like Richmond's, will face traditionally rigorous strict scrutiny. Programs with flexible, race-conscious but not race-determinative goals, like Maryland's, might face slightly less rigorous review. *See Bakke*, 438 U.S. at 320 n.5 (Powell, J.); Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over but the Shouting*, 86 Mich. L. Rev. 524, 550 (1987).

industry as a whole. 109 S.Ct. at 723-24. An assertion of discrimination in an entire industry, in the majority's view, differs little in substance from a generalized claim of a need to alleviate the effects of societal discrimination. That claim had previously been rejected by the plurality in *Wygant*.[6] Such a claim "provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.... 'Relief' for such an ill-defined wrong could extend until the percentage of public contracts awarded to MBEs in Richmond mirrored the percentage of minorities in the population as a whole." 109 S.Ct. at 723. Additionally, the Court discussed and rejected each of the more particular justifications proposed for the Richmond plan.

First, the Court held that the legislative body's declaration of a legitimate purpose for its racial classification is entitled to be given little or no weight by a reviewing court. "Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice." 109 S.Ct. at 724. Similarly, the Court held that statements by proponents of the legislation that there had been discrimination in the construction industry in the local area, the state, and the nation had little probative value in establishing the "identified discrimination" necessary to justify an MBE law. "A governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists." 109 S.Ct. at 725.

In adopting its MBE program, the Richmond City Council relied in part on a study indicating that less than one percent of the city's prime construction contracts had been awarded to minority businesses in the preceding five years, although minorities constituted 50 percent of the city's population. 109 S.Ct. at 714. The Court, however, held that this evidence failed to demonstrate the existence of discrimination because it compared the number of prime contracts awarded to MBEs to the wrong statistical pool. "[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." 109 S.Ct. at 725. The Court particularly criticized the city's lack of information on "how many

---

[6] *Wygant* involved an equal protection challenge by white public school teachers to an affirmative action plan under which nonminority teachers were laid off before minority teachers with less seniority, if necessary to maintain the proportions of minority and nonminority teachers on the faculty. Five members of the Court agreed that the plan violated the Equal Protection Clause, although no opinion commanded a majority for its analysis.

MBEs in the relevant market are qualified to undertake prime or subcontracting work in public construction projects" and the lack of information on the percentage of total construction dollars being received by MBEs as subcontractors. 109 S.Ct. at 725. Thus, the Court regarded Richmond's set-aside of contracting dollars as resting largely on "the unsupported assumption that white prime contractors simply will not hire minority firms." 109 S.Ct. 725.

Similarly, the Court held that the low membership of MBEs in local contractors' associations was not probative evidence by itself. In the Court's view, that low membership might have been explained by a number of factors, including career and entrepreneurial choices: "Blacks may be disproportionately attracted to industries other than construction." 109 S.Ct. at 726.

In enacting its MBE program, the City of Richmond had relied in part on a congressional finding that discrimination had stifled minority participation in the construction industry nationally. That finding had been regarded by the plurality in *Fullilove v. Klutznick*, 448 U.S. 448, 477-78 (1980), as sufficient to justify the enactment of an MBE provision in a federal law.[7] However, the *Croson* majority regarded that finding as of extremely limited probative value in determining the existence of discrimination in a particular area. "By its inclusion of a waiver procedure in the national program addressed in *Fullilove*, Congress explicitly recognized that the scope of the problem would vary from market area to market area." 109 S.Ct. at 726. Moreover, the Court held that the existence of discrimination in one jurisdiction or field may not be extrapolated from its existence in another. Instead, the legislative body must identify with particularity the discrimination that it seeks to remedy. 109 S.Ct. at 727.

Finally, the Court took special notice of the lack of any evidence of discrimination against nonblack racial minorities who were included in the groups benefited by the Richmond MBE requirement. Some of

---

[7] Various federal grant programs condition the receipt of federal funds on the recipients' compliance with affirmative action programs. *See, e.g.*, 49 C.F.R. §§23.41 through 23.69 (required participation by MBEs in Department of Transportation Financial Assistance programs). The Supreme Court's decision in *Croson* reaffirmed the holding in *Fullilove* that Congress has power to adopt race-conscious legislation to remedy the effects of past discrimination. *See* 109 S.Ct. at 32 [57 U.S.L.W. at 4726-27. Accordingly, those federal requirements, and the State's implementation of them, unquestionably remain fully effective.

those groups may never, in actuality, have been represented in the city's population. That overinclusiveness "suggests that perhaps the city's purpose was not in fact to remedy past discrimination." 109 S.Ct. at 728.[8]

The Court's discussion of the flaws in Richmond's evidentiary record included some guidance as to what kind of evidence would demonstrate a compelling state interest justifying race-conscious remedial legislation. The Court clearly indicated that a disparity between the proportions of MBEs in the relevant market who are qualified to undertake prime or subcontract work on public projects and the percentage of total public contract dollars going to MBEs is probative of discrimination. 109 S.Ct. at 725. Similarly, low MBE membership in local trade associations would be probative if it were linked to the number of local MBEs eligible for membership: "If the statistical disparity between eligible MBEs and MBE membership were great enough, an inference of discriminatory exclusion could arise." 109 S.Ct. at 726.

In reaching these conclusions as to the nature of the statistical evidence that will support the enactment of an MBE program, the majority relied on cases discussing the evidence necessary for a prima facie showing of discrimination in violation of Title VII. *See Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977); *Teamsters v. United States*, 431 U.S. 324, 337-38 (1977); *Mayor v. Educational Equality League*, 415 U.S. 605, 620 (1974). Thus, the general holding of *Croson* in this regard is that a state may adopt race-based preferences to remedy past discrimination only if the decisionmaking body has before it evidence roughly analogous to that which would support a prima facie claim of a pattern or practice of discrimination in employment. *Cf. Wygant*, 476 U.S. at 292 [106 S.Ct. at 1856] (evidence sufficient to support prima facie Title VII pattern or practice of discrimination claim "would lend a compelling basis for" affirmative action plan) (O'Connor, J., concurring).

In her concurrence in *Wygant*, Justice O'Connor took pains to enunciate her view that a governmental employer's adoption of an affirmative action plan need not be supported by a contemporaneous or

---

[8] The Court also suggested that the inclusion of groups who may never have experienced discrimination in the construction industry in Richmond prevented the MBE program from being narrowly tailored. *See* Part IIC below.

antecedent finding of actual discrimination. 476 U.S. at 290-91 [106 S.Ct. at 1855-56]. In Justice O'Connor's view, states have the "ability to take voluntary race-conscious action to achieve compliance with the law even in the absence of a specific finding of past discrimination." 476 U.S. at 291 [106 S.Ct. at 1856]. The public body "must have a firm basis for determining that affirmative action is warranted," but that basis may be found in an inference of past discrimination arising from statistical evidence, rather than from specific findings of actual discrimination. 476 U.S. at 292 [106 S.Ct. at 1856].

We think that it is appropriate to read the majority opinion in *Croson*, written as it was by Justice O'Connor, as consistent with the Justice's views previously expressed in *Wygant*. Thus, *Croson* holds that the compelling state interest necessary to justify a race-based MBE program must be supported by probative evidence of past discrimination in the particular jurisdiction covered against minority businesses qualified to engage in public contracting work. That evidence need not amount to proof of specific discrimination. But at the same time, the legislative finding of past discrimination cannot be merely conclusory. It must be supported by concrete evidence roughly analogous to that needed to make a prima facie Title VII "pattern or practice" claim.

C. Narrowly Tailored Remedy

The second prong of strict judicial scrutiny of an MBE program is an inquiry into whether the program is narrowly tailored to the achievement of its goal of remedying the present effects of past discrimination. *Wygant*, 476 U.S. at 279-80 [106 S.Ct. at 1849-50] (plurality); *Fullilove*, 448 U.S. at 480 (opinion of Burger, C. J.).

The *Croson* majority questioned whether Richmond's MBE program could be narrowly tailored to compensate black contractors for past discrimination when "they are forced to share this 'remedial relief' with an Aleut citizen who moves to Richmond tomorrow[.]" 109 S.Ct. at 728. However, the *Croson* majority directly cited two grounds for concluding that was not narrowly tailored.

First, the city did not appear to have considered the use of race-neutral means to increase minority business participation in public contracting. In support of its plan, the city had cited various factors that limited the ability of MBEs to participate in public contracting, including deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, and disability caused by an adequate track record. 109 S.Ct. at 723-24. In the Court's view, many of those problems would be amenable to race-neutral remedies. For example, "[i]f MBEs disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, *a fortiori*, lead to greater to minority participation." 109 S.Ct. at 728.

In *United States v. Paradise*, 480 U.S. 149, 171 (1987), the Supreme Court had held that, "[i]n determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies." The availability of alternatives to Richmond's MBE plan, and the city's failure to consider their use, therefore indicated to the *Croson* majority that the race-conscious remedy was not narrowly tailored to its goal.

Second, the Court indicated that a rigid quota "cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." 109 S.Ct. at 728. In light of the requirement that the city consider bids and applications for waivers on a case-by-case basis, the Court viewed the city's interest in a quota system as "simple administrative convenience." 109 S.Ct. at 729.[9] Moreover, the quota's appropriateness was further diminished by the lack of a provision for waiver of the requirement for any reason other than the unavailability of an MBE.

In this regard, the Court particularly noted that the federal statute upheld in *Fullilove* expressly provided for a waiver when the MBE's price was unreasonably high. Under the federal provision, the reasonableness of the MBE's price was to be determined by objective factors bearing on the MBE's expenses and the market value of the goods or services; the MBE's price was not to be considered to be unreasonable if it resulted from disadvantages affecting the MBE's cost

---

[9] The MBE program under consideration in *Croson* consisted solely of a preset quota of minority participation on all city construction contracts. Thus, Richmond's MBE program differed significantly in its nature and administration from MBE programs, like Maryland's, that seek to achieve flexible goals of minority participation in appropriate contracts. Nonetheless, only in this portion of the opinion did the Court rest its holding on the rigidity of the Richmond plan. *But see* note 5 above.

of doing business or from discrimination. *Fullilove*, 448 U.S. at 470. Thus, the waiver provision of the federal law was designed to prevent an MBE from exploiting the set-aside requirement without penalizing an MBE whose higher prices are genuinely dictated by the effects of discrimination. 448 U.S. at 488. Because the Richmond plan made no similar provision for a waiver when the MBE's price was unreasonable, it failed to "tailor remedial relief to those who truly have suffered the effects of prior discrimination ...." 109 S.Ct. at 729.

Hence, an MBE program may be adopted only after race-neutral remedies have been considered and reasonably determined to be ineffective. Moreover, an MBE program must be flexible, with a provision for waiver of its requirements when MBEs' prices are unjustifiably inflated.

III

Maryland's Minority Business Preference Program

A. Statutory and Regulatory Provisions

SF §14-302 sets up a three-part MBE program: (i) All units of State government must structure their procurement procedures to encourage participation by certified MBEs and to "try to provide a fair share of procurement contracts" to certified MBEs; (ii) certain agencies must structure their procurement procedures to try to achieve the result that at least 10% of the total dollar value of their procurement contracts is procured directly or indirectly from MBEs;[10] and (iii) the Department of Transportation must structure its procurements for construction to try to achieve the result that at least 10% of the dollar value of contracts exceeding $100,000 is procured from certified MBEs. SF §14-302(a) and (b).

For the purposes of these requirements, an MBE is a legal entity that is at least 51% owned and controlled by one or more "members of a group that is disadvantaged socially or economically," including

---

[10] Those agencies are the Department of General Services; the Interagency Committee on School Construction; the Maryland Food Center Authority; the Maryland Stadium Authority; the University of Maryland System; and the Department of Budget and Fiscal Planning, with regard to procurements of information processing equipment or services.

Alaskan natives, American Indians, Asians, blacks, Hispanics, Pacific islanders, women, or physically or mentally disabled individuals. SF §14-301(e). Thus, on its face, the statute contemplates a broadly inclusive MBE program. A business owned by a member of *any* group that is "disadvantaged socially or economically" would fit within the definition of SF §14-301(e).[11] Of course, under the definition, a member of a listed group is automatically to be considered "disadvantaged socially or economically." In the administration of the program to date, as far as we are aware, only businesses owned by members of the listed groups have been certified as MBEs.

SF §14-303(b) requires the Board of Public Works to adopt regulations addressing designated matters. Those include requiring that each contract solicitation specify the amount of minority participation and providing for the circumstances under which a contractor's minority business participation obligations may be waived. SF §14-303(b)(1) and (6).

Regulations adopted in accordance with the mandate of SF §14-303(b)(1) require that an MBE participation goal be set for each contract by taking into account (i) the number of certified MBEs available to provide the subject matter of the procurement; (ii) the geographic proximity of available certified MBEs to the location of the work to be performed; (iii) the feasibility of subcontracting, in light of the nature and extent of the proposed contract; and (iv) any applicable statutory participation goals. COMAR 21.11.03.09. All contract solicitations that provide MBE subcontract opportunities must contain a provision specifying the percentage goal for MBE participation in the project and notifying prospective bidders or offerors that a response constitutes agreement "that this amount of the contract will be performed by minority business enterprises." COMAR 21.05.08.04. Other regulations require that, all else being equal, a State contract be awarded to the bidder or offeror including the greatest degree of MBE participation. *See* COMAR 21.05.02.14 (selecting between tying bids) and 21.05.03.03F (evaluating competitive sealed proposals).

---

[11] The term "including" generally indicates that what follows is an illustration, not a limitation. Since 1986, this principle of construction has been codified in Article 1, §30 of the Maryland Code. However, the codified section merely reflects the common law rule: "Ordinarily the word 'including' means comprising by illustration and not by way of limitation." *Group Health Ass'n v. Blumenthal*, 295 Md. 104, 111, 453 A.2d 1198 (1983).

As required by SF §14-303(b)(6), the regulations also include provisions for waiver of the contract goal. To receive a waiver, the bidder or offeror must make a reasonable demonstration that certified MBE participation is unobtainable or is unobtainable at a reasonable price, and the contracting agency must determine that the public interest would be served by a waiver. In determining whether to grant the waiver, the agency may consider:

> [E]ngineering estimates, catalogue prices, general market availability, and availability of certified MBEs in the area in which the work is to be performed, other bids or offers and subcontract bids or offers substantiating significant variances between certified MBE and non-MBE cost of participation, and their impact on the overall cost of the contract to the State and any other relevant factor.

COMAR 21.11.03.11B.

B. *Constitutionality Of Maryland's MBE Preference*

1. *Introduction*

If Maryland's MBE program were simply a way of channeling State procurement dollars to members of groups that are "disadvantaged socially or economically," without regard to race, it would patently be constitutional. Nothing in *Croson* prevents such a preference program, even if most of the beneficiaries of the program were of a particular race. 109 S.Ct. at 727.[12]

Our statute comes into question, however, because it is not wholly race-neutral. Members of the racial and ethnic groups listed in SF §14-301(e)(1)(ii)1-6 are, by virtue of that fact alone, considered to be "disadvantaged socially or economically"; hence, the businesses that they own are the beneficiaries of the State's remedial measures. This one factor - the automatic inclusion within the MBE program of blacks

---

[12] As Justice Scalia put it in his concurrence: "Since blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remedial program aimed at the disadvantaged *as such* will have a disproportionately beneficial impact on blacks." Opinion of Scalia, J., at 739 (emphasis in original).

and other listed racial or ethnic minorities - triggers strict scrutiny review.[13]

2. *Compelling State Interest*

In our view, the General Assembly had before it evidence sufficient to permit it to infer the existence of identified discrimination against qualified minority-owned businesses. In 1977, the General Assembly considered but did not enact House Bill 403. Evidence offered during the deliberations on that bill (and, of course, available to the General Assembly when it took up the same issue the next year) showed a significant disparity between the percentage of minority-owned businesses among "active bidders" and the percentage of contract dollars awarded to minority bidders.

According to testimony by then-Delegate Trotter, 20 of the more than 7,900 bidders on active bidder lists were minority-owned firms; thus, MBEs represented 0.25% of the active bidders on State contracts. Out of $53 million spent by the State, less than $10,000 went to MBEs; thus, MBEs received but 0.01% of State contract dollars. Minutes, House Committee on Appropriations (March 29, 1977). While the raw numbers of MBE bidders and MBE contract dollars were both low, a comparison of MBEs' *proportional* representation among bidders with their *proportional* share of State contract dollars reveals a great disparity: MBEs' representation in the pool of available contractors was 25 times the share of contract dollars they received. The Supreme Court clearly stated that such a gross disparity may give rise to an inference of discriminatory exclusion. *See* 109 S.Ct. at 726.[14]

---

[13] Strict scrutiny is not applicable to the other classifications used in the MBE program, gender and disability. A gender classification must be "substantially related to a sufficiently important governmental interest." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 441 (1985). A classification based on handicap must be "rationally related to a legitimate governmental purpose." 473 U.S. at 446. Rectifying the effects of probable past discrimination satisfies these tests, in our view.

[14] The Supreme Court's insistence on statistics involving "qualified" MBEs would be especially troublesome if the State had to make some kind of individual judgment about the actual competence of potential contractors. The State does not prequalify the firms, minority-owned or not, that might receive its contract dollars.

(continued...)

The next year, then-Delegate Trotter bolstered the record about the dearth of awards to minority businesses. In a memorandum to the members of the House Appropriations Committee, he quoted a statement from the then Department of Economic and Community Development ("DECD") that, from June 1975 to December 1977, the Department of General Services ("DGS") awarded an estimated $230 million in construction contracts, of which $835,000 went to minority businesses, and contracts for goods and commodities totaling an estimated $250 million, of which $95,905 was awarded to minority businesses. Thus, MBEs received 0.36% of the dollar value of DGS construction contracts and 0.04% of the dollar value of commodities contracts, or 0.19% of total contract dollars spent by DGS during that 30-month period. At the same time, more than 800 minority firms were then listed in the Directory of Minority Business Enterprises compiled by DECD. Memorandum from Delegate Decatur W. Trotter to Members, House Appropriations Committee (January 26, 1978) (file on House Bill 64 (1978).[15]

In our view, this directory, issued in February of 1977, particularly contributed to the probative value of the evidence of discrimination then before the General Assembly. The directory, to which the General Assembly's attention was directed, necessarily reflected the number of MBEs in the total pool of available contractors during the time when then-Delegate Trotter's testimony on House Bill 403 (1978) demonstrated that only 20 MBEs were on active bidder lists. In light of the large number of MBEs interested enough in obtaining contracts

---

[14](...continued)

However, we take it that the Court used "qualified" in the broader sense of a business' holding itself out as available for work in the relevant market. *Cf. Killingsworth v. Dep't of Health & Human Serv.*, 602 F. Supp. 640, 645 (N.D. Cal. 1985) (for Title VII purposes, "qualified" means meeting basic eligibility requirements for job). The Court cited favorably the use in one case of statistics comparing the percentage of minority businesses in Ohio with the percentage of Ohio purchase contracts awarded to minority businesses. 109 S.Ct. at 726. *See Ohio Contractors Ass'n v. Keip*, 713 F.2d 167, 171 (6th Cir. 1983).

[15] A report issued by the Bureau of the Census in July of 1979 showed that 47,781 firms had been doing business in the state in 1977 in the areas for which State contracts are most commonly awarded - manufacturing; wholesale and retail trade; contract construction; finance, insurance, and real estate; and transportation and public utilities. Bureau of the Census, U.S. Dep't of Commerce, *County Business Patterson 1977-Maryland* 1 (July 1979). Thus, the 800 MBEs listed in the directory represented 1.8% of the total number of firms then available to do business with the State. Accordingly, MBEs' representation in the available market was approximately ten times the share of DGS contract dollars they received.

to provide the information necessary for their inclusion in the directory, the low number of MBEs bidding on State contracts cannot be attributed to lack of interest among minorities. *Cf. Croson*, 109 S.Ct. at 725-26. Rather, we think that the disparity between the number of MBEs in existence and the number actively bidding on State contracts was additional evidence of discriminatory exclusion of minorities from State contracting opportunities.

The legislative file on the MBE program also contains a letter from the Department of General Services dated February 6, 1978, stating that the Department's Purchasing Bureau had made 6,781 awards since September 1, 1977, of which 55 were to minority businesses. Those awards totaled $25 million, of which $20,700, or 0.08%, went to minority businesses. Letter from Robin J. Zee, Director, Office of Central Services, to Delegate John R. Hargreaves (February 6, 1978). Given that the General Assembly was aware of the proportion of minority-owned firms qualified to perform those contracts, this letter is additionally probative of discrimination.

The Department of Transportation ("DOT"), which adopted an MBE program in early 1978, provided the General Assembly with a more detailed summary of MBEs' participation in its contracts during fiscal year 1977. The summary showed that 4.84% of DOT's totaling contracting dollars had gone to MBEs; however, a breakdown showed that only three of DOT's seven major units had made any purchases from MBEs. Nor did those purchases generally represent a significant proportion of those units' total purchases: Only 0.56% of State Aviation Administration contract dollars and only 0.17% of State Highway Administration contract dollars went to MBEs. The Mass Transit Administration, which had previously put an MBE program into effect, had directed 9.91% of its contract dollars to MBEs. Letters from James J. O'Donnell, Deputy Secretary, DOT, to Delegate John R. Hargreaves (February 10, 1978).

In short, the General Assembly was able to "ascertai[n] how many minority enterprises are present in the local ... market" and "the level of their participation" in State contracts. *Croson*, 109 S.Ct. at 730. It also obtained "evidence that qualified minority contractors have been passed over for [State] contracts or subcontracts, either as a group or in ... individual case[s]." *Id.*[16]

The significance of this evidence is not undercut by the General Assembly's failure to find that there actually had been discrimination against those minority businesses that sought to participate in public contracting in Maryland.[17] As Justice O'Connor indicated in her concurrence in *Wygant v. Jackson Board of Education*, 476 U.S. 267 [106 S.Ct. 1842] (1986), a State need not support its adoption of an affirmative action program by proof of specific discrimination. *See* Part IIB above. There only must have been evidence before the

---

[16] Moreover, the evidence available to the General Assembly, unlike that presented to the Richmond City Council, did not pertain to blacks alone. The Directory of Minority Businesses compiled by the Department of Economic and Community Development, while not directly identifying the race or ethnicity of the businesses' principals, nonetheless indicates that those principals were members of various Hispanic, Oriental, and other ethnic groups. The Department of General Services, apparently as part of its review of the MBE bill, compiled statistics on the minority-owned firms known to it, which indicated that 6.9% of these firms were owned by "American Indian, Aleut, etc.," persons, while 3.9% were owned by Hispanics and 17.2% by blacks. Memorandum to Jerome W. Klasmeier, Deputy Secretary, Department of General Services, from Paul T. Harris (March 27, 1978). Hence, those who testified before the General Assembly were aware - as the General Assembly presumably was also - that the minorities whose representation in the pool of contractors and share of contract dollars were under discussion included all the groups designated in the MBE program. And, the testimony offered by those persons consistently referred to "minorities," rather than specifically to "blacks."

[17] The General Assembly adopted a preamble to the MBE bill that expressed concern about possible past discrimination:

> Whereas, The General Assembly is concerned that minority businesses <u>may</u> have experienced the effect of past discrimination in the awarding or letting of contracts or subcontracts ... for the benefit of the State; and
>
> Whereas, Such discrimination, although contrary to State policy, <u>may</u> have been based solely on the minority status of such businesses, and not on their competency; and
>
> Whereas, The economic development and expansion of minority enterprises, <u>may</u> have been impeded thereby; and
>
> Whereas, The General Assembly deems it necessary that certain departments shall structure their contract procedures so as to facilitate and encourage the award or letting of at least 10% of their contracts and the subcontracts which flow therefrom to competent minority businesses ....

Chapter 575, Laws of Maryland 1978, Preamble (emphasis added).

General Assembly from which it could infer that there had been apparent discrimination. *Wygant*, 476 U.S. at 291 [106 S.Ct. at 1856]. As outlined above, we think there was that evidence. Neither *Wygant* nor *Croson* requires the State to have actually leveled specific accusations of discrimination against anyone.

3. Narrowly Tailored Remedy

Maryland's program, unlike Richmond's, is narrowly tailored. It thus meets the second prong of the strict scrutiny test.

We have found evidence that the General Assembly did consider the use of race-neutral remedies before adopting the MBE program. In testimony before the House Appropriations Committee, the representative of the Department of General Services urged just such a remedy in preference to the MBE program: "[T]he real need of small businesses including minority businesses, is training in finance and management matters in order to place them in a stronger competitive position in the market place." Memorandum to Max Millstone from Robin J. Zee, Director, Office of Central Services (February 2, 1978) (recounting testimony given in bill hearing on January 12, 1978). Additionally, the same session of the General Assembly considered but did not enact a bill that would have established a State program to issue bid and performance bonds to small businesses unable to obtain those bonds in the private market. Senate Bill 1217 (1978). The General Assembly's decision not to adopt either of these proposals evidences its conclusion that these race-neutral remedies would not be effective.

Unlike the Richmond plan, moreover, Maryland's MBE program is not statutorily expressed as a rigid quota, but as a flexible system of goals. Further, the regulations governing waivers clearly permit a prime contractor to obtain a waiver if the prices charged by MBEs wishing to participate are unreasonable. COMAR 21.11.03.11B. Thus, our plan does not suffer from the degree of rigidity that constituted the Court's second criticism of the "tailoring" of Richmond's plan.

Richmond's program involved an especially rigorous remedy -a fixed percentage set-aside. To justify that remedy, Richmond must satisfy a demanding burden of proof. The evidence that it offered in support of that remedy was not nearly good enough to provide "an adequate basis for the 30% quota." 1090 S.Ct. at 724. Too general a body of evidence, in the Court's view, "does little to define the scope of any injury to minority contractors in Richmond or the necessary remedy. The factors relied upon by [Richmond and] the dissent could justify a preference of any size or duration." 109 S.Ct. at 727.

The Supreme Court did not hold that the same evidence would be required if a state or local government were seeking to justify a more flexible remedy. The Court's general direction to state and local governments recognizes that the "extent" of the remedy and its supporting evidence will vary from case to case: "Proper findings ... are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects." 109 S.Ct. at 730. For affirmative action in employment, Justice O'Connor pointed out, the required statistical evidence can vary depending upon the precise remedy chosen. 109 S.Ct. at 725.[18] The same proportional relationship between evidence and remedy ought to be true of affirmative action in procurement as well. Thus, in criticizing the Richmond plan, the Fourth Circuit contrasted favorably the affirmative action hiring plan approved (on statutory grounds) by the Supreme Court in *Johnson v. Transportation Agency*, 480 U.S. 616 (1987):

> The plan upheld in *Johnson* made race or gender "but one of numerous factors" considered by the government agency in its employment decisions. The race or gender was merely a "plus"; no rigid quotas or set-asides were used .... None of the factors emphasized by the Court in *Johnson* apply to Richmond's plan, which features the combination of an inadequate foundation for remedial action plus a "reflexive adherence to a numerical standard" which the Supreme Court in *Johnson* disavowed.

---

18 "[W]e have recognized that for certain entry level positions or positions requiring minimal training, statistical comparisons of the racial composition of an employer's workforce to the racial composition of the relevant population may be probative of a pattern of discrimination. But where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task." *Id.* (citations omitted).

Croson, 822 F.2d at 1362 (citations omitted). In its flexibility and its avoidance of "rigid quotas or set-asides," Maryland's MBE program is more akin to that approved in *Johnson* than to that condemned in *Croson*.[19]

4. *Conclusion*

We conclude that, even measured by the stringent standards of *Croson*, Maryland's MBE program is supported by evidence sufficient to demonstrate a compelling State interest in eliminating the identified discrimination against minority-owned businesses. Moreover, the program is narrowly tailored to the goal of remedying the effects of identified discrimination. Therefore, the MBE program does not violate the Equal Protection Clause.[20]

---

[19] To be sure, the General Assembly chose to use a particular percentage figure, 10 percent, that itself is not linked to specific evidence. However, SF §14-302 uses this intrinsically reasonable figure as a goal, not a set-aside; defines the goal in terms of all businesses owned by those who are "disadvantaged socially or economically," not in terms of minority-owned businesses alone; and provides for a flexibly administered waiver procedure, not a rigid waiver that ignores price considerations. Finally, the General Assembly had before it specific evidence underlying its decision to include nonblack minorities within the program's goal. *See* note 16 above. Therefore, we do not think that the General Assembly's choice of a 10 percent goal is precluded by *Croson*.

[20] Other provisions of State law also establish various minority preferences designed to increase the participation of minorities in public contracting and public programs. *See* Article 29, §3-102(d) (Washington Suburban Sanitary Commission contracts); Article 41, §13-105(3)(ii) (Maryland Food Center Authority contracting and market development); Education Article §5-110(d) (Montgomery County Board of Education contracts) and §16-408(d) (Montgomery Community College contracts); Financial Institutions Article, §13-138(d) (Maryland Industrial Development Financing Authority facilities); Financial Institutions Article, §13-231(b)(4) (qualifications of applicants for assistance from Maryland Small Business Development Financing Authority); Financial Institutions Article, §§13-802(4) and 13-806 (Department of Economic and Employment Development allocation of private activity bond authority); and SF §10-308 (leases of State-owned property to business enterprises). We do not know what statistical or other evidence may have been adduced to support the adoption of any of those programs. And, because *Croson* requires a case-by-case assessment of the basis for each program, we cannot undertake in this opinion to determine the validity of each.

For the same reason, we do not attempt to assess the constitutionality of any local program. It may well be that many local jurisdictions have also adduced sufficient evidence to satisfy the *Croson* standards. For example, we understand that Baltimore City's MBE program was adopted after consideration of an especially detailed and pertinent body of evidence.

IV

Conclusion

For the reasons stated above, it is our opinion that the race-conscious remedies contained in Maryland's MBE program are constitutional. Nonetheless, we must candidly say that, given the questions that *Croson* leaves unanswered and the difficulty of looking back more than a decade at the legislative record, this conclusion is not entirely free from doubt.

In any event, future legislative action is far more important than what happened in the past. We strongly recommend that the General Assembly undertake, itself or by delegation, a reexamination of the need for the MBE program.[21] Such a study would yield current information about the extent of discrimination and the identity of the groups affected by it. Properly conducted, this study would afford a surer basis for an MBE program than now exists. Moreover, the General Assembly cannot rely indefinitely on evidence of a decade ago.[22]

We also recommend that Congress consider action to vindicate state and local affirmative action efforts. Congress, in the exercise of its unique constitutional authority to enforce the Fourteenth Amendment through appropriate legislation, may well be able to empower state and local governments to enact race-based remedial programs. *See Fullilove*, 448 U.S. at 483-84. Viewed realistically, local discrimination against minority contractors largely reflects a national problem that Congress should address. This office will be happy to assist in any effort to encourage congressional action.

---

[21] The General Assembly is free, should it so choose, to empower an Executive Branch agency - for example, the Board of Public Works, which has supervisory power over procurement matters - to make the requisite findings and apply appropriate remedies, within the confines of proper delegation. *See Croson*, 109 S.Ct. at 720.

[22] "It is clear that affirmative action plans that seek to maintain quotas once racial balances are met are invalid." *Smith v. Harvey*, 648 F.Supp. 1103, 1113 (M.D. Fla. 1986). *Accord Valentine v. Smith*, 654 F.2d 503, 510 (8th Cir. 1981). *See also United Steelworkers of America v. Weber*, 443 U.S. 193, 207 n.7 (1979) (legislative history indicates Title VII does not permit establishment of systems to maintain racial balance, but only temporary measures to eliminate manifest racial imbalance).

Maryland is committed to fairness in the allocation of its contracts. The General Assembly should lose no time in developing an updated record that would point the way to the MBE program of the future.

J. Joseph Curran, Jr.
Attorney General

Judson P. Garrett, Jr.
Deputy Attorney General

Illona Sheffey-Rawlings
Special Assistant to the Attorney General

C. J. Messerschmidt
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions and Advice

Editor's Note:

Following a detailed study that identified the continuing effects of discrimination against minority contractors, the General Assembly reenacted Maryland's MBE program with certain amendments. Chapter 708 (House Bill 1540) of the Laws of Maryland 1990.

Constitutional Law - Equal Protection - Taxation - Amendment To Maryland Declaration Of Rights Authorizing Residential Property Tax Credit Is Constitutional

March 1, 1989

The Honorable James W. Campbell
House of Delegates

You have requested our opinion concerning the constitutionality of House Bill 1162, a proposed constitutional amendment that is intended to authorize certain residential property tax credits. Specifically, you ask whether this bill violates the Equal Protection Clause of the Fourteenth Amendment, which provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the law."

For the reasons stated below, we conclude that House Bill 1162 is constitutional.

I

Background

House Bill 1162 proposes an amendment to the uniformity requirement in Article 15 of the Maryland Declaration of Rights. If enacted and ratified, the amendment would authorize the General Assembly to "enact legislation that provides for property tax credits for owner-occupied residential property, in order to limit the effect of increases in assessments that would result in increases in the value of the property." This constitutional amendment would overcome the problem that renders unconstitutional the tax credit now codified in §9-105 of the Tax-Property Article. *See* 72 *Opinions of the Attorney General* 350 (1987).

II

Analysis

House Bill 1162 authorizes the General Assembly to create a classification for property tax credits. That is, it authorizes more favorable tax treatment for "owner-occupied residential property" than for other property subject to property tax. Thus, the bill presents an equal protection question.

However, the General Assembly has wide latitude to fashion tax classifications. As the Court of Appeals has observed:

> The constitutional need for equal protection does not shackle the legislature. It has the widest discretion in classifying those who are to be regulated and taxed. Only if the grouping is without any reasonable basis, and so entirely arbitrary, is it forbidden.... If any state of facts reasonably can be conceived that would sustain a classification, the existence of that state of facts as a basis for the passage of the law must be assumed.

Allied American Co. v. Comm'r, 219 Md. 607, 623, 150 A.2d 421 (1959). The Supreme Court has been equally emphatic: "A State tax law is not arbitrary although it 'discriminate[s] in favor of a certain class ... if the discrimination is founded upon a reasonable distinction or difference in State policy,' not in conflict with the Federal Constitution." *Kahn v. Shevin*, 416 U.S. 351, 355 (1974) (quoting *Allied Stores v. Bowers*, 358 U.S. 522, 528 (1959)). *See also, e.g., Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973); *Villa Nova v. Comptroller*, 256 Md. 381, 391-92, 260 A.2d 307 (1970); *Lane Corp. v. Comptroller*, 228 Md. 90, 97, 178 A.2d 904 (1962).

As the Court of Appeals summarized: "[A]s long as the classifications made in imposing the tax are not utterly arbitrary, the tax statute meets the rational basis test for equal protection purposes. Moreover, there need not be evidence justifying the classifications; any 'imaginable factual basis' will do." *Nordheimer v. Montgomery County*, 307 Md. 85, 102, 512 A.2d 379 (1986).

We have no doubt that a classification distinguishing "owner-occupied residential property" from other property is constitutionally permissible. This office concluded as much in the opinion first pointing out that a residential property tax credit poses a problem under the uniformity requirement of Article 15. *See* 62 *Opinions of the Attorney General* 54, 67 (1977). As the Alabama Supreme Court observed in upholding a provision taxing "single-family owner-occupied residential property" at a lower rate than other residential property:

> The taxing scheme in question places a greater tax burden on those who are using their residential property for income-producing purposes. This is rational. The discrimination can be justified on the basis that the government is either providing more governmental services, on the one hand, or on the other hand, is interested in relieving the tax burden on specified property owners to further some social or economic policy.

Howell v. Malone, 388 So. 2d 908, 914 (Ala. 1980). *See also, e.g., Associated Industries v. State Tax Commission*, 722 S.W.2d 916, 918 (Mo.), *appeal dismissed* 107 S. Ct. 3254 (1987).

III

Conclusion

In summary, it is our opinion that the amendment to Article 15 of the Maryland Declaration of Rights proposed in House Bill 1162 does not violate the Equal Protection Clause of the Fourteenth Amendment.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

Constitutional Law - Personnel - Drug Testing - Fourth Amendment - Effect Of Recent Supreme Court Decisions

May 5, 1989

The Honorable Hilda E. Ford
Secretary of Personnel

You have requested our opinion concerning the effect of the two recent Supreme Court decisions on government-ordered drug testing, *Skinner v. Railway Labor Executives' Ass'n*, 109 S.Ct. 1402 (1989) and *National Treasury Employees Union v. Von Raab*, 109 S.Ct. 1384 (1989). Specifically, you ask whether these cases mean that the 1986 opinion of the Attorney General on drug testing of State employees, 71 *Opinions of the Attorney General* 58 (1986), is no longer valid.

For the reasons stated below, we conclude as follows:

One important conclusion in the 1986 opinion - that no State employee may be required to submit to drug testing without at least reasonable suspicion of that employee's drug abuse - is no longer valid. Applying the Supreme Court's cases, we advise that employees holding certain especially sensitive positions may be made subject to drug testing without individualized suspicion. The testing may be either categorical (that is, all employees holding a sensitive position are tested) or random (that is, all employees holding a sensitive position have an equal chance of being tested, but only a sample are chosen).

In other respects, the conclusions of the 1986 opinion remain valid. The United States Constitution does not permit suspicionless testing of State employees generally. It also requires various procedural safeguards, like those contained in the Department of Personnel's current drug testing program.

I

Railway Labor Executives

This case involved the constitutionality of federal regulations addressing the problem of alcohol and drug abuse by railroad employees. The regulations require that the members of a train crew involved in certain kinds of accidents are to be tested for the presence of alcohol and drugs. 49 C.F.R. §219.201. Another part of the regulations authorizes railroads to require testing with reasonable suspicion or after specified events, primarily breaches of safety rules. 49 C.F.R. §219.301.

The labor unions representing the employees subject to the testing program asserted that these regulations violated the Fourth Amendment to the United States Constitution, which prohibits "unreasonable searches and seizures." The unions prevailed in the Court of Appeals for the Ninth Circuit, which held that the regulations were unconstitutional. The Ninth Circuit concluded (just as this office had in the 1986 opinion) that the Fourth Amendment required a showing of some "particularized suspicion" before an employee could be tested. 839 F.2d 575 (1988).

The Supreme Court reversed. It held that the regulations "are reasonable within the meaning of the Fourth Amendment." 109 S.Ct. at 1422.

As a threshold matter, the Court held that, "[b]ecause it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, ... these intrusions must be deemed searches under the Fourth Amendment." 109 S.Ct. at 1413. As the Court went on to point out, however:

> To hold that the Fourth Amendment is applicable to the drug and alcohol testing prescribed by the [federal] regulations is only to begin the inquiry into the standards governing such intrusions. For the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable.... Thus, the permissibility of a particular practice "is judged by balancing its intrusion on the individual's

> Fourth Amendment interests against its promotion of legitimate governmental interests."

109 S.Ct. at 1413-14 (quoting *Delaware v. Prouse*, 440 U.S. 648, 654 (1979), other citations omitted).

The crux of the issue before the Court was whether an employee might constitutionally be compelled to submit to testing despite the absence of any suspicion that the particular employee had used drugs or alcohol.[1] Although at least individualized suspicion is ordinarily necessary to comport with the Fourth Amendment, "[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." 109 S.Ct. at 1417.

Looking at the privacy side of the balancing test, the Court concluded "that the [urine] testing procedures ... pose only limited threats to the justifiable expectations of privacy of covered employees." 109 S.Ct. at 1419.[2] Two important factors enabled the Court to reach this conclusion. First, the procedures for collection of urine samples sought to minimize the invasion of an employee's privacy. There was no direct observation, and the sample was collected "in a medical environment, by personnel unrelated to the railroad employer, and is thus is not unlike similar procedures encountered often in the context of a regular physical examination." 109 S.Ct. at 1418.

"More importantly," the Court went on, "the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees." *Id.* Because the employees subject to the testing requirements "have long been a principal focus of regulatory

---

[1] The Court dismissed as impracticable the contention that the testing could be done only upon issuance of a warrant supported by probable cause, the Fourth Amendment requirement for criminal law enforcement. 109 S.Ct. at 1416.

[2] The Court found that the blood and breath testing also authorized by the regulations does not amount to a significant intrusion upon employee privacy. 109 S.Ct. at 1417-18.

concern," these employees were reasonably subject to "a diminished expectation of privacy." 109 S.Ct. at 1419.

On the other side of the balance, the Court found that "the government interest in testing without a showing of individualized suspicion is compelling." *Id.* The Court emphasized the risk to safety that drug or alcohol impairment by these employees would cause:

> Employees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disasterous consequences. Much like persons who have routine access to dangerous nuclear power facilities, ... employees who are subject to testing under the [federal] regulations can cause great human loss before any signs of impairment become noticable to supervisors or others.

Id. (citations omitted). Moreover, the Court continued, the testing procedure was necessary to reinforce other sanctions against the use of drugs or alcohol while on duty: "By ensuring that employees in safety-sensitive positions know they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty, the regulations significantly increase the deterrent effect of the administrative penalties associated with the prohibited conduct, ... concomitantly increasing the likelihood that employees will forgo using drugs or alcohol while subject to being called for duty." 109 S.Ct. at 1420 (citation omitted).[3]

---

[3] The Court also pointed out the importance of testing to enable investigators to determine the cause of an accident. 109 S.Ct. at 1420-21. Justice Stevens concurred only in this part of the Court's analysis; he did not agree with the Court's conclusion that the testing program served to deter drug and alcohol abuse. 109 S.Ct. at 1422.

Justices Marshall and Brennan dissented: "The majority's concern with the railroad safety problems caused by drug and alcohol abuse is laudable; its cavalier disregard for the text of the Constitution is not. There is no drug exception to the Constitution, any more than there is a communism exception or an exception for other real or imagined sources of domestic unrest." 109 S.Ct. at 1426.

II

Treasury Employees

This companion case involved the drug testing program of the United States Customs Service. One important responsibility of the Customs Service is to interdict illegal drugs that traffickers seek to import into the United States.

The program required testing of a urine sample from any employee who sought to transfer to any of three types of jobs within the Customs Service: those directly involved in drug interdiction, those requiring that the employee carry firearms, and those requiring the employee to handle "classified" material. *See* 109 S.Ct. at 1388. Prior to being selected for any of these positions, the employee must produce a urine sample in the presence of (although not within sight of) a monitor hired by the Customs Service. "Customs employees who test positive for drugs and who can offer no satisfactory explanation are subject to dismissal from the service." 109 S.Ct. at 1389. However, the test results are not available for use in criminal prosecutions. *Id.*

Applying the same kind of balancing test that it set out in *Railway Labor Executives*, the Supreme Court sustained the Customs Services' testing program for employees engaged directly in drug interdiction and employees who are required to carry firearms. It did not decide the constitutionality of testing requirements for employees who have access to classified information. 109 S.Ct. at 1390.

On the privacy side of the balancing test, the Court wrote:

> We think Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty ... have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test. Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot

> reasonably expect to keep from the [Customs] Service personal information that bears directly on their fitness.

109 S.Ct. at 1394.

These diminished expectations of privacy, the Court held, are outweighed by "the Government's compelling interests in safety and in the integrity of our borders." *Id.* The Court thought it obvious that the Customs Service was entitled to find out who among its interdiction officers used drugs, for "[a] drug user's indifference to the Service's basic mission or, even worse, his active complicity with the malefactors, can facilitate importation of sizable drug shipments or block apprehension of dangerous criminals." 109 S.Ct. at 1393. In addition, the Customs Service has a compelling interest in seeing to it that "the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force." *Id.*

By contrast, the Court was "unable, on the present record, to assess the reasonableness of the Government's testing program insofar as it covers employees who are required 'to handle classified material.'" 109 S.Ct. at 1396. The Court's problem, it appears, is that the broad sweep of the category "classified material" might lead to the testing of employees who, the Court apparently believes, do not in truth have access to genuinely "sensitive information."

On the one hand, according to the Court, "employees who seek promotions to positions where they would handle sensitive information can be required to submit to a urine test under the Service's screening program, especially if the positions covered under this category require background investigations, medical examinations, or other intrusions that may be expected to diminish [the employees'] expectations of privacy in respect of a urinalysis test." 109 S.Ct. at 1397. On the other hand, the Court could not tell "whether the category defined by the Service's testing directive encompasses only those Customs employees likely to gain access to sensitive information." *Id.*[4] The

---

[4] The Court noted that employees subject to testing "include those holding such diverse positions as 'Accountant,' 'Accounting Technician,' 'Animal Caretaker,' 'Attorney (All),' 'Baggage Clerk,' 'Co-op Student (All),' 'Electric Equipment Repairer,' 'Mail Clerk/Assistant,' and 'Messenger,'" all of whom were covered presumably because they had access to classified information. 109 S.Ct. at 1397.

Court remanded so that the lower court could "examine the criteria used by the Service in determining what materials are classified and deciding whom to test under this rubric." *Id.*[5]

III

Implications For Maryland's Drug Testing Program

In some respects, the Supreme Court's decisions have changed the legal ground rules under which the State fashioned its drug testing program.[6] In other respects, the constitutional restrictions identified in this office's 1986 opinion remain unchanged.

We begin with the changes. In the 1986 opinion, the Attorney General analyzed the then-current body of case law and concluded that no employee, not even one engaged in a job related to public safety, could be subjected to mandatory testing without "a reasonable, objective basis to suspect illicit drug use." 71 *Opinions of the Attorney General* at 59. The Department of Personnel's current drug testing program adheres to this stricture. *See* COMAR 06.01.09.01B(6) and 06.01.09.04A.

---

[5] Justice Scalia, who had joined in the Court's opinion in *Railway Labor Executives*, dissented in this case. In Justice Scalia's view, a government-ordered testing program without individualized suspicion can be justified only if there is demonstrated evidence of a problem of substance abuse. Because there was no such demonstrated problem regarding drug use by Customs Service employees - indeed, the Customs Service denied that it had a drug problem - Justice Scalia thought that the program was intended to serve merely symbolic purposes: "I think it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search." 109 S.Ct. at 1401. Justice Stevens concurred with Justice Scalia's dissent. Justice Marshall, with Justice Brennan concurring, dissented for the same reasons as in *Railway Labor Executives*. 109 S.Ct. at 1398.

[6] Drug testing regulations were proposed on June 17, 1988. 15:13 Md. Reg. 1559. The program became effective on January 9, 1989. 15:27 Md. Reg. 3126 (Dec. 30, 1988).

This interpretation of the Fourth Amendment was the better view of the law in 1986. However, later cases eroded it.[7] Now the Supreme Court has determined that some categories of employees may be subject to drug testing without individualized suspicion.

In both of the Supreme Court's cases, the testing program in question was categorical, rather than random. That is, all train crew employees were tested if there was an accident. All Customs Service employees seeking particular jobs were tested. However, we discern no constitutionally significant difference between categorical testing and random testing. The determinative point is that testing without individualized suspicion is constitutionally permissible, under some circumstances. That the methodology of a testing program is random rather than categorical makes no difference, in our view.[8]

In the State's service, we can identify the following types of jobs that are either identical to, or indistinguishably similar to, the positions for which the Supreme Court approved suspicionless testing:

(1) employees required to carry a firearm;

(2) employees, such as correctional officers, who are directly involved in efforts to interdict the flow of narcotics into State institutions;

(3) any employee, whether or not the employee carries a firearm, who is involved with narcotics law enforcement;

(4) any employee whose on-the-job behavior, if affected by substance abuse, could cause death or

---

[7] *See Transport Workers' Union of Philadelphia, Local 234 v. Southeastern Pennsylvania Transportation Authority*, 863 F.2d 1110 (3rd Cir. 1988); *Policeman's Benevolent Association of New Jersey v. Washington Township*, 850 F.2d 135 (3rd Cir. 1988); *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987); Caruso v. Ward, 72 N.Y.2d 432, 534 N.Y.S.2d 142 (1988).

[8] A program that allowed improper motives to enter the decision about the employees subject to testing would be improper. *Treasury Employees*, 109 S.Ct. at 1394 n. 2.

> serious injury to other persons - for example, vehicle operators.[9]

The last category is defined in the Department of Personnel's drug testing program as a "sensitive classification." COMAR 06.01.09.01B(5).

At the same time, there is nothing in the Supreme Court's decisions to suggest that employees outside of these job categories may be subject to drug testing without individualized suspicion. The Court was careful to note that its discussion of diminished privacy and compelling government interest turned on the special sensitivity of these positions, "[u]nlike most private citizens or government employees in general ...." *Treasury Employees*, 109 S.Ct. at 1394. Indeed, the Court's reluctance to approve drug testing of Customs Service employees who were subject to testing merely because they might have access to classified information suggests that no Court majority would now support a blanket program of suspicionless drug testing.[10]

Both of the Supreme Court's decisions also emphasized the government's obligation to design the program with as minimal an intrusion into the employee's privacy as possible. For instance, neither program involved direct observation of the act of urination. The current Maryland program likewise can be administered to avoid needless embarrassment of those tested.[11]

Finally, the 1986 opinion emphasized the importance of proper procedures in any drug testing program. The Department of Personnel's program adopts such careful procedures. *See* COMAR 06.01.09.05, .07, .09, and .11. Nothing in the Supreme Court's

---

[9] We are referring here to employees who drive a vehicle during a substantial portion of their work day. We are not referring to State employees who might occasionally drive a State or personal vehicle on State business.

[10] See note 4 above and accompanying text.

[11] COMAR 06.01.09.05A provides as follows: "The appointing authority shall assure that all aspects of urine specimen collection are controlled to insure integrity of the specimen. This includes either observation as the specimen is provided or methods to preclude adulteration." The Customs Service program incorporates "methods to preclude adulteration" that make direct observation unnecessary. *See Treasury Employees,* 109 S.Ct. at 1388. We recommend that the State program be administered in this comparatively less intrusive way.

decisions counsels any relaxation in this regard. To the contrary, part of the Court's rationale in sustaining major parts of the Customs Service program was that the testing protocols were carefully conceived and the test results were likely to be highly accurate. *Treasury Employees*, 109 S.Ct. at 1394 n.2.

IV

Conclusion

In summary, it is our opinion that, under the interpretation of the Fourth Amendment in the recent Supreme Court cases, the Department of Personnel may modify its drug testing program to authorize testing of State employees in sensitive positions even without individualized suspicion. It may not, however, expand such a testing program to State employees generally. Moreover, the Department should retain the procedural protections in its current program.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

Constitutional Law - Equal Protection - Affirmative Action - One-Black-For-One-White Hiring Policy Of Circuit Court For Baltimore City Is Unconstitutional

October 10, 1989

The Honorable Hilary D. Caplan
Circuit Court for Baltimore City

You have requested our opinion on the constitutionality of the affirmative action hiring policy for certain employees of the Circuit Court for Baltimore City. Under this policy, which was adopted in March 1976, vacancies are filled alternately by qualified minority applicants and qualified white applicants.

On the basis of caselaw developed since the voluntary adoption of the 1976 plan, it is our opinion that continuation of this hiring policy would violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

I

Background

A. *Origin of the Policy*

On February 25, 1976, the Supreme Bench of Baltimore City's Committee on Equal Employment Opportunity ("CEEO"), composed of five judges of that court, issued its report on affirmative action. The report noted that, despite the adoption of an affirmative action plan for court employees four years before, the number of blacks employed was insufficient:

> [I]n the year 1973, for example, only 63 out of a possible 279 positions which are under the direct jurisdiction of the Supreme Bench were held by blacks; in the year 1974, only 60 out of 278 such positions were held by blacks ... [and] out of a possible 282 positions under the direct jurisdiction of

> the Supreme Bench of Baltimore City in the year 1975, only 65 of such positions were held by blacks.

CEEO Report at 2-3. The Committee compared these figures with the following statistics:

> The percentage of blacks making up the working age population of Baltimore City in the year 1975, however, was 43.1%. The prospects for the future indicate that that percentage will increase even more. Such a projection is based on the facts that 70% of the student population of Baltimore City Schools is black and that the current census figures indicate that the percentage of blacks making up the total population of Baltimore City is 53%.

CEEO Report at 3. Thus, the committee concluded that the existing affirmative action plan "has not been seen to ameliorate effectively prior discriminatory practices." Report at 6.

The committee posited as the goals of a new affirmative action effort "to provide employment opportunities to persons who have in the past been subjected, both overtly and covertly, to discrimination" and "to achieve a work force which, at all levels, will be truly representative of the work force of the community which it serves." Report at 5. The committee stated that:

> The present situation mandates the immediate adoption of preferential hiring practices as specific *temporary* affirmative relief, the duration of which should be determined by the results of an annual review of the Court Administrator and a committee of judges regarding the degree to which such measures undertaken effectively offset the effects of past discrimination. When that has been determined to be the result, the preferential hiring relief can be terminated.
>
> In this regard, the Committee recommends that specific one-to-one preferential hiring relief be implemented *temporarily* until the makeup of

> Supreme Bench personnel is more representative, in terms of minorities, of the area which it serves.

Report at 6 (emphasis in original). The committee added that:

> This *temporary* policy of preferential hiring within the Supreme Bench on a one-to-one basis should continue until the vestiges of past discrimination against minorities has been eradicated.
>
> Beginning as soon as is practicable, new vacancies on the Supreme Bench should be filled on a one-to-one basis, i.e., alternately, positions should be filled by a qualified racial minority applicant and next by a qualified white applicant, due regard being given in either instance for the employment of female applicants.

Id. at 7-12 (emphasis in original). The new hiring policy was approved by the entire bench on March 4, 1976, to become effective March 15, 1976. It applied to the Administrative Office, the Civil Assignment Office, the Criminal Assignment Office, the Court Reporters, the Pretrial Release Division, the Masters and staff and the Security Division, but not to the judges' secretaries and law clerks.

B. Statutory Changes

Although originally subject to the Supreme Bench Affirmative Action Plan, the Court House Security Division was transferred by statute to the Sheriff's Office in July 1976. Chapter 864, Laws of Maryland 1976. *See also* Public Local Laws of Baltimore City §§22-6 through 22-11. That law expressly provided, however, that:

> [I]n making new appointments to the staff of the Division of Court House Security the Sheriff shall be guided by the general concept that the black and white races should be represented on the staff of the Division in approximately the same proportion as they exist in the general adult population of the City; until these proportions are attained the Sheriff shall

> be guided by the general policy that new appointments be alternated between black and white employees.

Chapter 864, at Section 3.

In 1980, a more far-reaching change was initiated. Contingent upon voter approval in 1982 of a constitutional amendment transforming the Supreme Bench into the Circuit Court for Baltimore City, legislation consolidated the clerk's offices, and established a personnel merit system for various units of the old Supreme Bench, including the civil assignment commissioner's office, the jury commissioner's office, the criminal assignment commissioner's office, the domestic relations division, the juvenile court clerk's office and the pre-trial release services division. *See* Chapter 526, Laws of Maryland 1980, *codified as* Subtitle 5A of Title 2 of the Courts Article ("CJ" Article). This legislation also provided that:

> The Supreme Bench affirmative action policy that is in effect on January 1, 1983, and as amended from time to time by the judges of the Circuit Court for Baltimore City, shall apply to the personnel system.

CJ §2-5A-07(a).

In 1985, the General Assembly transferred the Pre-Trial Release Services Division to the Department of Public Safety and Correctional Services. Chapter 725, Laws of Maryland 1985. Thus, persons hired into this unit were no longer subject to the 1976 hiring policy.

C. Program Review and Progress

The CEEO Report called for the annual review of the one-black-for-one-white hiring policy by a committee of judges and the Court Administrator. As a result, the Equal Employment Committee was established. It is our understanding that this committee, which was merged into the Budget and Personnel Committee in 1988, has met annually and has voted to continue the hiring policy.

The last comprehensive study of the impact of the hiring plan occurred in April 1979. In a written report entitled "Affirmative

Action Under the Supreme Bench of Baltimore City 1975-1978", Associate Judge Joseph C. Howard, Sr., observed that the hiring policy had not achieved a reasonable increase in minority employment representation, primarily because there were "an almost equal number of minority employees terminated as were hired." 1979 Report at 21. However, the report also noted a net gain of five black employees:

> [D]uring the last nine months of 1976, in which the Affirmative Action Plan was in operation, minorities received 15 of the 34 job opportunities or 44%. Again in 1977 six of the 13 available jobs (45%) were awarded nonwhites. Finally, in the most recent year studied, a majority of the new positions (8 out of 14 or 57%) went to nonwhites.
>
> Viewing these data from another perspective, in 1975 minorities comprised 26% of the entire employment population but received an average of almost 50% of the job opportunities over the three succeeding years.[1]

Report at 9. The Report concluded that the affirmative action plan "was definitely needed; has shown increasing results as it was given time to succeed; but must be continued over time before its ultimate goals will be reached." 1979 Report at 22.[2]

Recent statistics on the racial composition of the courthouse workforce show a definite increase over these earlier figures. Of the 293 employees in the Clerk's Office, 161 or 55 percent are minority and 132 or 45 percent are non-minority. Of the 109 employees in the

---

[1] The 1979 Report stated that of the 223 court employees in 1975, 58 or 26% were black; and of the 211 employees in 1978, 63 or 30% were black. *Id.* at 6.

[2] The report noted that the plan would not be successful "until the overall representation reaches its goal of reflecting the community which we serve." 1979 Report at 19.

Administrative Office, 57 or 52.3 percent are black and 52 or 47.7 percent are white.[3]

II

Relevant Caselaw

The United States Supreme Court did not decide its first reverse discrimination/affirmative action case until 1978 - some two years after adoption of the Supreme Bench hiring policy. In *University of California Regents v. Bakke*, 438 U.S. 265 (1978), the Court invalidated a 16 percent racial quota, which reserved seats at a state medical school for certain minority groups. *Bakke* contained a number of elements that were to become hallmarks of affirmative action decisions for the next decade: (1) a conclusion that some form of affirmative action by a government entity was constitutionally permissible; (2) a dichotomy between rigid racial "quotas," which were generally proscribed, and flexible "goals," which were not; (3) a concern for whether the same standard governed affirmative action under the 1964 Federal Civil Rights Act and under the Equal Protection Clause; (4) sharp divisions among the justices that prevented any opinion from being the "opinion of the Court"; and (5) little predictability about what the Court would uphold.[4]

In *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979), the Court upheld the validity under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e *et seq.*, of a voluntary affirmative action plan

---

[3] According to 1980 Census figures, 55.4 percent of the population of Baltimore City is black, while 44.6 percent is white. For the Baltimore Standard Metropolitan Statistical Area ("SMSA"), the population was 25.9 percent black and 74.1 percent white. The employee work force (age 16 or older) in the City was 50.7 percent black and 49.2 percent white (25.1 percent-74.9 percent in the Baltimore SMSA). With respect to the potential work force (age 16 or older) in the City, 51.75 percent is black and 48.25 percent is white (27.7 percent and 72.3 percent in the Baltimore SMSA). *See generally* 1980 Census of Population: General Social and Economic Characteristics - MD (1983). A recent Census Bureau study of 1985 population statistics shows that Baltimore City is 57.4 percent black and the Baltimore SMSA 26 percent. *Baltimore Sun*, June 21, 1989, at A1. The relevance of these statistics will be discussed below.

[4] Other important features of the Court's affirmative action decisions over the last decade were the differing treatment of voluntary and court-ordered affirmative action and of public and private entities.

adopted by a *private* employer. Under the plan, 50 percent of new trainees were to be black until the percentage of black skilled craftworkers at the workplace approximated the percentage of blacks in the local labor force. In *Weber*, the majority of the Supreme Court said that the affirmative action plan was permissible under Title VII because it was designed "to eliminate manifest racial imbalance in traditionally segregated job categories," 443 U.S. at 197, and was a temporary measure "not intended to maintain racial balance." 443 U.S. at 208.[5]

The next year, in *Fullilove v. Klutznick*, 448 U.S. 448 (1980) the Supreme Court upheld against a facial constitutional challenge a federal minority business enterprise ("MBE") law that required local governments receiving funds under a federal public works program to use 10 percent of the funds for procurements from minorities. The plan at issue in *Fullilove* was characterized as a temporary "pilot program," 448 U.S. at 481-82, within a "flexible" administrative scheme, 448 U.S. at 487-89, justified by the evidence before Congress of private discrimination. Thus, it was permissible as "a limited and properly tailored remedy to cure the effects of prior discrimination." 448 U.S. at 484.[6]

In 1984, the Court disapproved modification of a consent decree entered in a Title VII case against the Memphis Fire Department that would have resulted in the layoff of white firefighters. *See Firefighters Local Union 1784 v. Stotts*, 467 U.S. 561 (1984). Initially, some viewed this decision as presaging the end of affirmative action. *See* Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over but the Shouting*, 86 Mich. L. Rev. 524, 525 (1987). Subsequent cases, however, appeared to confine *Stotts* to its facts. *See* Tribe, *American Constitutional Law* 1534-35 n. 61 (1988).

---

[5] The employer's adoption of the plan at issue in *Weber* had been prompted by the fact that only five of 273, or 1.83 percent of skilled craftworkers at the place were black, even though the workforce in the area was approximately 39 percent black. 443 U.S. at 198-99.

[6] As in *Bakke*, no single rationale commanded a majority.

In 1986, the Court rendered two major affirmative action decisions.[7] *Local 28 of Sheet Metal Workers v. EEOC*, 478 U.S. 421 (1986), involved a union found to have violated Title VII by intentionally discriminating against blacks and ordered by a federal district court to comply with a 29 percent non-white membership goal. A divided Supreme Court, in a plurality decision, upheld this race-conscious remedy as a temporary, flexible goal designed to end "pervasive and egregious racial discrimination." 478 U.S. at 476. The Court noted, however, that such relief should not be routinely ordered. 478 U.S. at 479.[8]

In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), the Court wrestled with the constitutionality of a voluntary race-conscious affirmative action plan established by a governmental entity and struck down the plan. In *Wygant*, white employees of the Jackson County School Board challenged the constitutionality of a collective bargaining agreement extending preferential protection against layoffs to minority employees. Although the Court upheld their claim, once again five justices could not agree upon a rationale. Four justices (Powell, Burger, Rehnquist and O'Connor) said that any racial distinction must be justified by a compelling governmental interest and that the measure chosen by the state to effectuate its purpose must be narrowly tailored to the achievement of that goal. 476 U.S. at 274. These justices went on to state that, before a governmental agency embarks on an affirmative action program, it must ensure that it has convincing evidence that remedial action is warranted and sufficient evidence to justify the conclusion that there has been prior

---

[7] In a minor decision, *Local Number 93 v. City of Cleveland*, 478 U.S. 501 (1986), a majority of the Court, distinguishing *Stotts* as involving court modification of a decree, found that Title VII did not prevent the entry of a consent decree providing for certain forms of race-conscious relief. However, the Court declined to reach the issue of how such relief would fare under the Fourteenth Amendment. 478 U.S. at 517 n.8.

[8] In *Sheet Metal Workers*, the justices said that:

> [T]he [trial] court should exercise its discretion with an eye towards Congress' concern that race conscious affirmative measures not be invoked simply to create a racially balanced work force.... [A] court should consider whether affirmative action is necessary to remedy past discrimination in a particular case before imposing such measures, and that the court should also take care to tailor its orders to fit the nature of the violation it seeks to correct.

478 U.S. at 475-76.

discrimination. 476 U.S. at 277. They said that the Jackson Board of Education had not made such a determination, noting that "[s]ocietal discrimination without more is too amorphous a basis for imposing a racially classified remedy." 476 U.S. at 276. Three of these justices (Powell, Burger, and Rehnquist) said that the layoff preference was not "narrowly tailored", because the actual burden shouldered by non-minorities laid off was "too intrusive." 476 U.S. at 283. In their view, "alternate remedies," such as hiring "goals," diffused to a greater extent among society "the burden to be borne by innocent individuals." 476 U.S. at 282. Justice O'Connor also specially concurred, concluding that the voluntary race-conscious remedy was not narrowly tailored because the layoff preference had no relationship to the availability of minorities in the relevant labor pool. 476 U.S. at 294.[9]

Thereafter, the Court remanded governmental affirmative action cases for reconsideration in light of *Wygant*. *See, e.g., J. A. Croson Co. v. City of Richmond*, 478 U.S. 1016 (1986) (minority set-asides in public contracts); *Janowiak v. Corporate City of South Bend*, 481 U.S. 1001 (1987) (public employer hiring preference). As late as 1988, the Court cited *Wygant* for the broad proposition that "[p]referential treatment and the use of quotas by public employers subject to Title VII can violate the Constitution," *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 977 (1988). Nevertheless, it remained possible to incorrectly view the decision as merely a "layoff" case without lasting relevance to other areas of affirmative action - particularly in light of the Court's 1987 decisions.

In *Johnson v. Transportation Agency, Santa Clara County, Calif.*, 480 U.S. 616 (1987), six justices - five joining in a single opinion - voted to reject a male employee's claim that by passing over him for

---

[9] Justice O'Connor also noted that public employers were not without a reliable benchmark to determine prior discrimination justifying affirmative action:

> [D]emonstrable evidence of a disparity between the percentage of qualified blacks on a school's teaching staff and the percentage of qualified minorities in the relevant labor pool sufficient to support a prima facie Title VII pattern or practice claim by minority teachers would lend a compelling basis for a competent authority such as the School Board to conclude that implementation of a voluntary affirmative action plan is appropriate to remedy apparent prior employment discrimination.

476 U.S. at 292.

promotion in favor of a female pursuant to an affirmative action plan, his public employer violated Title VII of the Civil Rights Act. Rejecting the concurring opinion of Justice O'Connor that Title VII and the Fourteenth Amendment should be read in tandem to require a statistical disparity sufficient to support a prima facie Title VII claim to justify the voluntary affirmative action plan, the majority felt that under Title VII all that was needed was a "manifest imbalance" that reflected underrepresentation of women in traditionally segregated job categories. 480 U.S. at 632.[10] However, because the issue had not been raised, the Court expressly declined to decide how the plan at issue would have fared under the Equal Protection Clause. 480 U.S. at 620, n. 2.

In *United States v. Paradise*, 480 U.S. 149 (1987), five justices upheld the constitutionality of a *court-ordered* one-black-for-one-white promotion requirement as an interim measure for Alabama state trooper promotions. However, only three justices joined in Justice Brennan's opinion, which emphasized that the challenged requirement was "effective, temporary and flexible," 480 U.S. at 185 - "flexible" in that it could be "waived if no qualified black candidates [were] available." 480 U.S. at 177. In the plurality's view, it was a necessary remedy for court-adjudicated, longstanding discrimination. Also relevant to the outcome of the case was the fact that the term of the promotion "goal" was contingent upon the state's own conduct. That is, the requirement lasted only until the public employer came up with a promotion procedure that did not have a discriminatory impact on blacks.[11]

The Court's 1987 decisions led some commentators to conclude that the constitutional basis for farreaching race-conscious affirmative action was firmly established. *See* Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over but the Shouting*, 86 Mich. L. Rev. 524 (1987). However, in the case of voluntary affirmative action by governmental entities, this reliance was misplaced.

---

[10] Justice O'Connor would have found a prima facie Title VII violation in the fact that *none* of the county's 238 skilled craft jobs was occupied by a woman, despite the fact that women constituted five percent of the local labor pool of skilled workers. 480 U.S. at 656.

[11] In fact, the one-for-one requirement affected only eight black troopers and was quickly suspended by the court. 480 U.S. at 185-89 (concurring opinion of Justice Powell). Despite this fact and a significant record of 12 years of governmental discrimination, four justices dissented.

In January of 1989, in *City of Richmond v. J. A. Croson Co.*, 109 S.Ct. (1989), a majority of justices struck down Richmond's 30 percent minority set-aside for city construction work, and finally agreed upon a standard to gauge the constitutionality of race-conscious affirmative action by state and local entities.[12] Writing for the majority and relying upon *Wygant*, Justice O'Connor said that a race-conscious remedy disadvantaging whites had to serve a compelling state interest, such as remedying the present effects of "identified" discrimination, and the remedy had to be narrowly tailored to the achievement of that goal. 109 S.Ct. at 723-28.

In discussing the first prong of this test, Justice O'Connor noted that the evidence relied upon by the Richmond City Council to adopt the set-aside did not rise to the level of a prima facie violation of Title VII. 109 S.Ct. at 724. Specifically, she noted that evidence of societal discrimination was insufficient, as was statistical evidence of the low number of minorities receiving city contracts as compared to Richmond's 50 percent black population. *Id.*[13]

Turning to the second prong of the constitutional standard, Justice O'Connor found that the Richmond plan was not narrowly tailored. Calling the set-aside a "rigid, numerical quota" and an "absolute preference ... based solely on race," adopted without any consideration of race-neutral means to increase minority participation, she said "[w]e

---

[12] By the time *Croson* was argued and decided, Justice Powell, a moderate on affirmative action, had been replaced by Justice Kennedy.

[13] The Justice stated that:

> In the employment context, we have recognized that for certain entry level positions or positions requiring minimal training, statistical comparisons of the racial composition of an employer's workforce to the racial composition of the relevant population may be probative of a pattern of discrimination.... But where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.

109 S. Ct. at 725. Subsequent to the *Croson* decision, the Court made it more difficult for some plaintiffs to use statistics to make out a prima facie case of Title VII discrimination. In *Wards Cove Packing Co. v. Atonio*, ___ U.S. ___ [109 S. Ct. 2115] (1989), the Court said that a comparison between the high percentage of nonwhite workers in one employment category and a low percentage of such workers in another was insufficient to establish a prima facie case.

think it obvious that such a program is not narrowly tailored to remedy the effects of past discrimination." 109 S.Ct. at 728-29.[14]

In dissent, Justices Marshall, Brennan and Blackmun emphasized the breadth of the Court's ruling: "Today for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection review of race-conscious remedial measures." 109 S.Ct. at 752. And just a month after *Croson* was decided, the Court declined to review two affirmative action/reverse discrimination cases that applied this rigorous test of constitutional analysis. *See City of South Bend v. Janowiak*, 109 S.Ct. 1310 (1989) (mem.) and *Higgins v. City of Vallejo*, 109 S.Ct. 1310 (1989) (mem.).[15]

With these decisions in mind, we turn to a constitutional analysis of the circuit court's hiring policy.[16]

---

[14] For a more detailed analysis of *Croson, see* 74 *Opinions of the Attorney General* 76 (1989).

[15] In *Higgins*, the Ninth Circuit rejected a constitutional attack by a top-ranked white candidate for promotion to firefighter-engineer who was rejected in favor of the third-ranked black, pursuant to an affirmative action plan. Under civil service rules, the city was free to choose among the top three candidates. Moreover, there was statistical *and* other evidence that the city had engaged in past discrimination. And the promotion plan was deemed narrowly tailored because it was just a "guideline" that treated race as a "plus" for an employee rather than a mandate. *Higgins v. City of Vallejo*, 823 F.2d 351 (9th Cir. 1987). In *Janowiak*, the Seventh Circuit struck down a race-conscious hiring plan that was premised solely upon a city finding that a disparity existed between the percentage of minorities in the city's population and the percentage of minorities in police and fire departments. *Janowiak v. Corporate City of South Bend*, 836 F.2d 1034 (7th Cir. 1987).

[16] Arguably, it may be possible to avoid the constitutional issue here by declaring the policy's stated contingency successfully satisfied. That is, the court is now "more representative, in terms of minorities, of the area in which it serves" and that "the vestiges of past discrimination against minorities has been eradicated." However, such a determination is for the bench to make, not the Attorney General. In addition, given the emphasis of the CEEO Report (and update) on city population and workforce statistics, it is not clear that the present employee breakdown by race would equal or exceed census statistics, which by 1990 will likely show the City with a greater black population and more blacks in the workforce. *See* note 3 above. Finally, the General Assembly by statute has in essence endorsed the hiring policy. *See* CJ §2-5A-07(a). Hence, it would be difficult for the court to unilaterally end it, were it not for the constitutional compulsion to do so.

III

Analysis

The one-black-for-one-white hiring policy for circuit court employees is a race-conscious remedy voluntarily adopted by a State employer. Thus, whether it is properly characterized as a "quota" or a "goal," its constitutionality must be gauged by the two-pronged test set forth in *Croson* and *Wygant*, rather than by the Title VII standards of *Weber, Local 28 of Sheet Metal Workers* and *Johnson*, or those governing court-fashioned remedies in cases of longstanding discrimination, such as in *Paradise*. Therefore, we must determine (1) whether the policy is justified as a remedy for identified discrimination or by another compelling reason, and (2) whether it is narrowly tailored to remedy the effects of past discrimination.

A. Past Discrimination

It would be naive to suggest that racial discrimination never existed in Baltimore City or that the courthouse was immune from the effects of that discrimination.[17] Nevertheless, under Supreme Court decisions, "societal discrimination" will not justify race-conscious affirmative action.

The 1976 CEEO Report identified no specific acts of discrimination with respect to courthouse personnel or judicial or administrative findings of past discrimination. Instead, it relied upon statistics showing blacks holding some 23 percent of the jobs as opposed to comprising 53 percent of the City's general population and 43.1 percent of the City's working age population. Regardless of whether such statistics could demonstrate a "manifest imbalance" for Title VII purposes under *Johnson v. Transportation Agency*, they do not appear to constitute a prima facie violation of Title VII for Equal Protection purposes under *City of Richmond v. J. A. Croson Co.*

Even if these statistics continued to show a disparity down to the present day, they suffer from a number of inherent problems. First,

---

[17] It was not until two decades ago that the Supreme Bench had its first black judge and court clerk.

courthouse positions are not homogeneous. Jobs covered by the hiring policy include masters (who must be lawyers), professionals, administrators, clerical workers, and skilled craft workers. While some of these positions may require minimal training, thus permitting resort to general workforce statistics, others clearly require special qualifications. In the latter case, the relevant statistical pool must be the number of minorities qualified to hold the position in question. *Croson*, 109 S.Ct. at 725. Second, "potential work force" statistics include 16- and 17-year-olds, persons without high school diplomas, and others who might not meet basic qualifications for courthouse employment. Third, because there is no across-the-board residency requirement for courthouse employment, it is not clear whether the relevant workforce statistics should be derived from the City alone or from the entire Baltimore SMSA.[18] If the latter figures are used, continuance of the one-black-for one-white hiring policy clearly would not be warranted on the basis of statistical disparities.[19]

In short, in light of current Supreme Court standards, neither the statistics assembled when the hiring policy was begun nor the present statistics would demonstrate a prima facie case of discrimination justifying a race-conscious remedy.[20]

---

[18] The Baltimore City Charter, Article IV, §6A requires City residency of "board chairmen and all commission heads," and the City has a residence preference for its civil service employees. Nevertheless, State law does not mandate City residency for court employees.

[19] *See* note 3 above.

[20] Although remedying identified discrimination would have been a "compelling" rationale for the hiring policy, we do not believe that Supreme Court decisions would recognize as sufficiently compelling the goal of representing the area "served" by the court. Litigants from all over the State use courthouse services in Baltimore City, not just City residents in proportion to black-white population ratios.

B. Narrow Tailoring

The most serious constitutional defect of the hiring policy is its failure to meet the second prong of the *Croson-Wygant* test. It is not a narrowly tailored remedy. In fact, it is an inflexible hiring quota.[21]

When it is a qualified black's turn to be hired, the policy mandates the hiring of a qualified black applicant regardless of the perhaps superior qualifications of a particular white applicant; when it is a white's turn to be hired, the policy prevents a qualified black from applying for or filling the post. And, although the 1976 CEEO Report describes the hiring plan as a "temporary" remedy, it has already extended more than a dozen years, and its termination hinges on the achievement of percentages keyed to amorphous workforce/population statistics. In *United States v. Paradise*, a bare majority of the Supreme Court upheld a court-ordered one-black-for-one-white promotion "goal" described as "ephemeral." 480 U.S. at 178. We are convinced that the Court would not uphold the 12-year-old hiring quota at issue here.

IV

Conclusion

For all of these reasons, it is our opinion that continuance of the one-black-for-one-white hiring policy of the Circuit Court for Baltimore

---

[21] In his concurring opinion in *Sheet Metal Workers*, Justice Powell described the distinction between "goals" and "quotas" articulated by the EEOC and the Departments of Justice and Labor:

> In the view of these federal agencies, which are charged with responsibility for enforcing equal employment opportunity laws, a quota would impose a fixed number or percentage which must be attained, or which cannot be exceeded, and would do so regardless of the number of potential applicants who meet necessary qualifications.... By contrast, a goal is a numerical objective, fixed realistically in terms of the number of vacancies expected, and the number of qualified applicants available in the relevant job market.... An employer's failure to meet a goal despite good faith efforts "is not subject to sanction, because [the employer] is not expected to displace existing employees or to hire unneeded employees to meet [the] goal."

106 S.Ct. at 3060-61.

City would violate the Equal Protection Clause of the Fourteenth Amendment.[22]

J. Joseph Curran, Jr.
Attorney General

Robert A. Zarnoch
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions and Advice

---

[22] Although the issue is not specifically raised by your opinion request, we also believe the racial quota for courthouse Security Division employees mandated by Chapter 864 of the Laws of Maryland 1976 is likewise unconstitutional.

CRIMINAL LAW

Reporting Of Suspected Crimes - Circumstances Affecting Reporting By Ordinary Citizens, Physicians, Mental Health Care Providers, And Rape Crisis Center Employees

July 18, 1989

Stephen M. Meyers, Esquire
Assistant State's Attorney
Office of State's Attorney
for Frederick County

You have requested our opinion on several questions concerning the obligation to report suspected rapes or other sexual assaults. Specifically, you ask:

1. Must an ordinary citizen who suspects that an adult has been raped or otherwise sexually assaulted report this information to the police?[1]

2. Must a physician, psychiatrist, psychologist, or therapist who is told by an adult patient that the patient has been raped or otherwise sexually assaulted report this information to the police over the patient's objections?[2]

3. Must an employee of a rape crisis center who learns that an adult has been raped or otherwise sexually assaulted report this information to the police?[3]

---

[1] All of your questions concern the suspected rape or sexual assault of an adult, not a minor.

[2] A "therapist" is not, as such, a legally recognized health care provider in Maryland. Other recognized health care providers, like social workers and nurses, often counsel victims of sexual assaults.

[3] A rape crisis center offers services "to address the special needs of a rape victim." Article 88A, §130(a)(2).

4. Do the answers to questions 1 through 3 remain the same regardless of whether the crime involves a felony or a misdemeanor?

For the reasons set forth below, we conclude as follows:

1. Under some circumstances, a citizen has a statutory duty to report that a person has been raped or otherwise sexually assaulted - for example, if the victim is developmentally disabled or resides at certain institutions. Apart from duties imposed by such statutes, an ordinary citizen has no legal obligation to report that an adult has been raped or otherwise sexually assaulted. This conclusion certainly is not intended to discourage a citizen who suspects that such a crime has occurred from reporting his or her suspicions to the proper authorities. This civic duty, however, is not a legal one.

2. Except as otherwise required by statute, a physician, psychiatrist, psychologist, or therapist generally has no legal obligation to report that an adult patient has been raped or otherwise sexually assaulted. Indeed, §§9-109 and 9-121 of the Courts Article ("CJ" Article) generally prohibit a psychiatrist, psychologist, or licensed certified social worker from disclosing information obtained from a patient, unless the patient consents.

3. Except as otherwise required by statute, an employee of a rape crisis center who learns that an adult has been raped or otherwise sexually assaulted has no legal obligation to report this information to the police.

4. The answers to questions 1 through 3 apply regardless of whether the alleged crime is a felony or a misdemeanor.

I

Duty to Report a Crime

A. *Statutory*

The General Assembly has identified certain particularly vulnerable populations and has imposed statutory reporting requirements on those who learn of abuse (which would certainly include sexual assault) of members of these populations. For example, §§5-704 and 5-705 of the

Family Law Article ("FL" Article) set forth mandatory reporting requirements if the victim of suspected abuse is a child. Similarly, §19-347(b) of the Health-General Article ("HG" Article) imposes a statutory obligation to report the suspected abuse of a nursing home resident. There is a similar statutory duty to report the suspected abuse of a resident of a mental health facility, HG §10-705(b); of an individual who is developmentally disabled, HG §7-1005; and of an adult who lacks the physical or mental capacity to provide for his or her daily needs, FL §14-302.[4]

Apart from particular provisions of this kind, in Maryland there is no general statutory obligation to report a crime, whether it be a felony or a misdemeanor. Some other states have such provisions. *See* N.J.S.A. §2A:97-2; Ohio Rev. Code §2921.22; Wash. Rev. Code §9.69.100. Maryland, however, does not.

B. Common Law

At common law, a person could be prosecuted for failing to report a felony. The crime of misprision of felony was "the concealment of a felony which a man knows, but never assented to; for, if he assented, this makes him either principal or accessary." 4 W. Blackstone, *Commentaries* *121. There was no comparable duty to report a misdemeanor.

Misprision of a felony was developed as part of a system to create communal responsibility for the apprehension of criminals. *Pope v. State*, 284 Md. 309, 335, 396 A.2d 1054 (1979). The duty imposed was for the benefit of the State. 284 Md. at 346. Although misprision of a felony was an actionable offense in England until the twentieth century, there is little evidence to suggest that its use was widespread. 284 Md. at 335-6. Similarly, "'No court in the United States has been prepared to ... hold that a mere failure to disclose knowledge of a felony is itself an offence....'" 284 Md. at 337 (quoting Glazebrook, *How Long, Then, Is the Arm of the Law to Be?*, 25 Mod. L. Rev. 301, 307 n.51 (1962)). In *Pope v. State*, the Court of Appeals rejected the

---

[4] FL §14-302(a) requires reporting by "each health practitioner, police officer, or human service worker who contacts, examines, attends, or treats an alleged vulnerable adult ...." Reporting by all other persons is permissive. FL §14-302(c).

crime of misprision of felony as incompatible with "our local circumstances and situation and our general code of laws and jurisprudence." 284 Md. at 352. In determining whether a defendant could be charged in this State with such a crime, the Court considered in detail the crime's origin, use, scope, practical application, and potential effect on constitutional and common law privileges. The Court was troubled by much of what it observed. First, the Court was concerned that the crime was "impractically wide" and in fact differed from most other common law offenses of omission:

> "[T]he duty to act arises not because of the willing assumption of responsibility, the occupation of an office, or the ownership of property, but because of the mere possession of certain knowledge - knowledge possessed accidentally and undesired - knowledge which may indeed have been acquired through some malevolent person."

284 Md. at 345 (quoting Glazebrook at 311).

In addition, the Court saw no basis for the distinction the crime made between a felony and a misdemeanor. The Court held that such a distinction would be especially troubling if applied in this State, since the categorization of crimes in Maryland "is a hodgepodge, following neither rhyme nor reason." 284 Md. at 346. The Court also was extremely troubled by the practical problems associated with the crime. It was unclear to the Court when the duty to reveal a felony would arise, how that duty would be discharged, and whether a relationship with the felon would prevent the duty from arising. 284 Md. at 348-9.

The Court's most fundamental concern, however, involved the "nature of the crime" and its incompatibility with modern society:

> "It may be the duty of a citizen to accuse every offender, and to proclaim every offense which comes to his knowledge; but the law which would punish him in every case for not performing this duty is too harsh for man."

284 Md. at 344 (quoting *Marbury v. Brooks*, 20 U.S. (7 Wheat.) 556, 575-76 (1822)).

These considerations led the Court to hold that "[m]aintenance of law and order does not demand ... application [of the crime of misprision of felony] and, overall, the welfare of the inhabitants of Maryland and society as enjoyed by us today, would not be served by it." 284 Md. at 352.[5] The Court observed that "[i]f the Legislature finds it advisable that the people be obligated under peril of criminal penalty to disclose knowledge of criminal acts, it is, of course, free to create an offense to that end, within constitutional limitations, and hopefully, with adequate safeguards." *Id.*

Applying *Pope*, we conclude that no citizen has a legal obligation to the State to report a suspected crime, whether the crime is a felony or a misdemeanor, unless the General Assembly has imposed such an obligation by statute.[6] This conclusion, however, is not intended to discourage an ordinary citizen who suspects that a crime has occurred from reporting his or her suspicions to the proper authorities. To do so is a civic duty. *See Bailey v. State*, 440 A.2d 997, 999 (Del. 1982); *State v. Novak*, 502 So. 2d 990, 994 (Fla. App. 1987); *Booker v. Eddins*, 359 S.E.2d 211, 212 (Ga. App. 1987).[7] Moreover, citizens ought to cooperate when the police or other law enforcement officials ask for information that would facilitate the apprehension of criminals and the prevention of future criminal activity.[8]

---

[5] In 61 *Opinions of the Attorney General* 335, 337 (1976), this office concluded that "the offens[e] of misprision ... [of] a felony would be recognized in our law." This conclusion is invalid in light of *Pope*.

[6] Similarly, "mere failure to disclose the commission of [a] felony, or to apprehend the felon, or mere approval of the felony is not sufficient to constitute one an accessory after the fact." *McClain v. State*, 10 Md. App. 106, 115, 268 A.2d 572 (1970). *But see* note 8 below.

[7] Indeed, because "[i]t is the civic duty of citizens to give to police or other officers such information as they may have respecting crimes which have been committed, ... public policy requires that communications of this kind, at least if made in good faith, be protected as privileged" and thus not subject to a defamation action. 50 Am. Jur. 2d *Libel and Slander* §214, at 726 (1970). *See Brinsfield v. Howeth*, 107 Md. 278, 289, 68 A. 566 (1908).

[8] Citizens *do* have a legal duty to refrain from certain actions or omissions that hinder a police officer in the performance of a duty. *See Cover v. State*, 297 Md. 398, 466 A.2d 1276 (1983) (discussing elements of common law offense of "resisting, hindering, or obstructing an officer of the law in the performance of his duties").

C. Health Care Providers and Rape Crisis Center Employees

The conclusion reached above applies as well to psychiatrists, psychologists, social workers, nurses, and employees of rape crisis centers: Unless a statute imposes a duty to report a crime, these persons are not legally required to do so.

II

Prohibited Disclosures By Psychiatrists, Psychologists, and Social Workers

We turn next to the circumstance in which certain health care providers who learn of sexual assaults are prohibited from reporting them. CJ §9-109(b) generally prohibits a psychiatrist or psychologist from disclosing information obtained from a patient without the patient's consent. The privilege is worded as follows: "Unless otherwise provided, in all judicial, legislative, or administrative proceedings, a patient or his authorized representative has a privilege to refuse to disclose, and to prevent a witness from disclosing, communications relating to diagnosis or treatment of the patient's mental or emotional disorder."[9] CJ §9-121(b) provides a similar privilege for the clients of licensed certified social workers.[10]

Because the reporting of a crime is not a disclosure in a "judicial or administrative proceedin[g]," a straightforward reading of CJ §§9-109(b) and 9-121(b) would suggest that they do not apply to such

---

[9] The wording of CJ §9-109(a)(3) indicates that the privilege extend not only to a patient's psychiatrist or psychologist but also to "any other person participating directly or vitally with either in rendering those services in consultation with or under direct supervision of a psychiatrist or psychologist."

[10] The wording of this provision is as follows: "Unless otherwise provided, in all judicial or administrative proceedings, a client has a privilege to refuse to disclose, and to prevent a witness from disclosing, communications made while the client was receiving counseling." The term "'witness' means a licensed certified social worker or any other person participating directly or vitally with a licensed certified social worker in rendering services to a client, in consultation with or under direct supervision of a licensed certified social worker." CJ §9-121(a)(4).

Legislation to provide a similar privilege to patients of "psychiatric-mental health nursing specialists" failed in the 1989 Session of the General Assembly. *See* House Bill 758 and Senate Bill 237.

disclosures. *See* 62 *Opinions of the Attorney General* 157, 159 (1977). However, in *Shaw v. Glickman*, 45 Md. App. 718, *cert. denied* 288 Md. 742 (1980), the Court of Special Appeals held otherwise:

> "It seems to us that inasmuch as the statute confers a privilege of confidentiality on the communication between patient and psychiatrist-psychologist in judicial, legislative, or administrative proceedings, which privilege is that of the patient, no lesser privilege is existent when the matter is not judicial, legislative, or administrative. With the exception of those instances where the privilege of confidentiality is expressly prohibited, the lips of the psychiatrist or psychologist have been statutorily sealed shut subject solely to being unsealed by the patient or the patient's authorized representative."

45 Md. App. at 726-27 (footnotes omitted).[11] Thus, if a psychiatrist, psychologist, or licensed certified social worker is told by an adult patient that the patient has been raped or otherwise sexually assaulted, the health care provider is prohibited from disclosing this information without the patient's consent.[12]

No comparable legal prohibition bars a physician (other than a psychiatrist) from disclosing this type of information. *See Robinson v. State*, 249 Md. 200, 221, 238 A. 2d 875 (1968).[13] Nevertheless, a physician must consider the confidential relationship with a patient when deciding whether to report that a patient has been raped or

---

[11] The Court of Special Appeals did not address the interplay between CJ §9-109 and a statute that mandates reporting, like the child abuse reporting provisions. For purposes of this opinion, we likewise need not discuss that issue.

[12] As a result of recent legislation, mental health care providers under certain circumstances may disclose a patient's "*intention* to inflict imminent physical injury upon a specified victim or group of victims." CJ §5-315 (emphasis added). *See* Chapter 634 (House Bill 50), Laws of Maryland 1989. This legislation does not change the law regarding the reporting of crimes already committed.

[13] HG §4-301 provides that, with certain exceptions, a medical care provider who has custody of medical records may not reveal specific medical information contained in those records to any person unless authorized by the individual on whom the record is kept. One exception is "[p]roviding information to a government agency performing its lawful duties ...."

otherwise sexually assaulted. As stated in the American Medical Association's Principles of Medical Ethics, "[a] physician shall respect the rights of patients, colleagues and of other health professionals and shall safeguard patient confidences within the constraints of the law."

III

Conclusion

In summary, it is our opinion that, except as otherwise required by statute, neither an ordinary citizen, a health care provider, nor an employee of rape crisis center has a legal obligation to report that an adult has been raped or otherwise sexually assaulted.

J. Joseph Curran, Jr.
Attorney General

Sharon Krevor-Weisbaum
Staff Attorney

Jack Schwartz
Chief Counsel
Opinions & Advice

DEBT COLLECTION

Attorney General - Budget And Fiscal Planning - Local Government - Authority To Retain Private Lawyers And Pay Contingent Fees

May 4, 1989

The Honorable Laurence Levitan
Senate of Maryland

You have requested our opinion on the following question: "Is there sufficient authority under law in Maryland for the Attorney General or for some other authority at the State or county level to retain private counsel for debt collection purposes, including litigation, with payment to be made from dollars recovered or is legislation needed?"

For the reasons stated below, we conclude as follows:

1. Under certain limited circumstances, the Secretary of Budget and Fiscal Planning and the Attorney General may hire private lawyers on a case-by-case basis to represent the State in debt collection actions. However, no statute currently authorizes the retention of private lawyers to represent the State in any broad category of debt collection actions.

2. If the Secretary contracts with a private lawyer for debt collection work, the Secretary may agree to pay a contingent fee. The Attorney General may do so only with the approval of the Board of Public Works.

3. With respect to county debts, each county has the current legal authority to engage private lawyers to collect debts owed to the county. Although a county probably may agree to pay a contingent fee, the matter is not altogether free from doubt.

I

Background

Your inquiry stems from the enactment in 1986 of federal legislation authorizing the Attorney General of the United States "to make contracts retaining private counsel to furnish legal services, including representation in negotiation, compromise, settlement, and litigation, in the case of any claim of indebtedness owed the United States." 31 U.S.C. §3718(b)(1)(A). *See* Debt Collection Amendments of 1986, Pub. L. No. 99-578, 100 Stat. 3305.

The purpose of the federal law is summarized as follows in the legislative history:

> Experience has shown that many debtors will not pay their debts unless threatened with litigation, and that some will not pay unless they are actually sued. However, because of the lack of resources in the Department of Justice to litigate these cases, debtors know that failure to pay on the debts will probably go unaddressed, and that ultimately the applicable statute of limitations will forever bar recovery of their debts.
>
> [The bill] is designed to address this problem. In order to make the threat of litigation for non-payment of debts to the Government a real one, and thus to provide adequate incentives to pay these debts, the Attorney General would be authorized under [the bill] to enter into contracts with private attorneys for the performance of legal services for the United States for the collection of these debts. This grant of authority should not only lead to more debts being paid as a result of litigation, but should also lead to the earlier payment of debts because of the threat of litigation.

H.R. Rep. No. 99-909, 99th Cong. 2d Sess. 4, *reprinted in* 1986 U.S. Code Cong. & Adm. News 5606.

The federal statute contains various provisions intended to assure that the Attorney General retains control over these private lawyers. 31 U.S.C. §3718(b)(5). For example, the Attorney General may terminate the representation "for the convenience of the Government" and is to receive monthly reports from each private lawyer retained under this program. 31 U.S.C. §3718(b)(5)(A) and (C). The statute expressly excludes debts resulting from tax obligations. 31 U.S.C. §3718(f).

II

Employment of Private Lawyers by the State

A. *General Authority*

The Attorney General of Maryland, with the approval of the Governor, has limited power to employ "assistant counsel." Section 6-105(b) of the State Government Article ("SG" Article) provides as follows:

> (1) In addition to any other staff appointed under this section, the Attorney General, with the written approval of the Governor, may employ any assistant counsel that the Attorney General considers necessary to carry out any duty of the office in an extraordinary or unforeseen case or in special county work.
>
> (2) The Attorney General shall submit to the Governor a written request that:
>
> (i) States the necessity of and each reason for the special employment; and
>
> (ii) States the proposed compensation and its source or certifies that the Attorney General cannot ascertain in advance the proper compensation.
>
> (3) Compensation that cannot be ascertained in advance may be agreed on or adjusted later.

This subsection is not limited as to the subject matter of a "case," so it could apply to debt collection work. However, the provision is limited to "an extraordinary or unforeseen case," which rules out the Attorney General's employing of private lawyers for routine debt collection activities.

B. Tax Collection

With respect to taxes, §13-816(a) of the Tax-General Article ("TG" Article) provides that "the Governor, tax collector, or Treasurer shall ask a qualified attorney who is a regular salaried employee of the Comptroller or the Attorney General to bring an action against the person responsible to pay the tax ...."[1] Similarly, TG §14-865(a)(1) provides that "if a tax under this article is not paid when due to the State, the Governor, the Comptroller, or the Treasurer shall request the Attorney General to institute an action against the person responsible for the taxes." While these provisions do not vitiate the Attorney General's separate authority to retain a private lawyer in an "extraordinary or unforeseen case," they do imply that employment of private lawyers to collect delinquent taxes is not generally authorized.

C. Debt Collection

The Central Collection Unit in the Department of Budget and Fiscal Planning ("CCU") is "responsible for the collection of each delinquent account or other debt that is owed to the State or any of its officials or units." §3-302(a)(1) of the State Finance and Procurement Article ("SF" Article). *See generally* 71 *Opinions of the Attorney General* 128 (1986).[2] The Attorney General has assigned several

---

[1] A "tax collector" is the official or agency responsible for collecting a tax, including the Comptroller and the Department of Assessments and Taxation. TG §13-101(c).

[2] CCU is not responsible for the collection of delinquent taxes or other specific debts listed in SF §3-302(b).

The General Assembly recently enacted House Bill 124, "Worker's Compensation - Uninsured Employers' Fund - Collection of Debts." If signed into law, this provision generally would require the Fund to use CCU to collect its debts. However, under certain conditions, the Fund "may employ any person who shall be (continued...)

assistant attorneys general to represent CCU in its debt collection activities. *See* SF §3-206(b) and (c).

SF §3-206(e) provides specific authority to the Secretary of Budget and Fiscal Planning to engage private lawyers for debt collection: "The Secretary may contract with another attorney [i.e., not an assistant attorney general] to handle on an agreed case-by-case basis a collection for the Central Collection Unit if it is not feasible for any of the assistant attorneys general assigned to the unit to handle the collection."

This provision contains two significant limitations. First, representation by this office must be found to be "not feasible." Second, the outside representation is to be on a "case-by-case basis"; assigning debt collection responsibility for an entire category of cases to private lawyers is not permitted.[3]

D. Contingent Fees

A contingent fee arrangement usually empowers the plaintiff's attorney to retain a specified percentage of the amount recovered, if any. *E.g., Old Equity Life Ins. Co. v. Barnard*, 171 S.E.2d 636 (Ga. App. 1969). The plaintiff, in effect, contracts away a share of the claimed sum in exchange for the attorney's services.

A debt to the State is a species of State property, a chose in action. 62 *Opinions of the Attorney General* 743, 745 (1977); 45 *Opinions of the Attorney General* 107 (1960). If a State official were to contract to pay a portion of that debt to a private lawyer, arguably the official would be "dispos[ing] of" property within the meaning of SF §10-

---

[2](...continued)
responsible for the collection of" debts to the Fund. Article 101, §91(b)(1)(iii) of the Maryland Code. If House Bill 124 is signed into law, the Uninsured Employer's Fund also will be empowered to pay contingent fees. Article 101, §91(b)(3)(iii)4.

[3] As we understand it, the Secretary occasionally has contracted directly with private lawyers to enforce judgments out-of-state. In addition, a debt collection agency, under contract to CCU, has hired out-of-state lawyers to seek enforcement of judgments. The agency itself charges a contingent fee, which is higher if it needs to use a lawyer.

305(a), which gives that power to the Board of Public Works.[4] "This provision extends to all interests in real and personal property of the State, including choses in action and other intangible property ...." 64 *Opinions of the Attorney General* 118, 122 (1979).

However, in 72 *Opinions of the Attorney General* 103 (1987) , we concluded that SF §10-305(a) does not apply to the settlement or abatement of those debts that are within the collection authority of CCU. CCU has express power to "settle [a] debt or claim." SF §3-304(a)(2). If a State agency claims that it is owed $10,000, for example, CCU has the authority to settle the claim for, say, $7,000, if the settlement is in the State's best interest. In light of its statutory authority, CCU need not obtain the approval of the Board of Public Works when it reaches such a settlement.

As we pointed out above, the Secretary has power, within certain limitations, to contract with a private lawyer to collect debts for CCU. SF §3-206(c). In our view, this provision implicitly authorizes the Secretary to agree to reasonable contractual terms related to debt collection. *See* 71 *Opinions of the Attorney General* 274, 277 (1986). The Secretary's agreeing to compensate the lawyer by a percentage of the recovery on the debt reflects a commercially reasonable - indeed, commonplace - practice when one engages legal services for debt collection. That a contingent fee results in the State's obtaining less than 100 cents on the dollar is no different in principle than CCU's settling a claim for a partial recovery. Presumably, the Secretary would engage an attorney for a contingent fee only in cases in which the State otherwise would not pursue the claim and therefore would recover nothing.

Whether the Attorney General has comparable authority under SG §6-105(b) is more doubtful. The portions of this subsection that deal with compensation contemplate that the amount of an outside lawyer's fee ordinarily is to be fixed in advance. SG §6-105(b)(2)(ii). A typical contract would agree to pay the lawyer a specified sum per hour. "Compensation that cannot be ascertained in advance," however, "may be agreed on or adjusted later." SG §6-105(b)(3). No specific mention is made of contingent fees, which leave the dollar amount uncertain

---

[4] SF §10-305(a)(1) provides that "[a]ny ... personal property of the State or a unit of the State government may be ... granted ... to any person ... for a consideration the Board decides is adequate."

although they entail a specific contractual agreement that the State will accept some percentage less than the full amount of its recovery.

This provision falls short of providing sufficient authority for the Attorney General to contract away a portion of property asserted to belong to the State. Under current law, we conclude, a contract between the Attorney General and a private lawyer for a contingent fee will have to be approved by the Board of Public Works under SF §10-305(a).

III

Employment of Private Lawyers By Counties

A. General Authority

In our view, all counties have current authority to engage private lawyers to collect debts. Under Article 25, §1, "The county commissioners of each county ... shall have full power to appoint ... all other officers, agents and servants required for county purpose[s] not otherwise provided for by law ...." Moreover, the commissioners "shall have charge of and control over the property owned by the county ...." *Id.*

A court would construe this grant of authority, we believe, as sufficient to authorize the county commissioners to take reasonable steps to obtain the form of property represented by the debt to the county. In *Gaver v. Frederick County*, 175 Md. 639, 648, 3 A.2d 463 (1939), the Court of Appeals examined the implied power of a county to effectuate a specific grant of power:

> When therefore the Board [of County Commissioners] was charged with the duty of issuing building permits, it was necessarily given at the same time power to employ such servants and agents as might be needed to perform that duty, and to pay to such persons reasonable compensation for services rendered by them. As a corporation the Board can only act through agents and servants. Since it is a governmental agency created to administer the county

> government, it is given the power to employ such agents and servants as it may need to perform that duty, and by necessary implication it is given the power to levy taxes to pay the persons so employed, and, where their compensation is not fixed by statute, it is authorized to allow and pay to them reasonable compensation for their services.

See generally B.F. Smith Fireproof Construction Co. v. Munroe, 97 Md. 370, 55 A. 315 (1903).

Charter home rule counties, in addition, have been vested with broad police power. They may enact "such ordinances as may be deemed expedient in maintaining the peace, good government, health and welfare of the county." Article 25A, §5(S). Acting under this grant of authority, a charter home rule county may by ordinance authorize the hiring of private lawyers to collect the county's debts and arrange appropriate compensation for those lawyers. Our construction in this regard is consistent with the general rule for municipalities: "[U]nless prohibited by statute or charter, a municipal corporation may, with the consent of the corporation counsel, employ other attorneys and counsel to conduct or assist in court proceedings to which it is a party or in which it is interested." 17 McQuillan, *Municipal Corporations* §49.33, at 218 (3d ed. 1982). *See, e.g., Pima County v. Grossetta*, 97 P.2d 538, 542 (Ariz. 1939). *See also* 10 McQuillan §29.11, at 241-42.[5]

County authority to engage private lawyers for the collection of delinquent taxes is separately found in the Maryland Code. Under §14-865(a)(2) of the Tax-Property Article, "if a tax under this article is not paid when due to a county or municipal corporation, the collector shall request the attorney for the county or municipal corporation to institute an action against the person responsible for the tax." As discussed above, "the attorney for the county" could be one specially engaged for this purpose.

---

[5] We do not address the respective roles of a county attorney and specially hired counsel, where the former is generally empowered under local law to handle the legal affairs of the county. *See generally* 10 McQuillan §29.12, at 244-45.

B. Contingent Fees

The potential use of contingent fee arrangements poses a special problem, however. On the one hand, counties have broad power to fix the compensation of persons whom they hire. Article 25, §3(e); Article 25A, §5(S); *Gaver v. Frederick County*, 175 Md. at 648. Several out-of-state cases sustain the power of a local jurisdiction to enter a contingent fee arrangement with a lawyer. *State ex rel. Bermudez v. Heath*, 20 La. Ann. 172 (La. 1868); *City of Louisville v. Chambers*, So.2d 711 (Miss. 1941); *Town of Mannford v. Watson*, 394 P.2d 506, 509-10 (Okla. 1964); *Waterbury & Co. v. City of Laredo*, 60 Tex. 519, 522 (1883).

On the other hand, at least one old case has rejected the concept of contracting away a portion of a future recovery. In *County of Chester v. Barber*, 97 Pa. 455 (1881), the Pennsylvania Supreme Court found "against public policy, and therefore null and void," a contingent fee arrangement under which the county's lawyers would receive 50 percent of any recovery of tax funds allegedly overpaid to the state:

> These Commissioners were acting in a fiduciary capacity. They were but trustees of the money, when received, for the use of the county. When therefore they contracted to give one-half of it to the [lawyers] for their services, they exceed their power. They were giving what did not belong to them.

97 Pa. at 464.[6]

Although we suppose that Maryland courts would more likely than not approve a county's authority to enter a reasonable contingent fee arrangement, we recommend that any legislation on this subject specifically address contingent fees, as the federal legislation does. *See* 31 U.S.C. §3718(d).

---

[6] The court rejected outright the size of the contingent fee; it is not clear whether it also rejected the concept of *any* contingent fee for funds claimed by a government entity.

IV

Policy Considerations

As the discussion in Part II above suggests, legislation is necessary if the State is to be represented by private lawyers in broad categories of debt collection cases. In the consideration of any such legislation, we urge that careful attention be given to the serious policy questions that private representation entails.

Persons who owe money to the State of course ought to pay it; they are entitled to no special consideration simply because the State is their creditor. Nevertheless, in our view, the State has an obligation to conform its own conduct to the highest standards of fairness and probity. Worse even than the State's inability to collect some of its debts would be the loss to its reputation if its representatives engaged in overreaching or sharp practices.

When Congress authorized the Attorney General of the United States to contract with private counsel for debt collection activities, it enabled the Attorney General to retain control over the representation, presumably to assure proper standards. 31 U.S.C. §3718(b)(5). Any State legislation should contain similar safeguards.

V

Conclusion

In summary, it is our opinion that:

1. Under certain limited circumstances, the Secretary of Budget and Fiscal Planning and the Attorney General may hire private lawyers on a case-by-case basis to represent the State in debt collection actions. However, no statute currently authorizes the retention of private lawyers to represent the State in any broad category of debt collection actions.

2. If the Secretary contracts with a private lawyer for debt collection work, the Secretary may agree to pay a contingent fee. The Attorney General may do so only with the approval of the Board of Public Works.

3. With respect to county debts, each county has the current legal authority to engage private lawyers to collect debts owed to the county. Although a county probably may agree to pay a contingent fee, the matter is not altogether free from doubt.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

EDUCATION

University of Maryland - Student Discipline - University May Discipline A Student For Off-Campus Misconduct Detrimental To University Interests, Subject To Constitutional Limits

January 23, 1989

The Honorable Arthur Dorman
The Honorable Timothy F. Maloney
The Honorable Pauline H. Menes
The Honorable James C. Rosapepe
21st District Delegation
Maryland General Assembly

You have requested our opinion concerning the authority of the University of Maryland College Park to discipline its students for misconduct that occurs off the grounds of the campus. You have also inquired about any constitutional constraints on the General Assembly's or the University's exercise of such authority.

In your inquiry, you relate that "the College Park community has been plagued by problems with student vandalism, disorderly conduct, use of fraudulent identification and other unlawful activity" and that this misconduct is usually associated with the presence of "[m]any student residences and fraternity houses ... located off-campus."

As we understand it, the University of Maryland College Park has assumed no authority - nor, correlatively, risked any potential legal liability - over the off-campus, private conduct of individual students or student organizations (including fraternities and sororities). Rather, the University's policy is that jurisdiction over private conduct and activities occurring off-campus should reside in the criminal and civil justice system.[1]

---

[1] The type of misconduct that you have illustrated might be subject to criminal prosecution by local law enforcement authorities. It might also serve as grounds for civil liability if a victim were to bring a common law tort action. In a letter of advice dated December 3, 1987 to Delegate Menes, Assistant Attorney General James J. Mingle, Chief Counsel for Educational Affairs, described the basis and manner in (continued...)

For the reasons stated below, we conclude that a State university or college may discipline a student for off-campus misconduct detrimental to the interests of the institution, subject to the fundamental constitutional safeguards that apply to all disciplinary actions by educational officials.

I

Background

The University of Maryland College Park's student disciplinary rules, set forth in the UMCP Code of Student Conduct, were approved by the Board of Regents pursuant to its statutory authority to provide for the discipline, suspension, expulsion, or reinstatement of any student. *See* former §13-104(d) of the Education Article ("ED" Article).[2] The Student Code begins with the following general

---

[1](...continued)
which the University of Maryland College Park regulates the activities of fraternities and sororities, many of which are housed off campus. Your present inquiry focuses on off-campus misconduct of individual students. So, we perceive no need to reiterate here campus rules governing student organizations, other than to acknowledge that the University's present policy position appears to be based, in part, upon the concern that increased control over the activities of off-campus student organizations could conceivably increase the risk of third-party tort liability.

[2] This citation is to the Code section in effect at the time that UMCP's Code of Student Conduct was approved. The Education Article has since been extensively revised as a result of the General Assembly's enactment of Chapter 246 (Senate Bill 459), Laws of Maryland 1988. Nevertheless, the current statutory authority of the Board of Regents for the University of Maryland System is similar. ED §12-106(d) states:

> In consultation with the Chancellor and the presidents, the Board may adopt policies providing for:
>
> (1) The discipline, suspension, expulsion, or reinstatement of any student; and
>
> (2) The recognition and conduct of student organizations and athletic programs and activities.

Furthermore, the transition provisions of the recently enacted law provide that "... all rules and regulations ... guidelines, policies ... associated with the [former] Board of Regents ... shall continue in effect under the [new] Board of Regents ... until completed, withdrawn, cancelled, modified, or otherwise changed pursuant to law."

(continued...)

description of the University's "inherent authority": "The University reserves the right to take necessary and appropriate action to protect the safety and well-being of the campus community." Student Code ¶4. The Student Code also sets forth specific types of misconduct that are subject to disciplinary action, potential sanctions for violation of the disciplinary regulations, and guidelines for disciplinary proceedings. Student groups and organizations, as well as individual students, may be charged with violations of the Student Code.

The Code's provisions are to "be read broadly and are not designed to define misconduct in exhaustive terms." Student Code ¶3. Nevertheless, the current Student Code does not expressly authorize the University to discipline students for off-campus misconduct.[3]

II

Authority to Discipline Off-Campus Misconduct

The United States Supreme Court has repeatedly recognized that a state has comprehensive authority to prescribe and enforce standards of conduct in its public schools and universities, consistent with fundamental constitutional safeguards. *See Goss v. Lopez,* 419 U.S. 565, 574 (1975); *Healy v. James*, 408 U.S. 169, 180 (1972); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 507 (1969). In the school environment, the state's power is not limited to prohibiting lawless actions; it may also prohibit actions which "materially and substantially disrupt the work and discipline of the school." *Healy*, 408 U.S. at 189.

Many of the earlier student discipline cases were based on a theory that the college authority stood *in loco parentis* for the physical and moral welfare and mental training of the pupils. The courts upheld public universities' disciplinary actions against students who engaged

[2](...continued)
Chapter 246, Section 14. Thus, the UMCP Code of Student Conduct continues in effect until changed by the new Board.

[3] If the University decided to change its policy and impose disciplinary sanctions for off-campus actions, consistent with the limitations described in Part III below, it should amend the Student Code in order to provide specifically for this new basis for discipline.

in immoral conduct off campus, often finding the student unfit for the profession for which he or she was studying.[4] This theory is now largely discredited. *See Bradshaw v. Rawlings*, 612 F.2d 135, 138-40 (3d Cir. 1979).

More recently, numerous lower federal courts have upheld the right of public universities to discipline students for off-campus misconduct that is detrimental to the interests of the university or to the welfare of its students. The reasoning behind this view of the universities' authority was well-stated by a United States District Court confronted with several major student discipline cases:

> In the field of discipline, scholastic and behavioral, an institution may establish any standards reasonably relevant to the lawful missions, processes, and functions of the institution....
>
> Standards so established may apply to student behavior on and off the campus when relevant to any lawful mission, process, or function of the institution. By such standards of student conduct the institution may prohibit any action or omission which impairs, interferes with, or obstructs the missions, processes and functions of the institution.

General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133, 145 (W.D. Mo. 1968) (en banc).[5] *See, e.g., Krasnow v. Virginia Polytechnic Institute and State University*,

---

[4] *See, e.g., Robinson v. University of Miami*, 100 So. 2d 442 (Fla. App. 1958) (student enrolled in program leading to a certificate to teach in secondary education dismissed for letter he wrote to a local newspaper dealing with the subject of atheism); *White v. Portia Law School*, 274 Mass. 162, 174 N.E. 187 (1931) (law school student boasted to classmates that she had used knowledge gained in the classroom to purchase goods with no intention of paying for them); *Tanton v. McKenney*, 226 Mich. 245, 197 N.W. 510 (1924) (female student in teachers' college dismissed for smoking cigarettes in public and other indiscretions).

[5] In this unusual order, the full District Court for the Eastern District of Missouri set out "a statement of judicial standards of procedure and substance" to achieve uniformity in the student discipline cases then pending in the court. 45 F.R.D. at 135.

414 F. Supp. 55, 56 (W.D. Va. 1976), *aff'd*, 551 F.2d 591 (4th Cir. 1977) ("students enrolled in state supported institutions acquire a contractual right for the period of enrollment to attend, subject to compliance with scholastic and behavioral rules of the institution, and to dismissal for violation thereof ...").

Several of the reported cases in which a student has challenged a university's right to impose discipline for off-campus misconduct have involved criminal misconduct. The institution's right to discipline such conduct has been upheld in all such cases, even if the university's rule were held invalid for other constitutional violations. For example, in *Krasnow v. Virginia Polytechnic Institute,* a student was placed on probation by a state court for unlawful possession of marijuana. The university then disciplined the student for violating a university rule prohibiting the "unlawful use or possession of drugs whether or not on university property." The Court of Appeals for the Fourth Circuit upheld the university's rule and disciplinary action, finding that "the university clearly has the prerogative to determine that any unlawful possession of drugs or criminal conduct on the part of students is detrimental to the university." 551 F.2d at 592.

The United States District Court for the District of Maryland also upheld the dismissal of a pharmacy student from the University of Maryland School of Pharmacy for drug-related offenses. *Sohmer v. Kinnard*, 535 F. Supp. 50 (D. Md. 1982). The University's disciplinary committee found that the student, while functioning as an extern, had been impaired by the improper use of two prescription drugs and had illegally possessed cocaine. He was dismissed pursuant to a University rule stating that students whose actions are judged to be detrimental to the interests of the University community may be required to withdraw. The court upheld the rule and the dismissal, finding that "the illegal use and possession of narcotic drugs would violate the law and the Code of Ethics of his profession and would therefore be detrimental to the interests of the University." 535 F. Supp. at 54. With respect to the University's interests, the court also noted that:

> The School [of Pharmacy's] reputation and its ability to place students in clinical externships would be seriously jeopardized if the Court intervened and prevented the School from disciplining a student who has admitted that he has used a narcotic drug without

> a prescription and that he has had cocaine in his possession.

535 F. Supp. at 53. *See also Paine v. Board of Regents of the University of Texas System*, 355 F. Supp. 199 (W.D. Tex. 1972), *aff'd per curiam* 474 F.2d 1397 (5th Cir. 1973) (commenting that regents may suspend or expel any student drug or narcotic offender who demonstrably poses a threat to other students, but finding this school regulation unconstitutional on other grounds); *Wallace v. Florida A & M University*, 433 So. 2d 600 (Fla. App. 1983) (upholding expulsion on ground that student was convicted of crime of intent to distribute cocaine, because student's conduct interfered with the operation of the university and also endangered the health and safety of other students and other members of the academic community).

Courts have also affirmed the authority of public universities to discipline students for types of criminal misconduct other than drug-related offenses. For example, one court upheld a public university's suspension based on a state court finding that the student was in criminal contempt of court. *Due v. Florida Agricultural and Mechanical University*, 233 F. Supp. 396 (N.D. Fla. 1963). In *Due*, the court also upheld the university's rule providing that disciplinary action will be taken against students for misconduct while on or off campus, including conviction by university officials, city, county or federal police for violation of civil or criminal laws. In *Cornette v. Aldridge*, 408 S.W.2d 935 (Tex. Civ. App. 1966), a state court upheld a student's suspension for reckless driving that occurred off campus but that also violated campus rules against "irresponsible behavior" on or off campus.

Courts have applied the same standard to uphold universities' disciplinary action for off-campus misconduct that violated university rules, even though the conduct was not criminal in nature. For example, in *Kusnir v. Leach,* 64 Pa. Cmwlth. 65, 439 A.2d 223 (1982), a student was suspended for crashing an off campus party, refusing to leave when requested to do so, and engaging in disruptive behavior in violation of the college's rules against behavior like assault, harassment, personal abuse, and trespass. The court upheld the suspension: "Obviously, a college has a vital interest in the character of its students, and may regard off-campus behavior as a reflection of a student's character and his fitness to be a member of the student body." 439 A.2d at 226. In *Esteban v. Central Missouri State College,* 415 F.2d 1077 (8th Cir. 1969), the suspensions of two students who participated in demonstrations on a public street adjacent to the college campus were upheld as violating a school rule prohibiting mass demonstrations. The Eighth Circuit agreed with "those courts which have held that a school has inherent authority to maintain order and to discipline students....[and] has latitude and discretion in its formulation of rules and regulations and of general standards of conduct." 415 F.2d at 1088 (citations omitted).[6]

In summary, the case law establishes that it is constitutionally permissible for a public college or university to impose disciplinary sanctions on students for misconduct that occurs off-campus. Any statute or university rule authorizing an institution to sanction such conduct, however, must limit disciplinary actions to misconduct that is detrimental to the institution's interests.

III

Constitutional Limitations on Disciplinary Action

An educational institution may discipline its students for prohibited conduct, whether it occurs on campus or off, "so long as there is no invidious discrimination, no deprival of due process, no abridgement of a right protected in the circumstances, and no capricious, clearly unreasonable or unlawful action employed ...." *General Order on Judicial Standards*, 45 F.R.D. at 141.[7]

Any disciplinary action by a public university must meet several basic constitutional requirements. First, the action must be based on existing rules or regulations that are reasonably clear, so that students

---

[6] In numerous other cases, student suspensions and expulsions for participation in protests and demonstrations have been challenged. Virtually all of those cases involve conduct that occurred on campus. *See* Annotation, 32 A.L.R.3d 864 (1970). Since those cases do not address a public institution's authority to discipline students for off campus misconduct, they are not directly applicable to your question.

[7] As the court pointed out: "It is not a lawful mission, process, or function of an institution to prohibit the exercise of a right guaranteed by the Constitution or a law of the United States to a member of the academic community in the circumstances. Therefore, such prohibitions are not reasonably relevant to any lawful mission, process or function of an institution." 45 F.R.D. at 145.

can understand the standards with which their conduct must comply and disciplinarians can enforce them fairly.[8] A rule that fails to meet this standard may be declared void for vagueness under the Fourteenth Amendment of the United States Constitution. *See Sword v. Fox*, 446 F.2d 1091 (4th Cir. 1971) (upholding regulation that "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices"); *Soglin v. Kauffman*, 418 F.2d 163 (7th Cir. 1969) (finding rule prohibiting "misconduct" unconstitutionally vague). A public institution's code of conduct must also comply with the constitutional doctrine of overbreadth in any area where it could affect First Amendment speech rights; in those instances, the rule must be narrowly tailored to serve a significant governmental interest. *Grayned v. Rockford*, 408 U.S. 104, 115 (1972).

A code of student conduct may not arbitrarily discriminate in the range and type of penalties or in the procedural safeguards afforded various classes of offenders. For example, in *Paine v. Board of Regents of the University of Texas System*, 355 F. Supp. 199 (W.D. Tex. 1972), *aff'd per curiam*, 474 F.2d 1397 (5th Cir. 1973), the court held that the university's practice of affording all students charged with violating university rules a full hearing, except students who were finally convicted of or placed on probation for a drug offense (who were automatically suspended), violated the Equal Protection Clause of the Fourteenth Amendment. Thus, a public university should follow the same procedures and consider the same penalties for disciplining students for off-campus misconduct as for similar on-campus misconduct. In addition, a university's disciplinary action must meet the constitutional requirements for due process under the Fourteenth Amendment, including notice to the student and an opportunity to be heard that is appropriate to the nature of the case. *See, e.g., Goss v. Lopez*, 419 U.S. 565 (1975); *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961).

Finally, disciplinary action for student conduct may not violate specific guarantees of the Bill of Rights of the United States Constitution as made applicable to state institutions by the Fourteenth

---

[8] Many institutions have created written codes of conduct for student behavior, as the University of Maryland College Park has, to insure that students receive sufficient notice of expected behavior.

Amendment. This limitation has been tested most frequently in cases where students contend that a university rule, or the application of a rule, violates the free speech and press clauses of the First Amendment. University rules relating to speech activities may place reasonable limits on the time, place, and manner of protected speech, but not on its content. *See, e.g., Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973); *Healy v. James*, 408 U.S. 169 (1972).

IV

Conclusion

The cases we have reviewed are revealing in several respects. They not only provide ample authority for public universities to regulate off-campus student misconduct - and illustrate the types of misbehavior that have been construed as being "detrimental" to the university's interests (e.g., drug offenses, assault, harassing and disruptive conduct) - but also stipulate the constitutional safeguards that must be afforded. We emphasize, however, that it is a policy judgment for the Board of Regents or the General Assembly whether UMCP or other institutions within the University of Maryland System should be obligated to monitor and discipline off-campus student misconduct or whether the University should continue to defer to the conventional criminal and civil processes. Moreover, should such authority be expanded, discretion should be reserved to campus officials to determine whether specific instances of off-campus misconduct are deemed detrimental to the University's interests so as to warrant disciplinary action, in addition to or in lieu of criminal proceedings.[9]

---

[9] The Double Jeopardy Clause of the United States Constitution does not protect students from being subjected to both criminal prosecution and a civil disciplinary proceeding. *See e.g., General Order on Judicial Standards*, 45 F.R.D. 133, 142 (W.D. Mo. 1968); *Paine v. Board of Regents of University of Texas System*, 355 F.Supp. 199, 203 (W.D. Tex. 1972), *aff'd*, 474 F.2d 1397 (5th Cir. 1973). A university may proceed with a disciplinary hearing before the criminal charges are resolved. *See Wimmer v. Lehman*, 705 F.2d 1402, 1406-07 (4th Cir. 1983). Due process requires that a student facing related criminal charges be allowed counsel at the disciplinary hearing for the limited purpose of advice and consultation, but not necessarily to examine or cross-examine witnesses. 705 F.2d at 1404-05. The student may also be entitled to assert the Fifth Amendment privilege against self-incrimination to exclude his testimony from a subsequent criminal proceeding if the student is *required* to testify at the disciplinary hearing or if his refusal to testify may

(continued...)

In summary, it is our opinion that a State college or university may discipline a student for off-campus conduct that impairs the interests of the institution, so long as the student is afforded sufficient procedural protections, is not subject to arbitrary discrimination, and is not disciplined for the exercise of a protected constitutional right.

J. Joseph Curran, Jr.
Attorney General

Caroline E. Emerson
Staff Attorney

Jack Schwartz
Chief Counsel
Opinions & Advice

---

[9](...continued)
be used against him. *See e.g.*, *Hart v. Ferris State College*, 557 F.Supp. 1379, 1384-85 (W.D. Mich. 1983); *Furutani v. Ewigleben*, 297 F.Supp. 1163, 1165 (N.D. Cal. 1969).

GAMING

Casino Nights - Financial Benefit - Organizations Conducting Casino Nights In Prince George's County May Not Use Gambling Proceeds To Pay Salaries Of Officers Or Directors

June 8, 1989

Michael P. Whalen, Esquire
County Attorney
Prince George's County Government

You have requested an opinion on whether an organization that conducts casino nights in Prince George's County may use part of the proceeds of those events to pay salaries or stipends to the organization's officers or directors. For the reasons given below, we conclude that this use of casino night proceeds is not permitted by Article 27, §§255 and 258B and, thus, that an organization paying salaries or stipends from those proceeds would be engaged in illegal gambling.

I

Background

Article 27, §255(b)(1) authorizes various kinds of service or charitable organizations in Prince George's County and 17 other counties to conduct gambling "if no individual or group of individuals benefits financially from the holding of any [gambling activities] or receives or is paid any of the proceeds ... for personal use or benefit." Similarly, §258B(a) authorizes described kinds of organizations to conduct benefit performances "the net proceeds of which ... shall inure to [the sponsoring] group ... for the promotion of and to be used for one or more [enumerated purposes], and not for the private gain of any member," at which prizes may be awarded by chance.[1]

The organization that prompted your inquiry is eligible to conduct casino nights. It pays salaries to its officers and an annual stipend to each member of its board of directors. Those persons are responsible for the administration of the organization and for disbursing the funds for its charitable programs, but they do not participate directly in the operation of its casino nights. The organization presently does not use any proceeds of its casino nights to pay those individuals' salaries or stipends; however, it has asserted that State law would not prevent its doing so.

II

Analysis

Maryland's gaming laws broadly prohibit all forms of gambling conducted by private persons or groups, except as certain gambling activities may be expressly authorized. The General Assembly has mandated that "[t]he courts shall construe the [statutes] relating to gambling and betting liberally, so as to prevent the mischiefs intended to be provided against." Article 27, §246. *See also Gaither v. Cate*, 156 Md. 254, 258-59 (1929) (rule should be applied to all gambling statutes, whether enacted before or after §246). Accordingly, the limitations in statutes that authorize some gambling must be strictly adhered to, if those authorizations are not to operate in contravention of the basic legislative purpose of suppressing gambling. *See Edward R. Marks Music Corp. v. Colorado Magnetics, Inc.*, 497 F.2d 285, 288 (10th Cir. 1974), *cert. denied,* 419 U.S. 1120 (1975) (statutes granting

---

[1] Article 27, §258B(a) further requires an organization that wishes to conduct a benefit performance to obtain a permit from the county, and §258B(c) authorizes the county governing body to "restrict or prohibit the issuance of" permits for casino nights, defined as benefit performances "at which card games, wheels of fortune or roulette are played and prizes are awarded." Pursuant to that authorization, the county council has adopted §§5-118.1 through 5-118.13 of the county code. §5-118.2 reiterates the substance of the "private gain" prohibition in Article 27, §258B(a), and §5-118.8 requires persons who work at casino nights to submit affidavits that they are "not working for any salary from the organization or private gain from the net proceeds ...."

exceptions to clearly articulated public policy should be construed narrowly).

In 73 *Opinions of the Attorney General* 152, 154-55 (1988), we noted that, because the extension of §255 to Prince George's County and the enactment of §258B occurred in the same session of the General Assembly and those statutes deal with the same subject, they must be construed together to ascertain and effectuate the legislative intent regarding permitted gambling activities in Prince George's County.[2] Because the General Assembly has not acted in any way that would evidence a contrary intent, we continue to believe that our view of the relationship between §§255 and 258B is correct. *See Twinbrook Swimming Pool Corp. v. Comptroller of the Treasury*, 274 Md. 88, 94-95, 333 A.2d 49 (1975) (legislative acquiescence in Attorney General's interpretation).

Both statutes are exemptions from the general statutes that broadly prohibit all gambling. *E.g.*, §240. But they are limited exemptions they do not authorize any and all gambling activities that may be conducted by an eligible organization. *See State v. 149 Slot Machines*, 310 Md. 356, 365, 529 A.2d 812 (1987). Any gambling activity not conducted in accordance with the limitations falls outside the scope of the exemption and is therefore prohibited. *Cf. Founding Church of Scientology v. United States*, 412 F.2d 1197 (Ct. Cl. 1969), *cert. denied*, 397 U.S. 1009 (1970) (substantial import of limitation on tax exemption for charitable organizations cannot be ignored).

Under §258B, gambling is authorized only if the "net proceeds" are used by the organization for described public purposes "and not for the private gain of any member ...." The limitation on private benefits in §255(b)(1) is phrased more broadly: Gambling is within the scope of that provision only if no individual "benefits financially ... or receives or is paid any of the proceeds ...." In Opinion No. 88-016, at 3-4 (March 11, 1988) (unpublished), we concluded that §255(b)(1) does not

---

[2] The organization that prompted your inquiry has suggested that §255(b)(1) - but not §255(b)(2) or (3) - is a rule of construction that should be ignored in determining the meaning of §258B because the language of §258B is unambiguous. In *Kaczorowski v. City of Baltimore*, 309 Md. 505, 514-16, 525 A.2d 628 (1987), the Court of Appeals expressly rejected the proposition that any statute, whether or not ambiguous, can be read in isolation and without reference to its context, including other related statutes. *See also Carolina Freight Carriers v. Keane*, 311 Md. 335, 339, 534 A.2d 1337 (1988) ("We decline to enter the debate about ambiguity or to engage in an exchange of slogans.").

prohibit indirect financial benefit that is an unavoidable concomitant of the conduct of an organization's gambling activity, but does prohibit direct financial benefit that is not Hence, an organization's lease of space in a commercial facility for its tip jar would not be permitted because it would not be a necessary expense. Opinion No. 88-016 at 4.

By the same token, we believe that the payment of salaries or stipends to an organization's members would not be a permitted use of the organization's gambling proceeds. The gambling activities conducted under §258B(a) must be "managed and operated only by members of [the sponsoring] group or organization personally." *See also* §255(b)(3) (gambling activities must be managed by members of organizations personally). We think that the legislative intent was to ensure that no gambling would be conducted for purposes of personal profit, first, by prohibiting the payment of any "net proceeds" to members and, second, by requiring that the activity be managed and operated by the members - who could be expected to perform those services without compensation because of their desire to promote the objectives of the organization.

Thus, the reference to "net proceeds" in §258B(a) was intended to recognize that the conduct of a fundraising event may entail some expenditures and to authorize the organizations to pay those expenses out of the proceeds of the fundraisers. Notably, §258B is not solely an authorization for the conduct of gambling activities as such. Rather, it was enacted to permit organizations conducting a wide variety of "benefit performances" to award prizes as an adjunct of those performances. *See* Chapter 342, Laws of Maryland 1973 (enacting §258B). Thus, a concert or lecture at which a door prize is awarded would come under the governance of §258B(a). The General Assembly may have contemplated that the necessary expenses of that kind of benefit performance might include the payment of compensation to the performer or lecturer. But it is not likely to have been within the legislative contemplation that persons interested enough in an organization's goals to join the organization would require the added incentive of compensation be ore supporting its efforts to raise funds to further those goals.[3]

Moreover, the possibility of abuse if members of an organization, who determine whether to conduct fundraisers and how to use the proceeds, could receive personal financial benefit from the fundraisers would contravene the clear legislative intent to authorize only limited gambling for purposes beneficial to the public in general. Therefore, we think that §§255 and 258B were not intended to permit the use of gambling proceeds to pay salaries or stipends to members of the organizations that conduct the gambling activities.

Even were we to construe §258B(a) as authorizing the organizations to compensate their members for managing or operating casino nights, we do not believe that the particular officers and directors about whom you have inquired may be compensated from casino night proceeds. A somewhat analogous provision of the Internal Revenue Code exempts from income taxes charitable and similar organizations "no part of the net earnings of which inures to the benefit of any private shareholder or individual ...." 26 U.S.C. §501(c)(3). That provision "has been construed to permit an organization to incur ordinary and necessary expenditures in the course of its operations without losing its tax-exempt status." *Founding Church of Scientology*, 12 F.2d at 1200. Therefore, an organization may pay salaries to individuals without losing its tax-exempt status, so long as the salaries are reasonable in relation to the services rendered to the organization by those persons. *Bubbling Well Church of Universal Love v. Commissioner of Internal Revenue*, 670 F.2d 104, 105-06 (9th Cir. 1981). Excessive salaries, however, constitute the inurement of net earnings to private benefit. *Church By Mail, Inc. v. Commissioner of Internal Revenue* 765 F.2d 1387, 1392 (9th Cir. 1985).

While 26 U.S.C. §501(c)(3) is concerned with the overall operations of tax-exempt organizations and the uses that they make of all of their net earnings, regardless of source, §258B(a) is concerned

---

[3] We do not mean to suggest, of course, that it is improper for an organization to compensate any of its members under any circumstances. Many organizations have members who also serve as full-time or part-time employees, and without whose services the organizations would be hard-pressed to continue functioning. Organizations are not prohibited from compensating those members; that compensation simply must be derived from sources other than gambling conducted under §255 or 258B.

only with the conduct of service and charitable organizations' fundraisers and the uses made of the net proceeds of those fundraisers. Hence, a construction of §258B(a) that would allow the payment of salaries to members out of the proceeds of fundraisers must be limited to the payment of salaries that can be regarded as reasonable and necessary expenses of the fundraisers.

Put another way, any salary that is not simply reasonable compensation for work done in managing or operating a fundraiser is not a necessary expense of the fundraiser. Therefore, the payment of that salary would be a payment of part of the fundraiser's net proceeds the proceeds remaining after reasonable and necessary expenses have been paid. You have specifically advised us that the officers and directors about whom you inquire do not participate in the casino nights. Accordingly, their compensation cannot be regarded as expenses of the operation of the casino nights and, if paid out of the proceeds of those events, would necessarily be paid out of the net proceeds. We think that §258B prohibits any inurement of the net proceeds of a fundraiser to members of the sponsoring organization.[4]

III

Conclusion

In summary, it is our opinion that, under Article 27, §255(b)(1) and 258(B)(a), organizations that conduct casino nights in Prince

---

[4] The organization about which you inquire suggests that a reasonable salary is not "private gain," relying on the language of §5-118.8 of the Prince George's County Code. *See* note 1. The organization suggests that this provision distinguishes between salary, which the organization characterizes as quid pro quo compensation for services rendered, and pecuniary benefit that is provided without any quid pro quo. In our view, the phrase "private gain" must be construed in its ordinary sense as a broad term denoting all forms of pecuniary increase to a private individual rather than the public at large. Thus, the term is not distinct from, but includes, salary. We note, for example, that federal courts considering whether net earnings of a tax-exempt organization inured to the benefit of a private individual have considered the total compensation received by the individual, regardless of form. Those courts have not distinguished between salary and benefits and have not hesitated to conclude that the combination may constitute inurement of net earnings even when the salary alone might not be unreasonable. *See e.g., Founding Church of Scientology*, 412 F.2d at 1200.

George's County are not permitted to use part of the proceeds of those events to pay salaries of stipends to the organizations' officers or directors. Accordingly, organizations that use casino night proceeds to pay members' salaries of stipends would be engaged in illegal gambling activities.

J. Joseph Curran, Jr.
Attorney General

C. J. Messerschmidt
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

HOUSING

Fair Housing Act - Handicap Discrimination - State Requirements Regarding Siting of Community Residences For Special Populations May Not Be Enforced As To Persons With Disabilities

August 7, 1989

John D. Stafford, M.D.
Deputy Secretary for Public Health Services
Department of Health and Mental Hygiene

Your predecessor, Dr. Mack Bonner, Jr., requested our opinion on whether certain requirements regarding the siting of State-funded community residences for special populations, contained in §2-104(b)(2) of the Health-General Article ("HG" Article), are enforceable in light of the recently enacted federal Fair Housing Amendments Act of 1988.

For the reasons given below, we conclude that enforcement of HG §2-104(b)(2), as it relates to individuals with disabilities, contravenes the federal law. Consequently, while the Maryland statute may be enforced as to special populations *not* comprising individuals with disabilities, it may not be enforced with respect to individuals with disabilities.

I

State Siting Restrictions

HG §2-104(b)(2), enacted as Chapter 768 (Senate Bill 591) of the Laws of Maryland 1988, became effective July 1, 1988. It authorizes the Department of Health and Mental Hygiene ("DHMH") to adopt regulations to govern the siting of State-funded community residences for special populations.[1] It requires these regulations to include certain area-wide distance or density limits and local government approval for residences for special populations serving 17 or more people.

Although "community residences" and "special populations" are not defined in the statute itself, the law refers to the State agencies that are covered by its provisions. These include DHMH, the Department of Housing and Community Development, the Department of Human Resources, and the Department of Juvenile Services.[2] The special populations served by these agencies include people with developmental disabilities, mental illness, drug addiction, and alcohol addiction; children receiving services funded by the Department of Juvenile Services; and people in certain residences funded by the Public Assistance to Adults program.[3]

Specifically, with regard to distance or density limits, HG §2-104(b)(2)(i) requires the adoption of regulations that:

1. Require a 4 percent limit on the number of people served in community residences in relation to the total population for the areas to be monitored;

---

[1] Chapter 768 is the product of a comprehensive study conducted by DHMH and set forth in *Planning for Community Residential Facilities* (April 1987) and guidelines developed as a result of that study, *Maryland's Proposed Site Selection Standards for Community Residences ["Proposed Standards"] and Executive Summary ["Summary"]* (1988). Although Bill 591 was a departmental bill, it was extensively amended en route to passage.

[2] The planning materials and guidelines cited in note 1 above, which formed the basis for Senate Bill 591, define "community residences" as: "Residences for special populations funded by the Addiction Services Administration, the Department of Housing and Community Development, the Developmental Disabilities Administration, the [former] Juvenile Services Agency, and the Mental Hygiene Administration, and by the Department of Human Resources' Public Assistance to Adults program."

[3] Regulations drafted but not issued by DHMH to implement the statute define "special populations" as follows: "A group composed of: (a) People with developmental disabilities; (b) People with mental illness; (c) People with drug addiction; (d) People with alcohol addiction; (e) Children receiving services funded by the Juvenile Services Agency; or (f) People in residences by the Public Assistance to Adults program." Draft COMAR 10.01.13.02B(9).

2. Require that the number of community residences in a building containing multifamily dwelling units may not exceed the greater of 10 percent of the units in the building, or 2 units;

3. Require that the number of community residences in single-family attached dwelling units on a section of a street between 2 intersecting streets, or between an intersecting street and a dead end, may not exceed 2 units with a minimum distance of 200 feet between the community residences; and

4. Limit the distance between single-family detached dwellings serving special populations in accordance with the general population.

In addition, HG §2-104(b)(2)(ii) requires that "[a]ny residences for special populations serving 17 or more people shall be subject to local government approval."

These provisions arose as a result of a finding by State planning agencies that Maryland did not then have a coordinated siting policy for community residential facilities and that it is in the State's interest to provide clients "with an opportunity to participate in normal societal interaction."[4] Guidelines developed in response to this study stated that:

> The State of Maryland is committed to helping special populations receive decent, appropriate housing and related services in community settings. These site selection standards should not be construed as an attempt on the part of the State to restrict access to housing by special populations, or to allow communities to discriminate against special populations who need housing. Instead, these site selection standards are instituted to direct providers

---

[4] *Summary* at I-3.

> of housing services in establishing and maintaining normal community residential settings for special populations.[5]

Thus, Chapter 768 reflects a well-intentioned plan to increase housing opportunities for special populations.[6]

II

Fair Housing Amendments Act

A. *Introduction*

After the enactment of HG §2-104(b)(2), Congress passed the Fair Housing Amendments Act, which became effective on March 12, 1989. Pub. L. No. 100-430, 102 Stat. 1619 (1988), codified at 42 U.S.C. §3601 *et seq.* The Act extends to people with disabilities the broad remedial provisions of the 1968 Fair Housing Act, which prohibits discrimination on the bases of race, color, religion, national origin and sex in both public and private housing.

---

[5] *Proposed Standards* at 1-2. *See also* Preamble to Chapter 768.

[6] At least one state that has a statutory scheme regulating the spacing of community residences treats different groups of residents differently. The Colorado spacing statute regulates the distance between group homes for persons with mental illness, but it states no spacing requirement controlling the siting of group homes for individuals *with* developmental disabilities. *Compare* Colo. Rev. Stat. §30-28-115(2)(a) and §31-23-303(2)(a) (policy on group homes for developmentally disabled persons) *with* §30-28-115(2)(b.5) and §31-23-303(2)(b.5) (policy on group homes for persons with mental illness). Colorado's statutory policy on siting of group homes for individuals with developmental disabilities is discussed and applied in *Roundup Foundation, Inc. v. Board of Adjustment*, 626 P.2d 1154 (Colo. App. 1980) and *Adams County ARC, Inc. v. City of Westminister*, 196 Colo. 79, 580 P.2d 1246 (1978).

The states of Delaware and Arizona have statutory prohibitions on the establishment of new community residences serving persons with disabilities within a certain distance of an existing community residence. Del. Code Ann. Title 9 §4923 (5000 foot spacing requirement); Ariz. Rev. Stat. Ann. §36-582(h)-(k) (1,200 foot spacing requirement; applies only to facilities licensed, operated, supported, or supervised by the department). In Connecticut no community residence can be established within 1,000 feet of any other such residence without approval of the appropriate zoning authority. Conn. Gen. Stat. Ann. §8-3f.

The Act generally prohibits discriminatory practices against individuals with any "handicap." The term "handicap" is defined very broadly to mean "with respect to a person - (1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment ...." 42 U.S.C. §3602(h).[7]

The Act's purposes include ending segregation of the housing available to people with disabilities and giving people with disabilities the right to choose where they wish to live. Given the specific provisions of the federal statute and its legislative history, we have concluded that the requirements of HG §2-104(b)(2) cannot be applied to individuals with disabilities in a manner consistent with the subsequently enacted federal legislation.

B. Purpose of Fair Housing Amendments Act

42 U.S.C. §3604(f)(1) makes it unlawful for any individual or government:

> To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of -
>
> (A) that buyer or renter;

---

[7] The definition of "handicap" parallels the scope of the comparable term used in Section 504 of the Rehabilitation Act of 1973, Pub.L. 93-112, 87 Stat. 355, 29 U.S.C. §§701-794, as amended by the Civil Rights Restoration Act of 1988, 29 U.S.C. §706. *See* Preamble to HUD's final regulations, 52 Fed. Reg. 3245 (January 23, 1989) (stating intention that the definition of "handicap" be interpreted in the same manner as the definition of "handicap" in Section 504 regulations).

The Fair Housing Amendments Act does not protect people who currently engage in unlawful use of controlled substances, 42 U.S.C. §3602(h)(3), 24 C.F.R. §100.201(a)(2), but does protect individuals in a treatment program for drug abuse. Further, the Act permits exclusion of persons whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others. 42 U.S.C. §3604(f)(8), 24 C.F.R. §100.202(d). However, the law does not permit inquiries about possible violent behavior of people with mental disabilities unless "these inquiries are made of all applicants, whether or not they have handicaps." 24 C.F.R. §100.202(c).

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that buyer or renter.

42 U.S.C. §3604(f)(2) further makes it unlawful for any individual or government to discriminate:

> Against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of -
>
> (A) that person; or
>
> (B) a person residing in or intending to reside in that dwelling after it is sold, rented, or made available; or
>
> (C) any person associated with that person.

Regulations adopted by the Department of Housing and Urban Development ("HUD") to implement the Fair Housing Amendments Act state that the Act's fundamental purpose is to prohibit practices that "restrict the choices" of people with disabilities to live where they wish or that "discourage or obstruct [those] choices in a community, neighborhood or development." 54 Fed. Reg. 3232, 3285 (January 23, 1989), 24 C.F.R. §100.70(a).

While the disability provisions, 42 U.S.C. §3604(f)(1) and (2), do not mention exclusionary zoning practices, case law interpreting the Fair Housing Act of 1968 and the legislative history of the Fair Housing Amendments Act make clear that the statute prohibitions apply to local government land-use decisions. In reference to 42 U.S.C. §3604(f)(2), set forth above, the House Committee on the Judiciary stated:

> This provision is intended to *prohibit* special restrictive covenants or other *terms or conditions*, or denials of service because of an individual's handicap

> and *which have the effect of excluding, for example, congregate living arrangements for persons with handicaps.*

H.R. Rep. No. 100-711, 100th Cong. 2d Sess. 23 (1988), *reprinted in* 1988 U.S. Code Cong. & Admn. News 2173, 2184 ("House Report") (emphasis added).[8] The Judiciary Committee went on to describe as follows the applicability of both the above-cited provisions:

> These new subsections would also apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps. While State and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. This has been accomplished by such means as the enactment or imposition of health, safety or land-use requirements or congregate living arrangements among non-related persons with disabilities. Since these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discriminating against persons with disabilities.
>
> The Committee intends that the prohibition against discrimination against those with handicaps *apply to zoning decisions and practices. The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community....*
>
> Another method of making housing unavailable to people with disabilities has been the application or

---

[8] For additional legislative history and remarks of sponsors, *see* 134 Cong. Rec. 10552, 10556 (daily ed. August 2, 1988).

> enforcement of otherwise neutral rules and regulations on health, safety and land-use in a manner which discriminates against people with disabilities.

House Report at 24 (emphasis added).

C. Application of Federal Act to HG §2-104(b)(2)

In analyzing the impact of the Fair Housing Amendments Act and its legislative history on HG §2-104(b)(2), we must consider whether the dispersion requirements (specifying the distance required between community residences) and the concentration limitations (restrictions on the number of community residences per building, block, or area) of the State statute have the effect of making dwellings of choice unavailable to people with disabilities and therefore violate federal law.[9] The Fair Housing Amendments Act prohibits practices with discriminatory effects, not solely intentional acts of discrimination.[10] Thus, even if HG §2-104(b)(2) or the proposed implementing regulations were neutral on their face, if they have the effect of limiting housing opportunities for people with disabilities, they might nevertheless contravene the federal act.[11]

---

[9] Under 42 U.S.C. §3603(a)(2), the provisions against discrimination apply to "all dwellings," with certain exceptions not relevant here. Nothing in the Fair Housing Act suggests that an otherwise prohibited discriminatory practice is permissible because a housing program receives public funds. *See Smith v.. Town of Clarkton*, 682 F.2d 1055, 1068 (4th Cir. 1982).

[10] House Report at 24, 25. For a discussion of the use of the effects test under the Fair Housing Act, *see Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988), *review declined in part and judgment aff'd*, 109 S.Ct. 276 (1988); *Metropolitan Housing Development Corporation v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied* 434 U.S. 1025 (1978); *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

[11] HUD is responsible for enforcing the Fair Housing Amendments Act, with the exception of challenges to state or local zoning or other land-use law or ordinances that violate the federal act's provisions. This latter authority is under the jurisdiction of the Justice Department [42 U.S.C. §3610(g)(2)(c)], which, upon referral from HUD, is charged with the responsibility for taking appropriate action pursuant to 42 U.S.C. §3614(b)(1), i.e., enforcement of the Act in federal court. *See also* House Report at 36.

The majority of individuals who constitute the "special populations" to be regulated by HG §2-104(b)(2) have disabilities. These include virtually all individuals served by the Developmental Disabilities Administration and the Mental Hygiene Administration; many served by the Addiction Services Administration; and some served by the Department of Juvenile Services, the Department of Human Resources, and perhaps the Department of Housing and Community Development. Thus, the group of individuals and the zoning decisions or practices to which HG §2-104(b)(2) applies are in the main exactly those that the Fair Housing Amendments Act addresses. Of course, to the extent that the populations served by any of the above agencies - for example, the Department of Juvenile Services or the Department of Human Resources - do not consist of individuals with disabilities, enforcement of HG §2-104(b)(2) with respect to these populations would not implicate the Fair Housing Amendments Act.

We can identify the following specific problems if the State law were enforced with respect to persons with disabilities: HG §2-104(b)(2)(i)1, imposing a four percent limit on the number of people served in community residences in relation to the total population, would violate 42 U.S.C. §3604(f)(1), because enforcement of this provision would "make unavailable or deny" State-funded housing to people with disabilities once the four percent numerical quota on the number of people with disabilities who may live in any one neighborhood was filled. HG §2-104(b)(2)(i)2, which restricts the number of residences in a building so that they may not exceed the greater of ten percent of the units, or two units, would similarly violate 42 U.S.C. §3604(f)(1), in that it would "make unavailable or deny" to individuals with disabilities housing in a particular building, thereby obstructing them from living in the neighborhood of their choice, once that density quota was reached. The same reasoning applies to HG §2-104(b)(2)(i)3; its distance limitation, which prohibits residences for special populations from being within 200 feet of each other on the same block, would clearly "make unavailable or deny" certain housing opportunities to individuals with disabilities.

Both the concentration limitations and dispersion requirements in HG §2-104(b)(2) would also violate 42 U.S.C. §3604(f)(2), because they constitute "terms" or "conditions" that, to the extent they are applied to congregate living arrangements for individuals with disabilities, discriminate against these individuals if they limit their ability to live in the residence of their choice in the community. This is particularly the case where such requirements are not imposed on individuals without disabilities.

Final HUD regulations adopted pursuant to the Act also contain prohibitions that relate to the enforcement of HG §2-104(b)(2). The regulations prohibit:

> (1) Discouraging any person from ... purchasing or renting a dwelling because of ... handicap;
>
> (3) Communicating to any prospective purchaser that he or she would not be comfortable or compatible with existing residents of a community, neighborhood or development because of ... handicap;
>
> (4) Assigning any person to a particular section of a community, neighborhood or development ... because of ... handicap.

24 C.F.R. §100.70(c).

HG §2-104(b)(2), as it is intended to be enforced, would discourage persons with disabilities from residing in certain neighborhoods, in violation of this regulatory provision. It would also communicate to individuals that, on the basis of their disabilities, they would not be compatible with the existing make-up of the residence or community into which they are moving.

In addition, HUD regulations prohibit certain real estate practices, making it unlawful to:

> (1) Refuse to sell or rent a dwelling after a bona fide offer has been made, or refuse to negotiate for the sale or rental of a dwelling because of race, color, origin, sex, familiar status, or national origin or to discriminate in the sale or rental of a dwelling because of a handicap ....

> (3) Engage in any conduct relating to the provision of housing which otherwise makes unavailable or denies dwellings to persons because of ... handicap ....
>
> (5) Represent to any person because of ... handicap ... that a dwelling is not available for sale or rental when such dwelling is in fact available.

24 C.F.R. §100.50(b). It is likely that enforcement of HG §2-104(b)(2) would result in the violation of all of these sections of the regulations.

Finally, 24 C.F.R. §100.400 prohibits any attempt to "interfere with any person in the exercise or enjoyment of" the rights afforded under the Fair Housing Act or implementing regulations. HG §2-104(b)(2), as it applies to individuals with disabilities, imposes restrictions inconsistent with the rights conferred by Congress under the Fair Housing Amendments Act.

Thus, although HG §2-104(b)(2) might be neutral on its face, if, upon implementation, it has the effect of limiting the number of group residences for individuals with disabilities in a particular building, block, or area, it would contravene the prohibitions of the Fair Housing Amendments Act. Similar to the application of such zoning provisions on the basis of race or religion, application on the basis of disability is prohibited.[12]

III

Conclusion

HG §2-104(b)(2) reflects the best of intentions. The State planning agencies and the General Assembly sought to accomplish a system whereby special populations, including individuals with disabilities,

---

12 *Huntington*, 844 F.2d at 935-36; *Metropolitan*, 558 F.2d at 1289-90; *Black Jack*, 508 F.2d at 1184.

would be afforded greater, not more limited, opportunities for normalized living arrangements. Nonetheless, the implementation of HG §2-104(b)(2) as to individuals with disabilities would have the effect of violating the subsequently enacted federal Fair Housing Amendments Act of 1988. Accordingly, HG §2-104(b)(2) may not be enforced to the extent that it impacts upon individuals with disabilities. However, enforcement of HG §2-104(b)(2), as it relates to individuals other than those with disabilities, does not contravene the federal act.

J. Joseph Curran, Jr.
Attorney General

Larry Goldberg
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions and Advice

Editor's Note:

The siting requirements discussed in this opinion were repealed by Chapter 425 (House Bill 1007) of the Laws of Maryland 1991.

LOCAL GOVERNMENT

Municipalities - Historic Area Zoning - Town Council May Not Serve As Historic District Commission - Commission May Not Be Created As Advisory Body Only

March 15, 1989

The Honorable Lloyd R. Helt, Jr.
Mayor of Sykesville

You have requested our opinion on whether the Historic Area Zoning Act, Article 66B, §§8.01 through 8.15 of the Maryland Code, requires Sykesville to create a historic district commission in order to exercise the powers granted in the Act. In addition, you ask whether Sykesville may enact a historic district ordinance that gives the town council the powers of a historic district commission or that makes the commission merely an advisory body to the council.

For the reasons given below, we conclude as follows: Sykesville has the discretion to decide whether to create a historic district and to define the boundaries of a district. However, in order to implement the historic and architectural protections authorized under the Historic Area Zoning Act, the town must establish a separate commission when it creates a historic district. Moreover, the town council may neither exercise the functions of the historic district commission itself nor create the commission as an advisory body only. Once created, the commission must be allowed to exercise the powers granted by the Act to all such commissions.

I

Historic Area Zoning

The planning and zoning authority of a municipality arises not from its general police power but from the authority delegated to it by the General Assembly under the State enabling law, Article 66B of the Maryland Code. *Cardon Invs. v. Town of New Market*, 55 Md. App.

573, 466 A.2d 504 (1983), *aff'd* 302 Md. 77, 485 A.2d 678 (1984). Sykesville's authority to enact historic district zoning, therefore, is limited to the powers provided under the Historic Area Zoning Act, Article 66B, §§8.01 through 8.15.[1]

The Act provides a statutory scheme for historic preservation that is separate and distinct from the other zoning provisions of Article 66B. *See generally City of Annapolis v. Anne Arundel County,* 271 Md. 265, 316 A.2d 807 (1974); 73 *Opinions of the Attorney General* 238 (1988); 62 *Opinions of the Attorney General* 490 (1977).[2]

Section 8.01(a)(2) authorizes local jurisdictions to enact ordinances or resolutions to "regulate the construction, alteration, reconstruction, moving and demolition of" structures having historic and architectural value and their "appurtenances and environmental settings." Section 8.01(b) provides that the purposes of such ordinances or resolutions include safeguarding the heritage of the local government "by preserving the district therein which reflects elements of its cultural, social, economic, political, or architectural history"; and "promoting the use and preservation of historic districts for the education, welfare, and pleasure of" the residents of the local government. To these ends, §8.02 authorizes local governments to establish districts of historic and architectural value.

Section 8.03(a) authorizes the local government to create a historic district commission consisting of three to seven members, "all of whom are qualified by special interest, knowledge or training in such fields as history, architecture, preservation or urban design ...." The members serve staggered three-year terms and are eligible for reappointment. In seeking persons with suitable qualifications, "[c]ounty or municipal authorities may consult private societies or agencies to request the names of possible members on a commission." *Id.*

---

[1] All statutory references in this opinion are to Article 66B.
With certain exceptions, the Act is applicable to all nonchartered Maryland counties and to all Maryland municipal corporations except Baltimore City. *See* §§7.03 and 8.01(a)(2); 60 *Opinions of the Attorney General* 569 (1975).

[2] The Act was enacted as a separate statute, not as part of a general zoning law. Chapter 874, Laws of Maryland 1963.

Sections 8.04 through 8.14 specify the powers and duties of the commission and the standards and procedures under which these responsibilities are to be accomplished. A person or entity seeking to change a visible part of a structure's exterior "shall file with the commission an application for permission ..." to do so. "Each such application shall be referred to and considered by the historic district commission and accepted or rejected by the commission." §8.05. The procedures for these reviews and the factors to be considered by the commission in approving or rejecting such proposals are detailed in §§8.06 through 8.11. Most importantly, §8.12 prohibits the issuance of permits or the beginning of construction until the commission has either approved the project or taken no action on it for 45 days.

II

Judicial Construction of the Act

In *City of Annapolis v. Anne Arundel County*, the Court of Appeals considered the provisions of the Act and the relationship of a local government to its historic district commission. The issue in the case was whether Anne Arundel County, which owned a building within the City of Annapolis' historic district that it wished to demolish, was required to obtain permission to do so from the Annapolis Historic District Commission.

The Court of Appeals found "substantial and significant differences between traditional zoning and historic area zoning," indicating the General Assembly's intention that political subdivisions owning land within a historic district are to be "subject to the jurisdiction of the historic district commission." 271 Md. at 291. To accomplish the primary purposes of historic area zoning, the exterior of buildings having historic or architectural value must be "preserved against destruction or substantial impairment by *every one*, whether a private citizen or a governmental body." 271 Md. at 291-92 (emphasis in original).

The Court also observed that, whereas traditional zoning is primarily directed at the use of land and the density and location of buildings, historic zoning is concerned only with preservation of the exterior appearance of buildings based on architectural and historic merit. The use of the buildings is unaffected by historic commission decisions. 271 Md. at 291. The Court thus found that "the jurisdiction of the Commission should extend to all owners be they private persons or governmental agencies." 271 Md. at 292. Indeed, the City of Annapolis itself was subject to the commission's jurisdiction. 271 Md. at 293.[3]

Subsequently, the Court of Appeals further construed the Act in *Faulkner v. Town of Chestertown*, 290 Md. 214, 428 A.2d 880 (1981). Once again, the Court affirmed the validity and scope of the Act and the role of the local historic district commission. In *Faulkner*, a property owner had received permission to make certain exterior changes to a non-historic building within the historic district, but then had made additional changes not authorized by the commission. The commission directed the owners to remove the unauthorized construction and suit followed. The Court upheld the Act and the authority of the commission against charges of overreaching, arbitrariness, and vagueness:

> To us the Act and ordinance are clear and capable of understanding by people of ordinary intelligence .... In plain language what the ordinances and the Act are saying is that if one proposes to do anything to a building within a historic district which will involve changes to exterior appearance of the structure visible from a street or alley in the district, one must obtain a permit. 290 Md. at 228.

Under the Act, "one must obtain a permit" from the *commission.* §8.05.

[3] The Court also concluded that the Act does not effect a taking and does not deny due process. 271 Md. at 294.

III

Relationship of Town and Commission

A. Establishment of Commission

The Act invests the historic district commission with the authority to exercise review powers. Nothing in the language of the Act or its construction by the Court of Appeals suggests that any other entity has the power to perform a role that, by law, is assigned to the commission.

If a municipality establishes a historic district without an entity to exercise the powers granted in the Act, the establishment of a district would be meaningless, contrary to the protective purposes of the Act. Therefore, if Sykesville chooses to establish a district, in order to comply with the Act it must also establish a commission.

B. Role of Town Council

In our opinion, the town council may not provide in its ordinance for the council itself to be the historic district commission. As noted in Part I above, §8.03 requires a commission to have three to seven members, all of whom are qualified by special interest, knowledge, or training in fields related to historic preservation. This requirement "reflects a judgment by the General Assembly that these important functions are best handled by a specialized body possessing a particular expertise." 62 *Opinions of the Attorney General* 490, 496 (1977). It also provides that the commission members serve staggered three-year terms.

These requirements negate the possibility of any local legislative body serving as the commission. Under §8.03, commission members are appointed as individuals based on special qualifications; they are not appointed as a group based on their election by the citizenry. While individual members of a local legislative body might possess the requisite background, mere membership on the legislative body by itself is insufficient. Also, the uniform terms of a local legislative body would conflict with the Act's requirement of staggered terms.[4]

Maryland's statutory scheme of establishing a separate board with special qualifications and authority with respect to historic preservation is consistent with the approach generally taken in other states. *See* 1 Rathkopf, *The Law of Zoning and Planning* §§15.02 to 15.04 (1980); 2 Rohan, *Zoning and Land Use Controls* §7.03(1-2) (1988).[5] Cases in other jurisdictions, in upholding historic preservation ordinances against charges of vagueness, have placed considerable importance on the knowledgeable and representative membership of the review boards and their ability to recognize and apply the criteria established. 1 Rathkopf, *The Law of Zoning and Planning* §15.02(b)(1).

We also conclude that Sykesville's historic district ordinance may not limit the commission to an advisory capacity and give the town council final authority. The Act gives the commission, and only the commission, responsibility for determining whether proposed exterior changes can be permitted and under what conditions. To be sure, the town council is responsible for determining the boundaries of the historic district, and the town will continue to have the primary responsibility for issuing and enforcing building permits. But specific decisions regarding the requirements of historic preservation within a historic district are the province of the commission. As this office opined over a decade ago: "It is our view that an action [by a local government] to delete a property from the historic district would in effect provide that the local government has ultimate appeal power over the decisions of the historic district commission. Such power is not provided in the enabling law and ... we conclude that it does not exist." 62 *Opinions of the Attorney General* at 496.

Section 8.14 does authorize appeals from decisions of the commission. As this office concluded in another opinion, however, such appeals would be heard either by the zoning board of appeals or

---

[4] Under Article XVII, §3 of the Constitution, county commissioners serve four-year terms, which expire simultaneously.

[5] State historic preservation enabling laws do differ in the degree of final authority given to the historic commissions. In many jurisdictions, the commission may delay, but cannot by itself deny, the issuance of a building permit in historic districts. Maryland's statute, however, does grant that authority and the Court of Appeals has affirmed its validity.

directly by the circuit court, in accordance with the provisions of §§4.07(d)(1) and 4.08(f). An appeal would not be heard by the local legislative body.[6]

IV

Conclusion

In summary, it is our opinion that the Town of Sykesville is required to comply with the Act if it desires to undertake historic district zoning within its limits. Article 66B, §§8.01 through 8.15 require that a historic district commission be established along with the historic district in order to implement the historic preservation powers provided in the Act. The General Assembly did not intend for the local legislative body to appoint itself as the commission. Sykesville likewise may not relegate the commission to the status of an advisory body.

J. Joseph Curran, Jr.
Attorney General

Roberta B. McCarthy
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

---

[6] In 67 *Opinions of the Attorney General* 409 (1982), the Attorney General concluded that: (1) §4.07(d)(1) gives the local board of appeals the power to hear and decide appeals from decisions of the historic district commission; (2) the board of appeals may consider the record of proceedings before the commission, as well as any other evidence or argument it chooses to hear and may make its own decision on any issue raised; (3) the board of appeals should give very strong consideration to the views expressed by members of the historic commission, particularly where these views relate to largely subjective aesthetic and other value judgments for which the commission members have special expertise and (4) in the alternative, the local jurisdiction may provide in its ordinance for an appeal directly to the circuit court under §4.08(f).

Local Government - Municipal Corporations - Charter Amendment - Statutory Procedures For Amendment Must Be Followed Even If Change Is Nonsubstantive

August 10, 1989

Mr. F. Carvel Payne, Director
Department of Legislative Reference

You have requested our opinion concerning procedures for amending the charters of municipal corporations. Specifically, you have asked whether the legislative body of a municipal corporation may make nonsubstantive changes in its charter without complying with the procedure prescribed by Article XI-E, §4 of Maryland Constitution, and Article 23A, §§11 through 18 of the Maryland Code.

For the reasons that follow, it is our view that the procedures in the Constitution and in Article 23A are mandatory, even if the changes are nonsubstantive.

I

Charter Amendment Procedure

Municipal home rule is established by Article XI-E of the Maryland Constitution. Under Article XI-E, §3, municipal corporations may amend or repeal an existing charter or adopt a new one. Conversely, the General Assembly is prohibited from passing any local or special law "relating to the incorporation, organization, government, or affairs of [a] municipal corporation ...." Article XI-E, §1. Article XI-E, §4 requires that charter amendments be proposed by a resolution of the legislative body or by a petition signed by 5 percent of the registered voters and provides that the General Assembly shall, by general law, "amplify" the provisions as to amendment.

In response to the requirement of §4, the General Assembly has enacted Article 23A, §§11 through 18 of the Maryland Code, which set out the procedures for adoption, amendment, and repeal of municipal charters. Article 23A, §11 provides that: "Every municipal corporation in this State shall proceed as in this subheading provided in exercising and applying the powers for the amendment of municipal charters which are granted thereto by Article XI-E of the Constitution of Maryland." If an amendment is proposed by resolution of the legislative body, the chief executive officer must give notice by posting of the resolution and publication of a fair summary. Article 23A, §13(d) and (e). An amendment takes effect 50 days after passage unless it is petitioned to referendum. Article 23A, §13(f).

The general rule is that the mode prescribed in the Constitution for amendment of a charter is exclusive. *Town of Glenarden v. Bromery*, 257 Md. 19, 262 A.2d 60 (1970); *Graham v. Joyce*, 151 Md. 298, 134 A. 332 (1926) (Article XI-A); 2 McQuillan, *Municipal Corporations* §9.25 (3rd ed. 1988). Thus, the Court of Appeals has held that Article 23A, §§11 through 18 occupy the entire field and supersede any local provisions on charter amendments. *Mayor of Hagerstown v. Lyon*, 236 Md. 222, 203 A.2d 260 (1964); *Hitchins v. City of Cumberland*, 208 Md. 134, 117 A.2d 854 (1955). It is our view that this rule is equally applicable when the changes to be made are nonsubstantive.

It is well-settled that the provisions of the State Constitution governing amendment, other than by convention, are mandatory, and must be followed even if only nonsubstantive changes are involved. *See Andrews v. Governor of Maryland*, 294 Md. 285, 449 A.2d 1144 (1982); *Hillman v. Stockett*, 183 Md. 641, 39 A.2d 803 (1944). This is the rule because the General Assembly, acting to amend the Constitution, "does not exercise its ordinary legislative power or any sovereignty of the people that has been entrusted to it," but rather acts under "a limited power which the people have conferred upon it ...." *Bourbon v. Governor*, 258 Md. 252, 257, 265 A.2d 477 (1970). Thus, when acting to amend the Constitution, the General Assembly does not have the plenary powers it has in enacting laws, but only the powers specifically delegated to it. 258 Md. at 258. *See also Board of Supervisors v. Attorney General*, 246 Md. 417, 229 A.2d 388 (1967). As the Court of Appeals wrote many years ago:

> [Were it otherwise] there would be, in fact, no Constitution. Its provisions would depend wholly upon the wisdom or caprice of the members at each recurring Assembly. To admit of such a power in the Legislature would be to ignore all our consecrated ideas of the protection furnished to our rights of person, liberty and property.

Dowling v. Smith, 9 Md. 242, 268 (1856).

Although the analogy is imperfect, a municipal charter is in some respects like a local constitution. *See Mugford v. City of Baltimore*, 185 Md. 266, 271, 44 A.2d 745 (1945). *See generally* 2 McQuillan, *Municipal Corporations* §9.03 (3d ed. 1988). *Cf. Board of Election Laws v. Talbot County*, 316 Md. 332, 341, 558 A.2d 724 (1989) (home rule county charter). And, as with the Constitution, if the legislative body wishes to amend its charter, it must follow the prescribed procedures for doing so.

II

Conclusion

In summary, it is our opinion that the legislative body of a municipal corporation lacks the authority to make even nonsubstantive changes in the charter except in conformity with Article XI-E, §4 of the Constitution and Article 23A, §§11 through 18 of the Maryland Code. While this procedure may seem burdensome when the intent is not to change meaning but to correct grammar or spelling, the statutory procedure ensures that such changes are given deliberate consideration and careful scrutiny, so that seemingly nonsubstantive changes do not, in fact, change the meaning. *See* 70 *Opinions of the Attorney General* 180, 199, n. 18 (1985) (comma deleted); 65 *Opinions of the Attorney General* 285, 288-290 (1980) (comma added).

If, indeed, the current procedures for charter amendment are believed to be overly burdensome, the General Assembly is of course free to modify them in accordance with Article XI-E of the Constitution. *Hitchins v. City of Cumberland*, 208 Md. at 148.

J. Joseph Curran, Jr.
Attorney General

Kathryn M. Rowe
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

PAROLE

Parole Commission - Inmate Grievance Commission - "Video-Conferencing" - Due Process - Hearings May Be Conducted Over Closed-Circuit Television

February 17, 1989

Mr. Paul J. Davis, Chairman
Maryland Parole Commission

Mr. Marvin N. Robbins
Executive Director
Inmate Grievance Commission

You have requested our opinion on whether the Maryland Parole Commission and the Inmate Grievance Commission ("IGC") may adopt procedures under which the presiding officials would conduct all hearings over closed-circuit television.

For the reasons set forth below, we conclude that the Maryland Parole Commission and the IGC may adopt procedures generally authorizing the conduct of hearings over closed-circuit television. However, with regard to parole revocation hearings and IGC hearings involving loss of "good-time" credits, these procedures should expressly recognize the presiding official's power, in unusual circumstances, to order that closed-circuit television not be used for a particular hearing or for particular testimony.

I

Background

Under the proposal, called video-conferencing, a closed-circuit television system would link State offices in Baltimore with correctional facilities throughout the State. This system would permit the Maryland Parole Commission and the IGC to conduct hearings from their offices without incurring the cost and inconvenience of traveling to and from the correctional facilities.

The hearings would be conducted exactly as they are now, except that the commissioners (or, where applicable, the hearing officers) would conduct the hearings from their offices while the inmates remain at their respective institutions.[1]

Prison personnel, if required to testify as witnesses, would testify from their respective institutions as well. The correctional facility would have a facsimile machine available if it were necessary to transmit copies of documents during the course of a hearing.

The Parole Commission and the IGC would adopt appropriate changes in their regulations to authorize this new approach to the conduct of hearings. *See* Article 41, §§4-507(b) and 4-102.1(h) of the Maryland Code.[2]

---

[1] For ease of reference, we shall refer to the person or persons who conduct these hearings as the "presiding official."

[2] All statutory references in this opinion are to Article 41, except as otherwise specified.

II

Maryland Parole Commission

A. Requirements of State Law

The Maryland Parole Commission has "the exclusive power to ... [a]uthorize the parole of individuals sentenced under the laws of this State to any ... place of confinement or detention within the State." §4-504(a)(1).[3] COMAR 12.08.01.17 provides that "[a]ll prisoners sentenced to a term of 6 months or more shall receive a parole hearing after serving not more than one-fourth of their sentence, or in the case of multiple sentences, one-fourth of their total combined sentences." In determining if an inmate is suitable for parole, Parole Commission members and hearing examiners must consider the factors enumerated in §4-506 and COMAR 12.08.01.18A.[4]

---

[3] The Parole Commission does not make decisions about parole from Patuxent Institution. *See* Article 31B, §11(b)(2).

[4] Section 4-506 provides:

> "Each hearing examiner and Commission member determining if an inmate is suitable for release on parole shall consider:
>
> (1) The circumstances surrounding the crime;
>
> (2) The physical, mental, and moral qualification of the inmate eligible for parole;
>
> (3) The progress of the inmate during his confinement, including the academic progress of the inmate in the mandatory education program required in §22-102 of the Education Article.
>
> (4) Whether or not there is reasonable probability that the inmate, if released on parole, will remain at liberty without violating the law;
>
> (5) Whether or not release on parole of the inmate is compatible with the welfare of society;
>
> (6) An updated victim impact statement or recommendation prepared under §4-504(d) of this subtitle; and
>
> (7) Any recommendation made by the sentencing judge at the time of sentencing."

COMAR 12.08.01.18A sets forth in greater detail the criteria that the Commission is to use in determining whether an inmate is suitable for release.

The statute governing the Parole Commission contains several references to hearing procedures. §§4-507, 4-508, 4-509, and 4-511.[5] Nothing in the statute is inconsistent with the use of video-conferencing. *See Greenberg v. Simms Merchant Police Service*, 410 So. 2d 566, 567 (Fla. App. 1982). The fundamental nature of the hearing will be unchanged. The inmate and presiding official will continue to be able to see, hear, and talk to each other. *See generally* Silbert, *Evaluation of First Appearances* 60 (1985).

The Parole Commission decides whether to grant an inmate parole based on its judgment about the circumstances of the crime as well as the inmate's progress and adjustment while in prison. We do not believe that the Commission's use of video-conferencing would significantly affect its ability to conclude whether an inmate is suitable for parole, since the Commission will be able to evaluate the factors relevant to this decision regardless of the proposed change in format. For this reason, we conclude that a properly adopted regulation authorizing video-conferencing would be consistent with State law.

B. *Due Process - Parole Hearings*

The requirements of the Due Process Clause of the Fourteenth Amendment apply only if a person has a protected interest - that is, "he must have more than a unilateral expectation of [the right;] [h]e must, instead, have a legitimate claim of entitlement to it." *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7 (1979).[6] "There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence," the Supreme Court held. *Id.* Depending on the structure

---

[5] The Parole Commission is not subject to the contested case procedures of the Administrative Procedure Act. §10-202(a)(3)(vi) of the State Government Article ("SG" Article). Even if it were, video-conferencing does not conflict with the APA's hearing procedures. A hearing conducted by video-conferencing enables a party to call and examine witnesses, offer evidence, cross-examine adverse witnesses, and present summation and argument, just as if the presiding official were physically present. *See* SG §10-208(e).

[6] The prerequisite is the same under Article 24 of the Maryland Declaration of Rights. *See, e.g., Department of Transportation v. Armacost*, 299 Md. 392, 415-16, 474 A.2d 191 (1984); *Vavasori v. Commission on Human Relations*, 65 Md. App. 237, 243, 500 A.2d 307 (1985).

and language of a particular statute, however, a state may establish a parole system that creates a protectible entitlement. 442 U.S. at 12.

In *Greenholtz*, the Supreme Court held that Nebraska's parole-determination statute created an entitlement protected by due process because of its mandatory language and the presumption that such language consequently created - that parole release would be granted absent certain findings. 442 U.S. at 11-12.[7] More recently, in ***Board of Pardons*** *v.* ***Allen***, 482 U.S. 369 (1987), the Court applied the *Greenholtz* analysis and held that the mandatory language of Montana's parole statute created a presumption that parole release would be granted when certain findings are made. Thus, the state had created a protected liberty interest by statute. 482 U.S. at 376.[8]

By contrast, neither the Maryland parole statute nor the Parole Commission's regulations contain language comparable to that deemed by the Supreme Court in *Greenholtz* and *Allen* to create a liberty

---

[7] The Nebraska statute provided in pertinent part:

> "Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it *shall* order his release unless it is of the opinion that his release should be deferred because:
>
> (a) There is a substantial risk that he will not conform to the conditions of parole;
>
> (b) His release would depreciate the seriousness of his crime or promote disrespect for law;
>
> (c) His release would have a substantially adverse effect on institutional discipline; or
>
> (d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law abiding life when released at a later date.

Neb. Rev. Stat. §83-1,114(1) (1976) (emphasis added). The statute also listed 14 explicit factors and one catchall factor that the Board was to consider in reaching a decision. *See* Neb. Rev. Stat. §§83-1,114(2)(a)-(n) (1976).

[8] The Montana statute at issue in *Allen* provided in pertinent part:

> "Subject to the following restrictions, the board *shall* release on parole any person ... when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community."

Mont. Code Ann. §46-23-201 (1985) (emphasis added).

interest.[9] Although §4-506 and COMAR 12.08.01.17 enumerate certain factors that the Commission is to consider when determining whether an inmate is suitable for parole, neither creates a presumption that parole will occur. In *Bryant v. State*, 848 F.2d 492, 493 (4th Cir. 1988), the court held that "since the Maryland parole statute does not create a legitimate expectation of parole release," the inmate, who alleged that he was wrongly denied a parole hearing, "has no right protected by the due process clause." 848 F.2d at 493. *See also Paoli v. Lally*, 812 F.2d 1489 (4th Cir. 1987). Thus, since an inmate has neither an inherent constitutional right to parole nor, in Maryland, a state-created liberty interest in parole, the parole hearing itself need not meet the requirements of due process.

Moreover, although a state's law may establish certain procedures to guide parole determinations, "[c]ourts have explicitly and repeatedly rejected the proposition that an individual has an interest in a state-created procedural device, such as a hearing, that is entitled to constitutional due process protection." *Brandon v. District of Columbia Board of Parole*, 823 F.2d 644, 648 (D.C. Cir. 1987).

In *Brandon*, an inmate alleged that he had a constitutionally protected interest in having the parole board adhere to its own regulations and procedures for parole consideration, including a right to a meaningful annual reparole hearing. 837 F.2d at 647. In rejecting the inmate's claim, the court held: "The mere fact that the government has established certain procedures does not mean that the procedures thereby become substantive liberty interests entitled to federal constitutional protection within the Due Process Clause." 823 F.2d at 648. *See also Shango v. Jurich*, 681 F.2d 1091, 1101 (7th Cir. 1982).

Thus, although COMAR 12.08.01.17 provides that "[a]ll prisoners ... shall receive a parole hearing after serving not more than one-fourth of their sentence," this state-created procedure is not a liberty interest entitled to constitutional due process protection. Rather, it is a state right that "must be enforced in state courts under state law." *Brandon*, 823 F.2d at 649. As discussed in Part II A above, we believe that this

---

[9] We look to the regulations as well as the statutory language since rules adopted pursuant to statutory authority have the force and effect of law. *Staley v. Board of Educ.*, 308 Md. 42, 47 n.4, 517 A.2d 349 (1986).

procedure may be conducted by video-conferencing without offending State law.

C. Due Process - Parole Revocation Hearings

Unlike an inmate who has no inherent constitutional right to parole, a parolee has a protected liberty interest in retaining his or her freedom. *Morrissey v. Brewer*, 408 U.S. 471 (1972). As the Supreme Court recognized, a parolee may "be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life." 408 U.S. at 482. Thus, "the liberty of a parolee ... includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others." *Id.* The parolee is entitled to rely on "an implicit promise that parole will be revoked only if he fails to live up to the parole conditions." *Id.*

Accordingly, certain procedural protections are constitutionally required. *Id.*[10] A parolee is entitled to a final revocation hearing that includes:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board ...; and (f) a written statement by the fact finders as to the evidence relied on and reason for revoking parole.

408 U.S. at 489.[11]

---

[10] These same due process requirements apply when the State seeks to revoke probation. *See Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973); *State v. Fuller*, 308 Md. 547, 520 A.2d 1315 (1987).

[11] In addition, a prompt preliminary hearing following the arrest of the accused violator must be held near the site of the arrest or alleged violation to determine (continued...)

The Maryland Parole Commission has exclusive authority to hear cases involving parole revocation (except as to parole from Patuxent Institution). §4-504(a)(7). The Commission has adopted regulations that encompass the procedural requirements established in *Morrissey*. *See* COMAR 12.08.01.22.

At the outset, we must consider whether one of *Morrissey's* requirements - that the parolee be afforded the "opportunity to be heard *in person*" - precludes the use of video-conferencing.[12] We think not. In *Morrissey*, the Court was reacting to a procedural system under which parole was revoked merely on the basis of a written report by the parole officer. 408 U.S. at 472-73. The Court described the kind of in-person hearing it required as follows: "At the hearing the parolee may appear and speak in his own behalf; he may bring letters, documents, or individuals who can give relevant information to the hearing officer. On request of the parolee, [a] person who has given adverse information on which parole revocation is to be based is to be made available for questioning in his presence." 408 U.S. at 487. All of this can be accomplished through video-conferencing.

Moreover, the Supreme Court itself subsequently has made clear that *Morrissey* does not stand in the way of procedural innovations

---

[11](...continued)
whether there is "probable cause" to believe that the accused violated the conditions of release. *Morrissey*, 408 U.S. at 485. This determination must be made by someone not directly involved in the case, although the hearing officer need not be a judicial official. 408 U.S. at 486. The parolee must be given notice of the purpose and date of the hearing and what parole violations have been alleged. The parolee may appear and speak on his or her behalf and produce witnesses and documentary evidence. "On request of the parolee, [a] person who has given adverse information on which parole revocation is to be based is to be made available for questioning in his presence," unless the hearing officer determines that an informant would be subjected to a risk of harm if the informant's identity were disclosed. 408 U.S. at 487.

[12] We are not aware of any cases on point. *State ex rel. Turner v. Kinder*, 740 S.W.2d 654 (Mo. 1987), concerned a statute providing that guilty pleas could only be accepted if the defendant was "personally present." The Missouri Supreme Court held that this statute precluded use of video-conferencing to take guilty pleas from prisoners charged with criminal offenses within a prison. The court's holding rested wholly on its understanding of legislative intent, however, not on an application of the Due Process Clause.

designed to further a state's interest in efficient administration of its parole system:

> While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in *Morrissey* intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence. Nor did we intend to foreclose the States ... from developing other creative solutions to the practical difficulties of the *Morrissey* requirements.

Gagnon v. Scarpelli, 411 U.S. 778, 782 n.5 (1973). Video-conferencing is exactly such a "creative solution."

Hence, we see no incompatibility between any of the requirements of *Morrissey* and a hearing conducted by video-conferencing. Nor do we perceive any other due process bar to the use of this technique.[13] Indeed, hearings conducted by telephone, a procedure that departs more markedly from the traditional norm of an in-person hearing, have been upheld in cases involving property interests. *See, e.g., Casey v. O'Bannon,* 536 F. Supp. 350 (E.D. Pa. 1982) (public assistance appeals may be conducted by telephone without violating claimant's right to due process); *Sterling v. District of Columbia*, 513 A.2d 253 (D.C. App. 1986) (use of telephone hearings do not violate an unemployment claimant's right to due process); *Babcock v. Employment Division*, 696 P.2d 19 (Or. App. 1985) (unemployment compensation hearing may be conducted by telephone without violating claimant's right to due process).

These courts, applying the due process test set forth in *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976), balanced (1) the private interest that could be affected, (2) the risk of an erroneous deprivation of that interest because of the procedures used, and (3) the state's interest in

---

[13] We need not address the potential effect of the Sixth Amendment, which applies only to "criminal prosecutions." *E.g., Hannah v. Larche*, 363 U.S. 420, 440 n.16 (1960). It does not apply to parole hearings or parole revocation hearings. *E.g., Dorsey v. Maschmann,* 571 F.2d 1002, 1003 n.1 (8th Cir. 1977); *Ganz v. Bensinger*, 480 F.2d 88, 89 (7th Cir. 1973).

conserving its fiscal and administrative resources. Although significant property interests were at stake, these courts concluded that due process is not violated when the state conducts something other than a face-to-face hearing. In *Casey*, for example, the court was convinced that a factfinder could "effectively judge credibility over the phone by noting voice responses, pauses, levels of irritation and other factors," and thus found no due process violation. 536 F.Supp. at 354.

In most parole revocation cases, the due process balancing test would come out the same way. To be sure, "the loss of liberty ... is a serious deprivation ...." *Gagnon v. Scarpelli*, 411 U.S. at 781 (1973); it is, therefore, an exceptionally important private interest under the first prong of the *Matthews v. Eldridge* test. But the use of video-conferencing does not intrinsically pose a risk of erroneously depriving a parolee of that interest, because the presiding official will remain able to assess, visually and aurally, the demeanor of any witness whose credibility is called into question. For its part, the State will save significant resources if video-conferencing is used for parole revocation hearings.[14] In our view, the balance generally favors the constitutionality of video-conferencing.

Nevertheless, we cannot rule out the possibility of an unusual case posing due process problems - one in which witness credibility is potentially determinative but, for some demonstrable reason, the presiding official cannot adequately assess credibility over closed-circuit television. We suggest that this slight risk be accommodated in regulations. A presiding official should be authorized to go to the hearing site in order to conduct all or part of a hearing if (i) the parolee requests the presence of the presiding official and shows good cause for the request or (ii) even without a request, the presiding official determines that fair decisionmaking would be compromised if video-conferencing were used. In our view, due process requires no more than this.[15]

---

[14] According to the Division of Correction, 938 revocation hearings were held in 1988.

[15] We also suggest that the regulations incorporate a requirement, akin to that in the Maryland Rules, that the camera operator "not distort the appearance or demeanor of participants in the [hearing] by the use of camera ... techniques." Rule 2-416(e).

III

Inmate Grievance Commission

A. Requirements of State Law

The IGC is a separate agency within the Department of Public Safety and Correctional Services. §4-102.1(a). Any inmate who has a grievance or complaint against "officials or employees of the Division of Correction or the Patuxent Institution" may submit a grievance to the IGC. §4-102.1(d). If a grievance "is not found to be on its face wholly lacking in merit," the inmate is entitled to a hearing, at which the inmate has a reasonable opportunity to call witnesses. §4-102.1(f).

A properly adopted video-conferencing procedure would be consistent with the hearing mandated by §4-102.1(f). Because the presiding official would be able to hear and see all the witnesses, video-conferencing comports with "the basic rules of fairness" to which all State administrative hearings are subject. *Bryant v. Department of Public Safety*, 33 Md. App. 357, 370, 365 A.2d 764 (1976). *See State Human Services Department v. Gomez*, 637 P.2d 117, 119 (N.M. 1983) (a "telephonic television hearing" in an AFDC appeal affords a public officer a sufficient opportunity to observe the demeanor of a witness). *See also Babcock v. Employment Division*, 696 P.2d at 21 (the "audible indicia of a witness' demeanor are sufficient" to make an adequate judgment as to credibility, a necessary prerequisite to a fair hearing).[16]

B. Due Process

Although the General Assembly created the IGC as a forum for inmates to grieve alleged wrongs, this procedural mechanism in and of itself is not protected by the Constitution. The requirements of due

---

[16] Assuming for purposes of this opinion that the contested case procedures of the Administrative Procedure Act apply to IGC hearings, we believe that the APA does not prevent the use of video-conferencing. *See* note 5 above.

process only apply if the grievance itself involves a protected interest. *See Greenholtz*, 442 U.S. at 7.[17]

In *Wolff v. McDonald*, 418 U.S. 539, 557 (1974), the Supreme Court held that a prisoner's right to "good-time credit" - that is, credit for good behavior leading to an earlier release - was a protected liberty interest under the Fourteenth Amendment.[18] Nevertheless, the deprivation of good time, though "unquestionably a matter of considerable importance ... is qualitatively and quantitatively different from the revocation of parole or probation," because it "does not then and there work any change in the conditions of [the inmate's] liberty." 418 U.S. at 561. Particularly in light of a state's interest in controlling prison disciplinary proceedings, the Due Process Clause does not require "the full range of procedures suggested by *Morrissey* for alleged parole violators ...." *Id.*

We concluded in Part II C above that due process does not generally prohibit the use of video-conferencing for parole revocation hearings. It follows that video-conferencing generally may be used by the IGC even if a hearing involves the loss of good-time credits.[19]

IV

Conclusion

For the reasons set forth below, we conclude that the Maryland Parole Commission and the IGC may adopt procedures generally authorizing the conduct of hearings over closed-circuit television.

---

[17] Not all complaints rise to the level of a protected interest. "[C]hanges in the conditions of confinement having a substantial adverse impact on the prisoner are not alone sufficient to invoke the protections of the Due Process Clause, '[a]s long as the conditions ... [are] within the sentence imposed upon him.'" *Vitek v. Jones*, 445 U.S. 480, 493 (1980) (quoting *Montanye v. Haymes*, 427 U.S. 236, 242 (1976)).

[18] As is true of parole, this liberty interest exists only if a state has "created the right to good time." 418 U.S. at 557. Maryland has done so. *See* Article 27, §700.

[19] The IGC's regulation should likewise allow for a presiding official to order, for good cause, that video conferencing not be used in a particular hearing. *See* text accompanying note 15 above.

However, with regard to parole revocation hearings and IGC hearings involving loss of "good-time" credits, these procedures should expressly recognize the presiding official's power, in unusual circumstances, to order that closed-circuit television not be used for a particular hearing or for particular testimony.

J. Joseph Curran, Jr.
Attorney General

Sharon Krevor-Weisbaum
Staff Attorney

Jack Schwartz
Chief Counsel
Opinions & Advice

Editor's Note:

In Chapter 251 (House Bill 1214) of the Laws of Maryland 1991, the General Assembly eliminated the Inmate Grievance Commission in favor of an Inmate Grievance Office within the Department of Public Safety and Correctional Services. Grievance hearings are now conducted by the Office of Administrative Hearings.

PERSONNEL

Executive Orders - Drug Abuse - Rehabilitation Act - Merit System Law - Executive Order Setting Out State's Drug Abuse Policy Is Lawful In All Respects

August 8, 1989

The Honorable F. Vernon Boozer
Senate of Maryland

You have requested our opinion concerning the State's new substance abuse policy, as embodied in Executive Order 01.01.1989.05. You ask generally about the legality of the policy. More particularly, you are concerned about the portions of the policy that hold State classified employees open to discipline for drug or alcohol abuse that occurs on the employee's own time, away from the work place.

For the reasons stated below, we conclude that the policy is itself lawful and can be applied consistently with applicable legal requirements. Specifically, we conclude that:

1. The Governor had the authority to issue the executive order embodying the policy.

2. The policy is constitutional.

3. The policy does not violate the federal Rehabilitation Act.

4. The policy's treatment of off-duty drug or alcohol convictions is consistent with the requirements of the Merit System Law.

I

Federal Drug-Free Workplace Act

In late 1988, Congress enacted an omnibus Anti-Drug Abuse Act. Public Law No. 100-690, 102 Stat. 4181. One portion of the omnibus law is the Drug-Free Workplace Act of 1988, 102 Stat. 4304. This act requires federal contractors and recipients of federal grants to meet certain requirements for a drug-free workplace.

Many State programs, of course, are recipients of federal grants. Therefore, they are required to comply with this law. Specifically, the law requires a grant recipient to provide a drug-free workplace "by taking the following actions":

> (A) publishing a statement notifying employees that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violations of such prohibition;
>
> (B) establishing a drug-free awareness program ...;
>
> (C) making it a requirement that each employee to be engaged in the performance of such grant be given a copy of the statement required by subparagraph (A);
>
> (D) notifying the employee in the statement required by subparagraph (A), that as a condition of employment in such grant, the employee will -
>
> (i) abide by the terms of the statement; and
>
> (ii) notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than 5 days after such conviction;

> (E) notifying the granting agency within 10 days after receiving notice of a conviction under subparagraph (D)(ii) from an employee or otherwise receiving actual notice of such conviction;
>
> (F) imposing sanction on or requiring the satisfactory participation in a drug abuse assistance or rehabilitation program by any employee who is so convicted ...; and
>
> (G) making a good faith effort to continue to maintain a drug-free workplace through implementation of subparagraphs (A), (B), (C), (D), (E), and (F).

Section 5153(a)(1). Under Section 5154, an employer who receives notice from an employee of a conviction for a drug violation occurring in the workplace must either "take appropriate personnel action against such employee up to and including termination" or "require such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program ...."

II

State Policy

On April 7, 1989, Governor Schaefer issued Executive Order 01.01.1989.05, "State of Maryland Substance Abuse Policy." The preamble indicates that the executive order was intended in part to assure the State's compliance with the Drug-Free Workplace Act. However, the executive order clearly is intended to go beyond the requirements of the federal act. The executive order establishes a significant State policy in its own right.[1]

---

[1] The executive order applies to all Executive Branch agencies, whether or not they receive federal grants. *Cf.* note 8 below.

The State policy applies to both drug and alcohol abuse. Several of the provisions in the policy address drug or alcohol abuse during working hours.[2] Your inquiry assumes the validity of these provisions.

The policy also extends to off-the-job drug and alcohol abuse. Paragraph B(6) requires that "all employees must report any drug conviction to their supervisor within five (5) days of that conviction." This requirement exceeds that of the federal act, which requires reporting only convictions for drug offenses in the workplace. In addition, paragraph B(8), which calls upon employees to "cooperate fully with appropriate law enforcement authorities in the investigation and prosecution of illegal drug or alcohol use," is not limited to job-site investigations.

The key provision, paragraph B(7), provides that "all employees convicted of off-the-job drug or alcohol offenses will be in violation of this policy." Employees who violate the policy are subject to discipline. "Those employees who are assigned to designated sensitive classes will be terminated if they are found to be in violation of this policy." Paragraph B(11).[3] All other employees "found to be in

---

[2] These are:

"(1) Employees are prohibited from unlawfully manufacturing, distributing, dispensing, possessing, or using a controlled substance in the workplace.

. . .

(4) All employees must report to work in a fit condition to perform their duties. Reporting to work under the influence of drugs or alcohol is a violation of this policy and shall subject the employee to disciplinary action.

(5) All employees on official business, on or off the workplace, are prohibited from purchasing, transferring, using, or possessing illegal drugs or from abusing alcohol or prescription drugs in any way that is illegal."

[3] The executive order defines a sensitive class as follows:

"'Sensitive classes' are those in which the Secretary of Personnel has determined that all of the following conditions exist:

(a) A substantially significant degree of responsibility for the safety of others;

(continued...)

violation of any of the provisions of this policy shall be subject to the penalties contained in Article 64A of the Annotated Code of Maryland, which provides sanctions up to and including termination." Paragraph B(12).[4] We understand that this aspect of the policy is intended to be administered with customary concepts of "progressive discipline" in mind.[5]

To illustrate the application of the policy: If an employee is arrested and convicted of possession of marijuana at a weekend party, for example, the employee is required by the policy to report that conviction to his or her supervisor within five days of the conviction. If the employee is in a sensitive class, the agency is to institute termination proceedings. If the employee is not in a sensitive class, the agency may seek to impose any form of discipline authorized by law.

If an employee is arrested and convicted of driving under the influence of alcohol after a weekend party, to take another example, the employee is not required to report that conviction to his or her supervisor. However, if the agency learns of the conviction, and the employee is in a sensitive class, the agency is to institute termination proceedings. If the employee is not in a sensitive class, the employee is subject to discipline for violating the policy.

These two examples suggest the applications of the policy that gave rise to your particular concern. For purposes of analysis in this

---

[3](...continued)

> (b) A potential that impaired performance of the employee could result in death of or injury to the employee or others; and
>
> (c) Lack of close monitoring of the employee's behavior which reduces the possibility of intervention or assistance by another when necessary."

Paragraph A(6).

[4] The policy provides the following exception: "Employees will not be terminated for voluntarily seeking assistance for a substance abuse problem. However, continued unacceptable job performance, attendance and/or behavior problems shall result in disciplinary action up to and including termination." Paragraph B(10).

[5] Disciplinary sanctions short of termination include reprimand, suspension, and demotion. *See* COMAR 06.01.01.45A.

opinion, we will assume that the agency is seeking to terminate an employee for an off-the-job drug or alcohol conviction. If this disciplinary action were legally permissible, obviously a lesser sanction would be permissible as well.

III

Governor's Authority

A decade ago, the Attorney General observed that "there is little Maryland authority on the nature or effect of an executive order." 64 *Opinions of the Attorney General* 180, 181 (1979). That statement is just as true today.[6] Nevertheless, we need not here try to define the outer limits of the Governor's authority, for we are able to conclude that an executive order dealing with the conduct of Executive Branch employees is within that authority.

"The Governor is the head of the Executive Branch of the State government and, except as otherwise provided by law, shall supervise and direct the officers and units in that Branch." §3-302 of the State Government Article ("SG" Article).[7] This statute reflects the role of the Governor under Article II, §1 of the Maryland Constitution. As the Revisor's Note to SG §3-302 observes, "the Governor clearly is head of the Executive Branch of State government and has responsibilities as to officers and units within that Branch." Thus, the Governor has "extremely broad authority to 'supervis[e] and direc[t] .. the officers and agencies ... assigned to the Executive Department'." 67 *Opinions of the Attorney General* 203, 207 (1982) (quoting former Article 41, §15).

---

[6] Indeed, there is little authority anywhere. "Executive orders are rarely the subject of judicial opinions." *Stein v. James*, 651 S.W.2d 624, 628 (Mo. App. 1983).

[7] SG §8-201 enumerates the principal departments of the Executive Branch, including the Department of Personnel.

The executive order embodying the State's drug-free workplace policy addresses Executive Branch employees.[8] It does not purport to impose requirements on persons outside State government. *Cf.* 48 *Opinions of the Attorney General* 72 (1963). Rather, it is the latest in a series of executive orders that, over the years, have "supervised" or "directed" some aspect of employee conduct or provided a benefit to employees. *See, e.g.*, Executive Orders 01.01.1974.16 (grievance procedures for unclassified employees, later rescinded); 01.01.1981.10 (criteria for employee release in emergencies); 01.01.1987.13 (smoking policy); 01.01.1988.10 (procurement of group life insurance benefit). In our view, executive orders of this kind are valid (assuming, of course, no inconsistency with a constitutional or statutory provision) and are enforceable through applicable disciplinary procedures.

IV

Constitutional Considerations

Although the Due Process Clause of the Fourteenth Amendment and its State counterpart, Article 24 of the Maryland Declaration of Rights, place certain substantive limits on State actions, they do not prohibit a State policy of terminating an employee who is convicted of an off-the-job drug or alcohol offense. A State decision to terminate drug or alcohol abusers would unquestionably be rational, and that is all that the substantive aspect of due process protection requires. *Kelley v. Johnson*, 425 U.S. 238, 247 (1976). *See* 67 *Opinions of the Attorney General* 322, 328 (1982).[9]

To be sure, a classified employee has a property interest in his or her job that is protected by the procedural element of the Due Process

---

[8] Although the order is not expressly so limited, it is not enforceable against employees who are not subject to the Governor's direction. However, any State entity not subject to the order that receives federal grants should either comply voluntarily with the executive order or adopt its own policy to conform to the federal requirements.

[9] The result is no different under the Equal Protection Clause. *New York City Transit Authority v. Beazer*, 440 U.S. 568, 592-94 (1979). *See also* 67 *Opinions of the Attorney General* at 324-26.

Clause. Accordingly, a classified employee must be afforded certain procedural rights prior to termination. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

The procedural protections of the Merit System Law, Article 64A and its implementing regulations, amply satisfy the requirements of procedural due process. 70 *Opinions of the Attorney General* 151 (1985). The executive order specifically refers to the Merit System Law and, we understand, is intended to be applied with full regard for the procedural protections of Article 64A. Therefore, because any classified employee who is disciplined for a policy violation will have been given the notice and opportunity for hearing called for by Article 64A, the policy comports with procedural due process requirements. *See* 70 *Opinions of the Attorney General* at 157.[10]

Finally, one particular provision in the executive order raises a question under the Fifth Amendment. Paragraph B(8) states that "[a]ll employees must cooperate fully with appropriate law enforcement authorities in the investigation and prosecution of illegal drug or alcohol use." We do not believe that this provision was intended to (nor, in any event, could it) infringe upon an employee's Fifth Amendment right not to be "compelled in any criminal case to be a witness against himself." Clearly, the State may not penalize the exercise of this right.[11] Rather, Paragraph B(8) embodies an expectation that State employees will cooperate fully in the investigation of other persons' illegal drug or alcohol use.

---

[10] Unclassified employees have no "property interest in continued employment" so as to invoke procedural due process protections. 70 *Opinions of the Attorney General* at 159. *See* note 16 below.

[11] "[T]he mandate of the great privilege against self-incrimination does not tolerate the attempt ... to coerce a waiver of the immunity it confers on penalty of the loss of employment." *Gardner v. Broderick*, 392 U.S. 273, 279 (1968). *See also, e.g., Benjamin v. City of Montgomery*, 785 F.2d 959, 963 (11th Cir. 1986) ("a public employee cannot be terminated for refusing to waive fifth amendment rights").

V

Federal Rehabilitation Act

A. Introduction

The same fact, receipt of federal grants, that makes State programs subject to the Drug-Free Workplace Act also makes those programs subject to the federal Rehabilitation Act of 1973. In pertinent part, the Rehabilitation Act protects individuals with handicaps against employment discrimination. In this portion of the opinion, we explain our conclusion that the State policy on substance abuse is consistent with the Rehabilitation Act.

B. Applicability to Drug Abusers and Alcoholics

Section 504 of the Rehabilitation Act, 29 U.S.C. §794, prevents a recipient of federal financial assistance from discriminating against an "otherwise qualified individual with handicaps."[12] An "individual with handicaps" is, generally, any person "who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. §706(8)(B).

In 1977, the Attorney General of the United States was asked whether the definition set out above included alcoholics and drug addicts. Attorney General Griffin Bell concluded that individuals with these conditions were "handicapped individuals," for purposes of Section 504 of the Rehabilitation Act. "[T]he statute requires that [employers] covered by the Act not automatically deny employment or benefits to persons solely because they might find their status as alcoholics or drug addicts personally offensive, any more than contractors and grantees could discriminate against an individual who had some other condition or disease - such as cancer, multiple

---

[12] Prior to 1986, the statutory term was "handicapped individual." In 1986, in a change not pertinent to this analysis, Congress amended the Act to replace the term "handicapped individual," wherever it appeared in the statute, with the term "individual with handicaps." Pub. L. No. 99-506, §103(d)(2)(B), 100 Stat. 1807, 1810.

sclerosis, amputation, or blindness - unless its manifestations or his conduct rendered him ineligible." 43 Op. A.G. No. 12 (April 12, 1977), at Westlaw pp. 7-8. An alcoholic or drug addict would not be protected by Section 504 "if the manifestation of his condition prevented him from effectively performing the job in question ...." 43 Op. A.G. No. 12, at Westlaw p. 1.

In adopting regulations to implement the Rehabilitation Act, the Secretary of Health, Education and Welfare ("HEW") expressed the same construction of the statute. 42 Fed. Reg. 22, 686 (May 4, 1977), *codified at* 45 C.F.R. Part 84, App. A, at 375. The Secretary of HEW drew the same distinction between a person's status as a drug addict, on the one hand, and the workplace manifestations of that drug abuse, on the other:

> The fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities. On the contrary, a recipient [of federal funds] may hold a drug addict or a alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism. In other words, while an alcoholic or drug addict may not be denied services or disqualified from employment solely because of his or her condition, the behavioral manifestations of the condition may be taken into account in determining whether he or she is qualified.

Id. Moreover, the Secretary went on, "employers may enforce rules prohibiting the possession or use of alcohol or drugs in the work place, provided that such rules are enforced against all employees." *Id.*

The only case that extensively analyzed the applicability of the original Rehabilitation Act to drug abusers was *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978). This case was brought by job applicants who claimed that they were denied employment solely on the basis of former drug use, "without regard to their qualifications, present rehabilitative status, or the nature of the job for which they had applied." 451 F. Supp. at 793. The applicants were fully qualified for the positions for which they applied, and the City of Philadelphia conceded that "but for the old scars and admissions of prior drug use, the applicants would have been hired ...." 451 F. Supp. at 794.

The district court found that the city's refusal to hire these rehabilitated drug addicts violated the Rehabilitation Act. In so holding, the court concluded "that persons with a history of drug use, including present participants in methadone maintenance programs, are 'handicapped individuals' within the meaning of the statutory and regulatory language." 451 F. Supp. at 796. Because none of the job applicants in the case were current drug abusers, the court did not have to consider how the Act would apply to them.

In 1978, Congress added language to the definition of "handicapped individual" that, for purposes of employment discrimination, specifically addressed alcoholics and drug abusers: "[T]he term 'handicapped individual' ... does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others." Pub. L. No. 95-602, §122(a), 92 Stat. 2955, 2984-85. In substance, this is part of the current definition. 29 U.S.C. §706(8)(B).[13]

The key question is whether this amendment was intended to codify the distinction drawn in the Attorney General's opinion and the interpretation of the Secretary of HEW - that is, between current drug abusers who nevertheless can perform the job and current drug abusers who cannot. The statutory language suggests such a result. It identifies one category of current drug abusers and alcoholics who are outside the Act, those "whose current use of ... drugs prevents ... [the performance of] the duties of the job in question" or who constitute a threat to others; and, inferentially, another category, current alcohol and drug abusers who are able to do the job and who do not pose a threat to others, who remain within the Act's protection.

---

[13] *See* note 12 above regarding the change from "handicapped individual" to "individual with handicaps."

The legislative history on the whole suggests that this distinction reflects Congress' intent. The House version of the provision would have limited the employment protections of the Rehabilitation Act to those alcoholics and drug addicts who had already completed rehabilitation. *See* H.R. Rep. No. 1149, 95 Cong., 2d Sess. (1978), *reprinted in* 1978 U.S. Code Cong. & Adm. News 7333-34.[14]

The Senate version was broader. Its language would have protected all alcoholics and drug abusers, except an abuser whose condition "renders that individual not qualified for employment by preventing him from performing the essential functions of the job in question." 124 Cong. Rec. 30,332 (1979). One Senator, at least, thought that this language protected "active" alcoholics who could do the job, apparently without regard to their rehabilitative status: "Many 'active' alcoholics ... hold jobs and perform them satisfactorily .... [T]he Rehabilitation Act protects such persons ... from being fired solely because of their alcoholism ...." 124 Cong. Rec. 30,324 (remarks of Senator Hathaway). Another Senator, however, emphasized current rehabilitation - that the provision would protect "persons stabilized in methadone maintenance treatment [who] are fully employable." 124 Cong. Rec. 30,323 (remarks of Senator Williams).

The conference committee version, which is that now contained in 29 U.S.C. §706(8)(B), appears to reflect an intent to apply the Act to any abuser who can do the job. The conference report states that "only those active alcoholics or drug abusers who cannot perform the essential functions of a job in question or who present a danger to life and property are not covered ...." H.R. Rep. No. 95-1780, 95th Cong., 2d Sess. 102 (1978), *reprinted in* 1978 U.S. Code Cong. & Adm. News 7413. The conference report does not discuss any requirement that an active abuser be in rehabilitation.

Subsequent judicial interpretations are not conclusive. Most of the cases treat the question of current drug or alcohol abuse in passing dicta. *See Crewe v. U.S. Office of Personnel Management*, 834 F.2d 140, 143 n.6 (8th Cir. 1987); *Heron v. McGuire*, 803 F.2d 67, 68-69 (2nd Cir. 1986); *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226,

---

14 The report suggested that the amendment "protects otherwise qualified self-reformed or rehabilitated alcoholics or drug abusers from unreasonable discrimination."

1231 n.8 (7th Cir. 1980); *Whitlock v. Donnovan*, 598 F. Supp. 126, 129 n.3 (D.D.C. 1984). These dicta go in both directions.

A recent case, *Burka v. New York City Transit Authority*, 680 F. Supp. 590 (S.D.N.Y. 1988), contains the only extensive analysis of the issue and is directly on point. In *Burka*, several of the plaintiffs were current drug abusers not in any rehabilitation program. They claimed that the Rehabilitation Act prevented the Transit Authority from refusing to hire them because of their drug abuse. After a detailed assessment of the legislative history of the 1978 amendment, Judge Goettel concluded as follows: "We hold today that section 504 protects only those otherwise qualified drug abusers who have been or are being rehabilitated. It does not protect the illegal narcotics abuser who has not sought or is not seeking treatment for his or her condition." 680 F. Supp. at 597. The court observed that its conclusion was "consistent with sound public policy. It encourages those abusers of illegal narcotics who have not done so to seek treatment for their problem, but it does not provide those same abusers with the assurance of safe haven in the workplace should they instead choose to continue their illegal activity and ignore help." 680 F. Supp. at 600.

C. *Effect On State Policy*

Under any reading of the Rehabilitation Act, the State surely may take disciplinary action against a drug abuser or alcoholic if the employee's substance abuse impairs job performance or threatens property or personal safety. Moreover, the Rehabilitation Act does not preclude disciplinary action against a recreational drug user who does not have "an impairment which substantially limits one or more of such person's major life activities ...." As one commentator has observed: "[T]emporary impairments, such as an occasional drinking problem or occasional drug abuse, are more likely to be viewed as within the employee's control and thus outside the scope of the Act." Note, *Hidden Handicaps: Protection of Alcoholics, Drug Addicts, and the Mentally Ill Against Employment Discrimination Under the Rehabilitation Act of 1973 and the Wisconsin Fair Employment Act*, 1983 Wis. L. Rev. 725, 729.

There is also no doubt that the Rehabilitation Act protects some drug abusers and alcoholics. Section 504 does not permit the State to take disciplinary action against a drug abuser or alcoholic *if* the employee's substance abuse does not impair his or her job performance or pose a threat to property or other persons *and* the employee is in a rehabilitation program. Paragraph B(10) of the executive order reflects this requirement.[15]

The closest question is whether the State may take disciplinary action against a drug abuser or alcoholic if the employee's substance abuse neither impairs job performance nor threatens property or personal safety *but* the employee is *not* in a rehabilitation program. On the one hand, the language, legislative history, and background of the 1978 amendment seem to reflect a legislative intention that the Rehabilitation Act apply to all current drug abusers and alcoholics who are able to perform their jobs satisfactorily. Nevertheless, the only court to directly address the question to date has assessed the pertinent material differently and forcefully reached the opposite result. Accordingly, based on current (albeit limited) caselaw, the State may, in enforcing its policy, take disciplinary action against an employee who is a current drug abuser or alcoholic and who is not in a rehabilitation program, regardless of the employee's job performance.

VI

Merit System Requirements

A. *"Cause" for Removal*

In this portion of the opinion, we consider whether discharge of a classified employee for off-the-job drug or alcohol convictions would be inconsistent with the Merit System Law. Article 64A, §33(b)(2)(i) provides that "no employee who has completed his probation may be permanently removed from the classified service except for cause ...." Article 64A, §33(d)(1) authorizes the Secretary of Personnel, "by rule, [to] prescribe what may constitute cause for removal ...."[16]

---

[15] *See* note 4 above.

[16] An unclassified employee may be removed without cause. *See* 70 *Opinions of the Attorney General* at 159. It follows, then, that an unclassified employee may (continued...)

In COMAR 06.01.01.47, the Secretary has set out certain "sufficient cause[s] of removal, though removal may be for causes other than those enumerated." One such cause is "that the employee has been convicted of a criminal offense or of a misdemeanor involving moral turpitude." COMAR 06.01.01.47I.[17] Another is "that the employee has been guilty of conduct such as to bring the classified service into public disrepute." COMAR 06.01.01.47M.

A law limiting removal "for cause" is intended to address "future job performance, rather than to punish employees for past wrongs.... The [provision] regarding cause for discharge reflects [a] proclivity for basing discharge on job efficiency, rather than on retribution." *Sheetz v. City of Baltimore*, 315 Md. 208, 214, 553 A.2d 1281 (1989).[18]

The emphasis given by the Court of Appeals to "job efficiency rather than ... retribution" reflects a well-settled construction of "for cause" dismissal provisions in merit system laws. The Illinois Civil Service Law, for example, provides for removal for "cause," without further legislative elaboration. Under Illinois cases, "cause" has been construed to mean "some substantial shortcoming which renders the employee's continuance in office in some way detrimental to the service's discipline and efficiency, and which the law and sound public opinion recognize as good cause for his no longer occupying the position. Such shortcoming need not be directly connected with the performance of work, but must not be trivial, arbitrary or

---

[16](...continued)
be removed because of an off-the-job drug or alcohol conviction, or for any other lawful reason. Under COMAR 06.01.01.60, an unclassified employee who is terminated may submit an appeal to the Secretary, "limited to the legal and constitutional bases for the termination."

[17] The term "criminal offense" presumably was intended to refer to felonies. It cannot be read literally, for a literal reading would make a nullity out of the immediately ensuing phrase, "a misdemeanor involving moral turpitude."

[18] In this passage, the Court of Appeals was referring in particular to a portion of the Baltimore City Charter that allows for an employee's removal "for any cause ... which, in the opinion of the person authorized by law to remove or dismiss such officer or employee, may interfere with the efficient discharge of the duties of the position." Article VII, §118(a) of the Baltimore City Charter. However, the context of the Court's comment and its citation of authority indicate that it was referring broadly to "for cause" dismissal provisions, not solely to the City Charter provision.

unreasonable." *Martin v. Mathys*, 501 N.E.2d 286, 290 (Ill. App. 1986). *Accord, Department of Driver Services v. Secretary*, 477 N.E.2d 1372, 1374 (Ill. App. 1985). As one Pennsylvania court similarly put it: "The criteria for determining just cause must be based on merit; that is, the criteria must be job-related and in some rational and logical manner touch upon competency and ability." *Rossellini v. Reading Housing Authority*, 541 A.2d 417, 419 (Pa. Cmwlth. 1988). *Accord, Pesteau v. Civil Service Board*, 385 So.2d 1310, 1312 (Ala. App. 1980); *Doerr v. Commonwealth*, 491 A.2d 299, 302 (Pa. Cmwlth. 1985); *Brengle v. Commonwealth*, 474 A.2d 352, 353 (Pa. Cmwlth. 1984).

The federal courts have formulated a similar test. Under the Federal Civil Service Law, an agency may discharge an employee "only for such cause as will promote the efficiency of the service." 5 U.S.C. §7513(a). A long line of federal cases have interpreted this requirement to mean that there must be a "nexus" - "that vital connection between the employee's complained of activities and some identifiable detriment to the efficiency of the service ...." *Young v. Hampton*, 568 F.2d 1253, 1261 (7th Cir. 1977). *See also, e.g., Crofoot v. United States Gov't Printing Off.*, 761 F.2d 661, 664 (Fed. Cir. 1985); *Bonet v. United States Postal Serv.*, 661 F.2d 1071 (5th Cir. 1981).

B. Applicability to Off-Duty Criminal Misconduct

A substantial body of case law rejects the argument that discipline may be imposed only for misconduct occurring on the job. As the West Virginia Supreme Court observed, "the fact that [the employee's] conduct is alleged to have occurred while he was off duty is of no legal significance" to the issue of "good cause" for dismissal under the West Virginia Civil Service Act. *West Virginia Department of Corrections v. Lemasters*, 313 S.E.2d 436, 439 (W.Va. 1984).

What *is* significant is a reasonable link between off-duty misconduct and the employee's job-related responsibilities. The West Virginia Supreme Court stated the test as follows:

> "If the employing authority dismisses or otherwise disciplines a civil service protected employee for gross misconduct occurring off the job and not

> involving state property, such misconduct must be substantial and not frivolous, trivial or inconsequential, and it must be shown that such misconduct reflects adversely upon the employee's ability to perform his job, impairs the efficient operation of the employing authority and bears a substantial relationship to duties directly affecting the rights and interest of the public."

Lemasters, 313 S.E.2d at 439 (quoting *Thurmond v. Steele*, 225 S.E.2d 210 (W.Va. 1976)). A California court stated the test similarly: "[T]he mere finding of an off-duty act, coupled with a determination that the act falls under the definition of failure of good behavior, is not a sufficient basis for termination of employment. It must be shown that the misconduct bears some rational relationship to his employment and must be of such character that it can easily result in the impairment or disruption of the public service." *Ramirez v. California State Personnel Board*, 251 Cal. Rptr. 9, 11 (Cal. App. 1988). *See also, e.g.*, *White v. United States Postal Serv.*, 768 F.2d 334 (Fed. Cir. 1985) (leaving scene of fatal accident by postmaster); *Thompson v. State Personnel Board*, 247 Cal. Rptr. 210 (Cal. App. 1988) (off-duty assault by correctional officer); *Stouffer v. Commonwealth*, 464 A.2d 595 (Pa. Cmwlth. 1983) (shoplifting by police officer); *Brown v. Sexner*, 405 N.E.2d 1082 (Ill. App. 1980) (off-duty assault by correctional officer).

For example, suppose that a State employee who was responsible for handling State funds was convicted of embezzling money from a private organization. No one would suppose that this employee was qualified to continue to handle State funds. Certainly, in this example, the off-duty misconduct would have a telling effect on the employee's qualifications and ability to carry out the State job.

C. *Drug or Alcohol Convictions as "Cause"*

These principles apply to convictions for off-duty drug or alcohol offenses. The cases establish that such a conviction (or, indeed, sufficient evidence of drug involvement even without a conviction) affords the employing agency grounds for dismissal of a classified employee where the agency can demonstrate a nexus between the conviction and the employee's job responsibilities.

Many of the federal cases involve air traffic controllers. In *Borsari v. FAA*, 699 F.2d 106 (2d Cir. 1983), an air traffic controller had been criminally convicted of possessing marijuana and had been administratively determined to have sold marijuana and possessed cocaine. He was discharged. In his appeal, Borsari claimed that dismissal for these offenses was not necessary to "promote the efficiency of the [civil] service," which was the basis for his dismissal. He also claimed that the dismissal violated a statutory prohibition against "discriminat[ion] ... on the basis of conduct which does not adversely affect the performance of the employee ... or the performance of others." Borsari pointed to "considerable evidence indicating his superior job performance ...." 699 F.2d at 110.

The Second Circuit, "not convinced this is the only relevant factor," instead was persuaded by the FAA's argument about the "incompatibility of drugs with successful air traffic control":

> The phrase "promote the efficiency of service" cannot be so limited as to require the Agency to wait for an on-the-job violation before dismissing an offending employee. Indeed, it has repeatedly been held that where an employee's misconduct is in conflict with the mission of the agency, dismissal without proof of a direct effect on the individual's job performance is permissible under the "efficiency of the service" standard.

Id. The court then described the extraordinary public safety responsibilities of air traffic controllers and the need for absolute public trust in the integrity of the air traffic control system. "For these reasons, it is clear that any connection with illegal mind-altering substances is anathema to proper control over air traffic." 699 F.2d at 111.[19]

---

[19] Borsari was not found to have used drugs. However, the court found it "reasonable to infer that as a group, individuals possessing drugs are more likely to employ them.... '[T]o an employer, there is a greater risk that an employee who has once sold marijuana will use it than in the case of one who has never sold marijuana.'" 699 F.2d at 111.

Moreover, the court rejected Borsari's contention that his dismissal amounted to improper discrimination "on the basis of conduct which does not adversely affect the performance of the employee ... or the performance of others." The court held that this prohibition was not intended to negate the agency's discretion to dismiss an employee to "promote the efficiency of service." Rather, "Congress expressly permitted removal of employees whose actions might disrupt an agency's smooth functioning by creating suspicion, distrust, or a decline in public confidence." 699 F.2d at 112.

Other courts have reasoned similarly when reviewing an agency's dismissal of an employee from various jobs because of drug abuse. *Stump v. Department of Transportation*, 761 F.2d 680 (Fed. Cir. 1985) (air traffic controller); *Masino v. United States*, 589 F.2d 1048 (Ct. Claims 1978) (customs inspector); *Dew v. Halaby*, 317 F.2d 582 (D.C. Cir. 1963) (air traffic controller); *McDowell v. Goldschmidt*, 498 F.Supp. 598 (D. Conn. 1980) (air traffic controller); *Fulton v. Dept. of Public Health*, 494 So. 2d 73 (Ala. Civ. App. 1986) (supervisory employee of health department, which had responsibility to enforce laws relating to drugs).

Two federal cases also illustrate the other element of the decisional principle applied in this area - that a drug conviction alone is not necessarily sufficient cause for removal of an employee. In the leading case of *Young v. Hampton*, 568 F.2d 1253 (7th Cir. 1977), an employee of an army arsenal was arrested during off-duty hours at his residence for possession of marijuana and amphetamines. After the employee's conviction, the government then terminated him for misconduct.

The court pointed out, however, that the employee "had very little contact with the public in performing his job," and his criminal conviction was not so notorious as to cause the agency's reputation to suffer. 568 F.2d at 1256. Moreover, there was no evidence at all of job performance problems:

> His supervisor and foreman testified that he had done very good work, and that his ability to perform his job was substantially the same when he returned to work following his conviction. Young had never exhibited any kind of conduct on the job that would

> have affected his ability to perform his work. His conviction did not affect the quantity or quality of his work, and did not decrease his supervisor's opinion of his reliability or trustworthiness.

Id. The court distinguished one of the air traffic controller cases, *Due v. Halaby*, because the employee in that case was employed in "a position which, unlike Young's relatively mundane product inspection tasks, required split-second judgment and daily responsibility for many hundreds of lives." 568 F.2d at 1261.[20]

Similarly, in *McLeod v. Department of the Army*, 714 F.2d 918 (9th Cir. 1983), the court found insufficient as a basis for dismissal an agency's finding that an employee had possessed marijuana. The court emphasized the lack of evidence of any effect on the employee's performance and the fact that the employee, a warehouse worker, "was not in an authoritative position with responsibility and contact with the public." 714 F.2d at 921.[21]

D. Effect on State Policy

In our view, the cases discussed above underscore the soundness of the distinction drawn in the State policy. Employees in "sensitive classes" - those involving public safety - are to be terminated for drug or alcohol offenses. This policy decision by the State has an ample legal basis.[22] At the same time, the policy makes clear that other

---

[20] The court also distinguished cases in which the criminal offense was so serious that "a court could properly find a nexus once the facts of the misconduct were proven." 568 F.2d at 1262.

[21] One other case suggests that even a low-level employee may be dismissed for a drug offense. *Sanders v. United States Postal Service*, 801 F.2d 1328 (Fed. Cir. 1986) (post office clerk). However, this case may be distinguishable because of the comparative seriousness of the offense, trafficking in cocaine, and the fact that a portion of the transaction occurred on postal property. 801 F.2d at 1329.

[22] Cases involving misconduct other than drug offenses likewise support the proposition that employees in positions of special sensitivity are subject to discipline under circumstances that might not lead to the discipline of employees in other jobs. *See, e.g.*, *White v. United States Postal Serv.*, 768 F.2d at 336; *Brown v. Sexner*, 405 N.E.2d 1082, 1089 (Ill. App. 1980). *Cf. Sherburne v. School Board of Suwannee County*, 455 So. 2d 1057, 1062 (Fla. App. 1984).

employees, while subject to discipline for off-duty drug or alcohol offenses, are not automatically subject to dismissal. Rather, the policy contemplates that each case will be considered on its own facts; the appropriate level of discipline sought; and, if dismissal of a classified employee is sought, the requisite cause established. In short, the policy is intended to be administered so as to comply fully with the Merit System Law.

VII

Conclusion

In summary, it is our opinion that the State's substance abuse policy, Executive Order 01.01.1989.05, is lawful in all respects.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

PLANNING COMMISSION

Zoning - "Public Building" - Planning Commission Does Not Have Authority Under Article 66B, §3.08 To Review And Approve Project For Privately Owned Retail Business

August 4, 1989

Robert J. Merriken, Esquire
Earnest & Cowdrey, P.A.

On behalf of the Town of Vienna, you have requested our opinion on whether Article 66B of the Maryland Code requires planning commission approval for the construction of a retail business that will be open to the public - that is, whether the business is a "public building" within the meaning of Article 66B, §3.08.

For the reasons given below, we conclude that Article 66B, §3.08 does not apply to privately owned and operated retail stores, and the planning commission therefore does not have authority under Article 66B, §3.08 to review and approve those projects. However, that authority might arise under §§5.01 through 5.08 if and when the town adopts subdivision regulations.

I

Authority of Planning Commission

The Town of Vienna, a municipal corporation chartered by the General Assembly, receives its planning and zoning powers under the State Planning and Zoning Enabling Act, Article 66B (the "Act"). *Cardon Inv. v. Town of New Market*, 55 Md. App. 573, 466 A.2d 504 (1983), *aff'd*, 302 Md. 77, 485 A.2d 678 (1984). Sections 3.01 through 3.09 of the Act authorize each local government to create a planning commission and adopt a comprehensive plan for development in the jurisdiction, and the Town of Vienna has exercised that authority.

Section 3.08 provides in part that, after the adoption of a comprehensive plan, "no street, square, park or other public way, ground, or open space, or public building or structure, or public utility, whether public or privately owned, shall be constructed or authorized in the jurisdiction ... until the location, character, and extent of such development shall have been submitted to and approved by the [planning] commission as consistent with the [comprehensive] plan." The section further provides that the commission's disapproval may be overruled by a two-thirds vote of the entire local legislative body or other board, commission, or body having jurisdiction over the authorization of financing for the public way, ground, space, building, structure, or utility. These provisions have been part of the Act since the General Assembly first enacted it as Chapter 599 of the Laws of Maryland 1933, but have never been directly construed or interpreted by the Maryland courts.

Sections 5.01 through 5.08 of the Act provide for the adoption of subdivision regulations governing matters like erosion and sediment control, street and open space arrangement, and lot width and area. After the regulations have been adopted, every subdivision plat must receive planning commission approval before it may be recorded or the land covered by the plat may be sold. §§5.02, 5.05, and 5.06. However, the Town of Vienna has not yet adopted subdivision regulations.[1]

Your inquiry concerns a combination gas station and convenience store. This business is privately owned and operated but is open to the general public for commercial purposes. The question has arisen whether this development must be reviewed by the planning commission, pursuant to §3.08 of the Act, for consistency with the Town's comprehensive plan.

In *Board of Commr's v. Gaster*, 285 Md. 233, 245, 401 A.2d 666 (1979), the Court of Appeals held that a planning commission may disapprove a proposed subdivision that conforms to zoning requirements but is inconsistent with the comprehensive plan. In doing so, the Court commented:

---

[1] In *Board of Comm'rs v. Gaster*, 285 Md. 233, 245, 401 A.2d 666 (1979), the Court of Appeals held that the planning and subdivision provisions of Article 66B, taken together, require the local legislative body to adopt both a comprehensive plan and subdivision regulations to effectuate the plan.

> [T]he board of appeals found the factual conclusions of the [planning] commission to be correct. Thus, it follows that if this proposed subdivision were approved, the streets contemplated in it would be spewing traffic out onto a county road "which has poor vertical and horizontal alignment, poor sight distances, and narrow width [, a] road ... not programmed for reconstruction before 1990." Given the provisions of §3.08, this in itself was a sufficient basis for the disapproval of the subdivision plat by the commission.

285 Md. at 249. Thus, the Court recognized that §3.08 applies not only to facilities developed by governmental entities but also to streets planned and built by private developers. *See also* 64 *Opinions of the Attorney General* 341, 348 n.9 (1979).[2] However, because those streets would presumably be dedicated as public streets upon completion, the Court's comments in *Gaster* are not determinative of whether a building housing a privately owned and operated retail business is a "public building" that also requires planning commission approval.

II

Construction of §3.08

The cardinal rule of statutory construction is to ascertain and carry out the real legislative intent - that is, the legislative purpose, aim, or policy underlying the statute. *Kaczorowski v. City of Baltimore*, 309 Md. 505, 513, 525 A.2d 628 (1987). The starting point for

---

[2] In this passage, the Attorney General observed:

> "Because streets, squares, parks, playgrounds, and open spaces are often developed by the local government and because public buildings or structures and public utilities may be characterized as public or quasi-public development, §3.08 generally will apply to public or quasi-public development. However, it also applies to the development of streets, playgrounds and open spaces by private developers of subdivisions as the Court of Appeals of Maryland recently recognized in *Cecil County v. Gaster* ...."

determining that intent is the words of the statute, but statutory language must be considered in light of its context. *NCR Corp. v. Comptroller of Treasury*, 313 Md. 118, 125, 544 A.2d 764 (1988). The context of a statute includes related laws. *ANA Towing, Inc. v. Prince George's County*, 314 Md. 711, 718 n.5, 552 A.2d 1295 (1989). Moreover, we should also consider the consequences resulting from one construction rather than another, to avoid results that are illogical. 314 Md. at 717.

Black's Law Dictionary 1105 (5th ed. 1979) defines a "public building" as:

> One of which the possession and use, as well as the property in it, are in the public. Any building held, used, or controlled exclusively for public purposes by any department or branch of government, state, county, or municipality, without reference to the ownership of the building or of the realty upon which it is situated. A building belonging to or used by the public for the transaction of public or quasi public business.

That definition certainly suggests that a building constructed and used by a private entity for a commercial enterprise that is operated for private profit is not a public building.

Section 3.08 includes the phrase "whether publicly or privately owned." While the phrase could be construed to refer to all of the public facilities listed in the provision, the more logical construction is that it modifies only "public utility," the term that immediately precedes it. Public utilities differ from other types of public facilities in that they are often privately owned although they provide basic public needs such as water and electricity. Utility companies are really quasi-public or public in nature because of type of the services they provide and the extensive governmental regulation to which they are subject. Utilities often have large facilities whose installation can profoundly effect the development of an area, and review by the planning commission is important for the protection and promotion of the general plan. By contrast, private facilities open to the public for commercial purposes have on an individual basis much less impact on the plan.

Limiting the application of §3.08 to public utilities and publicly owned structures also comports with the provision of §3.08 regarding the power to overrule planning commission decisions. That power is given to the local legislative body unless the project under consideration is "one the authorization of financing of which does not, under the law or charter provisions governing same, fall within the province of the local legislative body ...." In that case, the power to overrule the planning commission is given to the "board, commission or body" that has jurisdiction to authorize the financing of the project.

This language clearly contemplates a facility constructed under government direction using public or quasi-public funds. Under *Cecil County v. Gaster*, §3.08 also includes facilities that would be financed and built by the developer and then transferred to the government. In those cases, however, the facilities would eventually be owned by a public body and maintained with public funds, like facilities originally constructed with public funds.[3] Thus, the overruling provisions indicate that §3.08 applies only to facilities in which a governmental entity has an interest.[4]

---

[3] The planning commission's disapproval of one of those facilities would be subject to override by the body that would eventually own and maintain the facility, and not by the private developer or the financing bank. Individuals and business entities simply are not "board[s], commission[s] or bod[ies]" - all terms that import governmental or quasi-governmental entities.

[4] It is helpful to compare §3.08 with a closely related provision in the Regional District Act, Article 28, §7-112 of the Maryland Code, which states:

> "[N]o road, park, or other public way or ground, no public (including federal) buildings or structures, and no public utility, whether publicly or privately owned, shall be located, constructed or authorized in the regional district until and unless the proposed location, character, grade, and extent thereof has been submitted to and approved by the Commission. In case of disapproval the Commission shall communicate its reasons to the State, federal, county, municipal, or district board, body or official proposing to locate, construct or authorize such public way, ground, building, structure, or utility. There upon the board, body, or official in its discretion may overrule the disapproval and proceed...."

The provision concerns the same kinds of facilities and follows the same procedures as in §3.08, except that a two-thirds vote to override the commission is not required. The language of §7-112 is clearer that the facilities addressed are those in which a governmental entity has a significant and continuing interest.

The evident purpose of §3.08 is to ensure that a local planning commission has an opportunity to evaluate the appropriateness of proposed facilities that may significantly affect the integrity of the master plan. The opportunity would not necessarily arise under the general provisions of Article 66B: Under Maryland law, State property used for public purposes is not subject to the controls and restrictions of local planning and zoning authorities, absent a specific grant of authority by the General Assembly. *Board of Child Care v. Harker*, No. 120 September Term, 1988, slip op. at 9, 12 and 14 (Md. July 28, 1989); *City of Baltimore v. State*, 281 Md. 217, 224, 378 A.2d 1326 (1977); *City of Baltimore v. State Dep't of Health and Mental Hygiene*, 38 Md. App. 570, 578, 381 A.2d 1188 (1978). Neither are local governments' public facilities generally subject to planning and zoning control. 73 *Opinions of the Attorney General* 238, 243-45 (1988). *See also* 57 *Opinions of the Attorney General* 121, 125 (1972).

Thus, local planning commissions ordinarily would have no control over where government agencies placed their public roads, open spaces, and buildings. Moreover, the State's comprehensive and detailed regulation of public utilities might well prevent local governments from regulating the construction of public utility facilities authorized by the State. *See Rowe v. Chesapeake & Potomac Tel. Co.*, 65 Md. App. 527, 532-33, 501 A.2d 464 (1985). In §3.08, however, the General Assembly has given the commission the power to review government proposals for public and quasi-public facilities and to apprise a government if its proposal contravenes the master plan.

Because §3.08 is intended to allow a planning commission to disapprove (although it may not wholly prevent) the construction of facilities over which local planning and zoning authorities would otherwise have little or no control, the scope of §3.08 must be determined by reference to the uses that are generally exempt from planning and zoning controls. Several Maryland cases have considered this issue. In *City of Baltimore v. State*, 281 Md. at 224, the Court of Appeals held that State-owned property intended to be used for a penal institution was exempt from local zoning. In *Youngstown Cartage Co. v North Point Peninsula Community Coordinating Council*, 24 Md. App. 624, 630, 332 A.2d 718 (1975), the Court of Special Appeals held, on the other hand, that State-owned property rented to a private enterprise for commercial use as a trucking facility was subject to zoning because it did not constitute a public use.

In reaching its conclusion in *Youngstown*, the Court of Special Appeals considered two distinct concepts of public use arising from the eminent domain provisions of the Maryland Constitution. Under Article XI-B, property may be acquired by eminent domain for land redevelopment so long as a public benefit can be shown. However, this "public benefit" test, as the court noted, seems to be limited to land redevelopment projects. 24 Md. at 629. The more generally used construction, which comes from Article III, §40 and the cases construing it, is that "public use" means use or enjoyment by the public. 24 Md. App. at 628. The court adopted this concept of public use and applied it to the zoning issue, concluding that State-owned property leased to a private enterprise for private commercial purposes was not a public use (and therefore not exempt from zoning) because the public had no right to enter upon or make use of the property so long as the private party remained a lawful tenant. 24 Md. App. at 630-31.

In *City of Baltimore v. State Dep't of Health and Mental Hygiene*, 38 Md. App. 570, 381 A.2d 1188 (1978), however, the Court of Special Appeals subsequently refined its definition of "public use." The court stated that the term "is not susceptible to any one single, all-inclusive definition"; rather, its meaning in any particular case must be determined by reference to the particular factual circumstances. 38 Md. App. at 576. *See also Riden v. Philadelphia, B. & W. R.R.*, 182 Md. 336, 340, 35 A.2d 99, 101 (1943) ("Whether a particular use is in fact public is ultimately a question for the determination of the court."); *Prince George's County v. Collington Crossroads, Inc.*, 275 Md. 171, 186-90, 339 A.2d 278, 286-88 (1975) ("'public use' is not synonymous with the physical use or access by the general public"). The court therefore considered the facts of the case before it: The Department of Juvenile Services was required by law to provide for the diagnosis, care, and rehabilitation of children in need of supervision by placing them in group homes. The Department had purchased a building and rented it to a charitable organization for the operation of such a group home. The court concluded that, because the organization was using the property for a purpose required of the Department by State law and for the benefit of the general public, the use of the property was a public use and the property was exempt from zoning restrictions. 38 Md. App. 577-78.

The analysis employed in these cases, in light of the close relationship of zoning controls to the subject matter and purpose of

§3.08, is equally applicable to the determination of whether a building is a "public building" within the meaning of §3.08. Thus, the fact that the business will be open to the public is not determinative of its status as a public building. Instead, it is important to determine whether the building is used by the public as a matter of right or is used to fulfill a governmental responsibility.[5]

Applying this analysis to the facts you have provided, it is clear that the gas station and convenience store about which you inquire would not satisfy the criteria for a public building. The property will not be owned by a public body. Further, while it may be useful to the public to have such services at that location, the purposes of the establishment, like those of the trucking facility in *Youngstown*, are purely private. The facility is "open to the public," but what that really means is only that the owners or operators invite the public to enter the premises during business hours to make purchases. The public has no right to enter the premises, for that invitation can be withdrawn or restricted at any time. The facility is not used by the public in the sense that it is controlled by a governmental agency, and it does not fulfill a governmental responsibility or duty. While the meaning of the term "public building" may vary under different circumstances, the term cannot be interpreted to include a combination gas station and convenience store operated on privately owned property for private profit.

III

Subdivision Regulations

Although the planning commission would not have authority under §3.08 to review the gas station project, it is unquestionably subject to

---

[5] In its very recent decision regarding the applicability of local land use regulations to a privately owned, State-licensed child care facility, *Board of Child Care v. Harker*, the Court of Appeals wrote that "the right to exemption does not turn on the use being made by the party claiming exemption but upon its ownership by the state or its instrumentalities." Slip op. at 14. In this passage, the Court was responding to the argument that a *privately owned* child care facility was entitled to invoke the State's immunity from local zoning. We do not understand this passage to suggest that the matter of use is never relevant to a question of the applicability of local land use regulations. Indeed, elsewhere in its opinion the Court cited with approval *City of Baltimore v. State Dep't of Health and Mental Hygiene*, which found the use of a State-owned building to be a determinative.

the municipality's zoning and building controls pursuant to Article 66B and Article 23A, §2(b)(30). Further, the planning commission itself could be granted review authority under §§5.01 through 5.08 of Article 66B. These sections authorize the planning commission to review and approve proposed subdivisions for conformance with subdivision regulations adopted by the jurisdiction. In many jurisdictions, this review power has been extended to site plan review to assure conformance with the comprehensive plan. While the Town of Vienna does not have subdivision regulations now, it may enact them in the future and vest the planning commission with that authority.

IV

Conclusion

In summary, it is our opinion that Article 66B, §3.08 does not apply to privately owned and operated retail stores, and the planning commission therefore does not have authority under §3.08 to review and approve those projects. However, the planning commission might in the future be granted that authority if the Town of Vienna adopts subdivision regulations under Article 66B, §§5.01 through 5.08.

J. Joseph Curran, Jr.
Attorney General

Roberta B. McCarthy
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

PROCUREMENT LAW

"Sole Source" - Sole Source Contracts For Expert Witnesses Subject To Approval Of Attorney General Only

February 14, 1989

Mr. Hal Kassoff
State Highway Administrator

You have requested our opinion on whether the award of a contract for expert witnesses or other consultant services under the "sole source" procurement provisions of §13-107 of the State Finance and Procurement Article ("SF" Article) must be approved by the Department of Budget and Fiscal Planning ("DBFP"), as well as by the Attorney General.

For the reasons given below, we conclude that contracts awarded under the "sole source" authorization of SF §13-107(a) must be approved by DBFP. However, if a sole source contract for consulting or other professional services satisfies the various tests in SF §13-107(b), the required approval is that of the Attorney General only.

I

Background

The procedures established for selecting the persons from whom State agencies will purchase needed goods and services are designed in general to obtain the most advantageous contract price for the State, to ensure that all prospective contractors are treated fairly, and to safeguard the integrity of the procurement system. SF §11-201. Accordingly, those procedures ordinarily require State agencies to select contractors through a process that involves public notice of the nature, scope, or terms of the contract to be awarded and the solicitation of bids or proposals from multiple potential contractors in competition with each other. SF §§13-103 (competitive sealed bids) and 13-104 (competitive sealed proposals).

Even when effective competition is not possible, the Procurement Law ordinarily requires a public announcement of the proposed contract and encourages discussions with all prospective offerors who respond to the announcement. SF §13-106(b) (noncompetitive negotiations). Further, when a contract is to be awarded on a basis other than competitive bidding, the Procurement Law ordinarily requires that the proposed contract be approved by the Board of Public Works or the procurement agency that has been charged with direct oversight of contracts of the relevant type. Control over contracts for "services" has been given to DBFP, "subject to any limitation in this Division II ['General Procurement Law'] ...." SF §12-107(b)(2)(ii).[1]

However, in some circumstances, agencies are permitted to enter into contracts without following the usual procedures of advertising the proposed contract and soliciting and considering offers from multiple prospective contractors. Under SF §13-107, an agency may in designated circumstances deal with only a single source for the goods or services needed:

> (a) (1) Whenever a procurement officer determines that there is only 1 available source for the subject of a procurement contract, the procurement officer may award the procurement contract without competition to that source.
>
> (2) Before awarding a procurement contract to a sole source, the procurement officer shall obtain:
>
> (i) the approval of the head of the unit; and
>
> (ii) any other approval required by law.
>
> (b) (1) Subject to paragraphs (2) and (3) of this subsection, with the prior written approval of the Attorney General, a unit may enter into a sole source contract to obtain the services of a contractor in connection with:

---

[1] SF §11-101(s) defines "services" to include "services provided by attorneys, accountants, physicians, consultants, and other professionals" (other than contracts for construction-related, architectural, or engineering services).

(i) threatened or pending litigation;

(ii) appraisal of real property for acquisition by the State; or

(iii) collective bargaining.

(2) This subsection applies only to a procurement in which:

(i) a unit obtains the services of a contractor to represent the State; and

(ii) the nature of the services to be performed requires confidentiality.

(3) This subsection does not apply if the unit reasonably can anticipate a continuing need for a contractor described in paragraph (1)(ii) or (iii) of this subsection.

(c) Not more than 30 days after the execution and approval of a procurement contract awarded under this section, a unit shall publish in the Maryland Register notice of the award.

II

Types of Sole Source Procurements

SF §13-107 establishes two classes of "sole source" procurement. The first, described in SF §13-107(a)(1), applies to cases in which the agency's procurement officer "determines that there is only one available source for the subject of a procurement contract ...." Under those circumstances, an attempt to obtain offers from multiple prospective contractors would be futile. Hence, SF §13-107(a) permits the agency to "award the procurement contract without competition to that source," instead of carrying out the empty formality of public advertising and solicitation of bids or proposals.

The second class of sole source procurements is established by SF §13-107(b)(1). Under that provision, "a unit may enter into a sole source procurement contract to obtain the services of a contractor in connection with ... threatened or pending litigation; ... appraisal of real property for acquisition by the State; or ... collective bargaining." The language of SF §13-107(b)(1), unlike that of SF §13-107(a)(1), is not expressly limited to situations in which the person with whom the agency proposes to contract is in fact the sole source of the services needed. Instead, SF §13-107(b) applies if the contract concerns a subject matter identified in SF §13-107(b)(1) *and* the circumstances of the contract satisfy SF §13-107(b)(2) - that is, the matter must be one in which the contractor is to represent the State and "the nature of the services to be performed requires confidentiality." Even then, if the contract relates to real estate appraisal or collective bargaining, it must not be for services for which the agency has a continuing need. SF §13-107(b)(3).

Thus, sole source procurement under SF §13-107(a) is available to accommodate those cases in which an attempt to seek out multiple prospective contractors would be merely an empty gesture. Sole source procurement under SF §13-107(b) is available to accommodate specially delineated cases in which the State has a need for confidentiality regarding the subject matter of the specified types of contract.

III

Contract Approval Requirements

The provisions governing procurements under procedures other than "sole source" contracting all include a requirement that the contract be awarded "[a]fter obtaining any approval required by law ...." SF §§13-103(e)(1) and (e)(3)(vi) (competitive bidding); 13-104(f) (competitive sealed proposals); 13-105(h) (real property leases); and 13-106(d) (noncompetitive negotiation). SF §13-107(a) similarly provides that a sole source contract awarded under its provisions requires prior approval by the head of the contracting unit and "any other approval required by law." In marked contrast, SF §13-107(b) contains no such general requirement of approvals "required by law," but only a specific requirement that the contracting unit obtain "the prior written approval of the Attorney General ...." SF §13-107(b)(1).

We think that this difference between the wording of the approval provisions evidences a legislative intent to establish substantively different approval procedures. SF §13-107(b) was enacted as part of a general revision of the Procurement Law that also enacted the other provisions concerning the various procedures for awarding contracts. Chapter 840, Laws of Maryland 1986.[2] If the General Assembly had intended to require that contracts awarded under SF §13-107(b) be subject to the same procurement approvals applicable to contracts awarded under the other procedures, presumably it would have used the same general language that it used in those other provisions - indeed, that it used in the other sole source authorization, SF §13-107(a), within the very same section. This contrasting language indicates that the only approval required for the award of those contracts under SF §13-107(b) is the approval of the Attorney General. *See Kaczorowski v. City of Baltimore*, 309 Md. 505, 516, 525 A.2d 628 (1987) (statutes must be construed in light of context in which they were enacted, including related statutes).

We think that the different approval requirements of SF §13-107(a) and (b) reflect their different applicability and purpose. SF §13-107(a) is intended to apply to procurement contracts that differ from those entered into under ordinary procedures only in that there is but a single available source. Consequently, no special considerations require that those contracts be subject to a review and approval process different from that applicable to contracts formed under other provisions of the Procurement Law. Accordingly, a sole source contract entered into under SF §13-107(a), like a contract awarded after selection among multiple prospective contractors, requires prior approval by the head of the unit and also "any other approval required by law" - unquestionably including the approval of the Board of Public Works or the primary procurement unit with control over procurement of the goods or services that are the contract's subject (here, DBFP).

In contrast, SF §13-107(b) by its terms applies only to contracts that relate to pending or threatened litigation, the acquisition of real property, or collective bargaining. These are all matters that are adversarial in character. Litigation by definition is; property acquisition and collective bargaining, too, call for the close involvement of lawyers, who must view each such matter with at least

---

[2] We are not aware of any legislative history that bears on the issue addressed in this opinion.

one eye on the prospect of future litigation. Yet, even for these kinds of matters, a contract will not be subject to SF §13-107(b) unless the nature of the services to be rendered requires confidentiality. SF §13-107(b) carves out a narrow exception to accommodate the special requirements of the adversary setting. That is, SF §13-107(b), a specific provision governing approval of one small category of sole source contracts for services, is to be given effect over SF §12-107(b)(2)(ii), a general provision governing approval of a very broad category of service contracts. *See Criminal Injuries Compensation Board v. Gould*, 273 Md. 485, 495, 331 A.2d 55 (1975).

The public nature of the usual procurement process would breach the confidentiality of the contracts to which SF §13-107(b) applies. For example, procurement by competitive sealed proposals - the usual method of procuring services - requires the publication of a request for proposals that includes a work statement or scope of services statement, a performance schedule, and any special instructions regarding the services to be provided. COMAR 21.05.03.02A. In the context of particular litigation, appraisal of real property for State acquisition, or collective bargaining, such a description of the services that the State needs would tend to reveal the State's legal theory and contemplated action, thereby providing an actual or potential adversary with the important advantage of foreknowledge of the State's position and anticipated strategy.[3] Hence, those contracts involve special considerations that make a special review and approval process appropriate.

Moreover, the litigation-related contracts described in SF §13-107(b)(1)(i) implicate the Attorney General's constitutional responsibility to serve as the lawyer for the State. *See State v. Burning Tree Club, Inc.*, 301 Md. 9, 34, 481 A.2d 785 (1984). When consultants are needed in connection with representation of agencies or officials, the Attorney General, like an attorney representing a private client, must have the ability to select the most able and knowledgeable consultants available. Subjecting to approval by officials other than the Attorney General the determination of whether, when, and for what purpose the assistance of expert witnesses or other consultants is

---

[3] We note that SF §13-107(c), requiring public notice of any contract "awarded under this section," applies to contracts covered by SF §13-107(b). However, the public notice can be fashioned to avoid disclosure of privileged information. *Cf.* §§10-615(1), 10-618(b) and 10-618(e) of the State Government Article.

needed and the choice of the consultant who will provide those services in connection with litigation might impinge upon the Attorney General's constitutional duty to exercise ultimate supervision over the conduct of the State's legal business and, in some contexts, might interfere with the Attorney General's prosecutorial discretion. *See* 67 *Opinions of the Attorney General* 3 (1982). *See also Murphy v. Yates*, 276 Md. 475, 492, 348 A.2d 837 (1975) (duties characteristic of a constitutional office may not be transferred by statute to another office). SF §13-107(b) should be construed to avoid this potential constitutional problem. *See Yangming Transport v. Revon Products*, 311 Md. 496, 509, 536 A.2d 633 (1988).

To be sure, not all State agencies are represented by the Attorney General. *See, e.g.*, §6-102 of the State Government Article. Accordingly, the General Assembly could not have been concerned that requiring those agencies to submit their proposed procurements of expert witnesses to normal procurement approval procedures might impinge upon the Attorney General's constitutional role. Nonetheless, SF §13-107(b) does not distinguish between agencies represented by the Attorney General and those represented by independent counsel. We believe that the General Assembly thus recognized that the retention of consultants in connection with the litigation and other specified activities of those agencies implicates the same concerns that necessitate a special approval process for legal consultants' contracts with agencies that are represented by the Attorney General: the need to maintain confidentiality concerning all aspects of the consultant's employment and the need for the full exercise of counsel's best legal judgment in determining whether to retain a consultant in connection with a particular legal matter and in the choice of the consultant. By requiring that the State's chief legal officer review the contracting unit's determination that the matter to which the contract relates and the nature of the services to be performed warrant the provision's invocation, the General Assembly sought to ensure that SF §13-107(b) will not be applied improperly. Hence, we believe that sole source procurements under SF §13-107(b), whether by an agency that is or by one that is not represented by the Attorney General, are subject to the approval of the Attorney General alone.

IV

Conclusion

In summary, it is our opinion that the award of a contract for expert witness or other consultant services under the "sole source" procurement provisions of SF §13-107(b) requires the approval of the Attorney General only. This conclusion is not a rejection of cooperation. To the contrary, we look forward to working with DBFP to develop orderly procedures for processing contracts within SF §13-107(b), consistent with the approval authority provided by the General Assembly.

J. Joseph Curran, Jr.
Attorney General

C. J. Messerschmidt
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions and Advice

PUBLIC OFFICERS

Incompatible Positions - County Council - Planning Board - Effect of Resignation

April 4, 1989

Clyde H. Sorrell, Esquire
County Attorney for Montgomery County

You have requested our opinion on the eligibility of a member of the Montgomery County Council for appointment to the Montgomery County Planning Board during that councilmember's term of office. Specifically, you ask that we consider the applicability of the common law doctrine of incompatible positions to this situation.

For the reasons stated below, we conclude that a person may not serve simultaneously as a member of the Montgomery County Council and a member of the Montgomery County Planning Board. However, a councilmember is eligible to serve on the Planning Board if he or she resigns from the County Council prior to any action by the County Council (i) to make the appointment to the Planning Board or (ii) to increase the salary of the Planning Board position.

I

Background

As we understand the situation, a member of the Montgomery County Council is considering whether to apply for the position of full-time member of the County Planning Board. Because the positions of member of the County Council and member of the Planning Board are "offices of profit," within the meaning of Article 35 of the Maryland Declaration of Rights, a person may not hold both of those offices "at the same time." The councilmember is prepared to resign from the County Council prior to assuming the Planning Board position (should the councilmember apply and be selected). The question has arisen, however, as to whether this course - resignation from the first office, followed by acceptance of the second - would be permissible under the common law incompatibility doctrine, or whether that doctrine renders the councilmember ineligible for the Planning Board position.

II

Resignation and the Incompatibility Doctrine

We begin with the question of whether the two positions are incompatible, within the meaning of the common law doctrine. In *Hetrich v. County Commissioners*, 222 Md. 304, 159 A.2d 642 (1960), a member of a board of county commissioners had been appointed by the board to serve simultaneously as county business manager. The Court of Appeals held that the two positions were incompatible and that the commissioner was not eligible for the position of business manager.

The Court phrased the test for determining whether offices are incompatible rather broadly:

> The fundamental test of incompatibility at common law is whether there is a present or prospective conflict of interest, as where one office is subordinate to the other or subject to supervision by the other, or where the incumbent of one office has the power to appoint or remove or set the salary of the other.

222 Md. at 308.

Three members of the Planning Board are appointed, and may be removed, by the Montgomery County Council. *See* Article 28, §§2-101 and 2-103 of the Maryland Code. The County Council also approves the operating and capital budgets of the Planning Board. §2-118. Moreover, the County Council authorizes a "supplementary salary" for a Planning Board member who serves full-time, which is the position in question here. §2-104. Based on these and other legal relationships between the County Council and the Planning Board, we conclude that the two offices are incompatible.

This conclusion matters, however, only if the common law doctrine prevents the holder of one office from resigning and accepting the second office. Such a sequence would, of course, satisfy Article 35 of the Declaration of Rights. The question is whether it would also satisfy the common law doctrine, or whether a member of the County Council would be ineligible for membership on the Planning Board even if the councilmember resigned from the County Council prior to his or her appointment.

Hetrich involved the problem of simultaneous service in incompatible offices. It did not address the legal consequence of a prior resignation from the first office. Indeed, as far as we are aware, all of the Maryland incompatibility cases involved simultaneous service. The Court of Appeals has summarized the doctrine as follows: "It is the well settled rule of the common law that a person cannot, *at one and the same time*, rightfully hold two offices which are incompatible...." *Lilly v. Jones*, 158 Md. 260, 265, 148 A. 434 (1930) (emphasis added). *See also Hetrich*, 222 Md. at 310; *Howard County Metro. Comm'n v. Westphal*, 232 Md. 334, 193 A.2d 56 (1963). An attempt to hold both simultaneously fails because, under *Hetrich*, the person who continues in the first office is ineligible for the second.

However, the clear implication of this caselaw is that if two offices are incompatible, the holder of one becomes eligible for the second through resignation from the first at the appropriate time. In this way, the common law doctrine would operate in conformity with the accepted mode of compliance with Article 35 of the Declaration of Rights. In general, "the common law and [a] statute" - or, as here, a constitutional provision -"must be construed so as to avoid conflict, if reasonably possible." *Dry Creek Valley Ass'n, Inc. v. Board of Supervisors*, 135 Cal. Rptr. 726, 729 (Cal. App. 1977).

To be sure, in *Hetrich* the Court of Appeals cited (without pertinent analysis) two out-of-state cases in which resignation from one office did not cure the legal problems occasioned by acceptance of the second office. But both of those cases involved special circumstances and do not, in our view, represent a general legal principle barring acceptance of an incompatible office after resignation from the prior office.

In *People ex rel. Ellis v. Lennon*, 49 N.W. 308 (Mich. 1891), a member of a town council resigned one week before the vote at which his former colleagues appointed him to be the town's police chief. The Michigan court held that he was ineligible for the position of police chief. However, the basis of the court's holding was a statute prohibiting appointment to office "during the period for which he was elected." The office of police chief had been created while Lennon was a member of the council. 49 N.W. at 310.

The Michigan statute, in other words, was aimed at the same evil addressed by Article III, §17 of the Maryland Constitution -a member of a legislative body being in a position to influence the creation of an office, or an increase in its salary, and then reaping the benefits of that legislative act. Resignation from the legislative body would not, in that situation, correct the problem.

The wording of Article III, §17 is noteworthy: "No Senator or Delegate, after qualifying as such, *notwithstanding he may thereafter resign*, shall during the whole period of time, for which he was elected, be eligible to any office, which shall have been created, or the salary, or profits of which shall have been increased, during such term." As far as we are aware, none of the cases or opinions on this provision suggest that the italicized phrase merely embodies a common law principle. *See also Wachter v. McEvoy*, 125 Md. 399, 93 A. 987 (1915) (specific statute prevents pursuit of office despite resignation from prior office).

Assuming that the common law incompatibility doctrine nonetheless may itself be applied to prevent the kinds of problems that are addressed only as to members of the General Assembly by Article III, §17, the doctrine need not apply in this case. First, the Planning Board was not created by the Montgomery County Council. Rather, it has existed by virtue of a State statute for many years. Second, although the County Council sets the salary of the full-time Planning Board position in question here (*see* Article 28, §2-104), we understand that the County Council has not yet acted on a proposed increase. Therefore, a councilmember interested in applying for the Planning Board position could resign from the County Council prior to that action.

The other case mentioned in *Hetrich* is *People ex rel. Shirey v. Pearson*, 200 N.Y.S. 60 (Sup. Ct.), *aff'd mem.* 201 N.Y.S. 936 (N.Y. 1923). In that case, the trial court announced the unexceptionable principle that "a public officer may not vote to appoint himself to public office." On the facts before it, the court found that a purported resignation was a sham, a mere "subterfuge and strategem" by which to control the vote on the appointment. 200 N.Y.S. at 61. We do not believe that this case addresses a situation in which a member of a legislative body resigns from the body and genuinely has nothing to do with a subsequent vote by which the former member is appointed to another office.

III

Conclusion

In sum, if a member of the Montgomery County Council resigned from the County Council prior to its action to fill a vacancy on the Planning Board, and prior to any action by the County Council to increase the salary for that Planning Board position, in our opinion the common law incompatiblity doctrine would not likely be applied to prevent that former councilmember from serving on the Planning Board.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions and Advice

RACING

Racing Commission - Harness Racing - Transfer of Meetings

October 6, 1989

Mr. Kenneth A. Schertle
Executive Director
Maryland Racing Commission

In response to an inquiry from the owner of Freestate Racing Association, Inc. ("Freestate"), you have requested our opinion concerning the authority of the Maryland Racing Commission ("Commission") to permit Freestate to conduct its future race meets at Rosecroft Raceway rather than at Freestate Raceway. Specifically, you ask:

1. May the Commission authorize the transfer of a licensed racing association's harness racing meet or meetings to a county where another racing association is licensed to hold harness racing?

2. If the Commission may authorize that transfer, may it authorize the transfer for an indefinite number of years?

For the reasons given below, we conclude as follows:

1. The Commission may authorize the transfer of a licensed racing association's harness racing meet or meetings from the county in which the racing association is licensed to a county in which another racing association is licensed, if in the Commission's judgment circumstances exist that justify the transfer.

2. A transfer may be authorized only for the year for which the racing association requesting the transfer holds a license to conduct harness racing.

I

Background

Freestate, a Maryland corporation, currently is licensed by the Commission to conduct 115 days of trotting and pacing races at Freestate Raceway, located in Howard County, Maryland, through October 3, 1989. Freestate does not own this racetrack, but leases it from Freestate Racing Association Limited Partnership.[1] The lease agreement expires at the end of October, 1990, with no provision for extension or renewal. You have advised us that the real property on which Freestate Raceway is situated has recently been sold to a real estate developer; as a result, the real property in all likelihood will no longer exist as a race track in the near future.

Pursuant to section 6.1 of the "Share Purchase Agreement" for the purchase of Freestate, the new owner is to make a good faith effort "to cause the [Maryland Racing Commission] to take favorable action on a request by the corporation to transfer the place for the conduct of Racing Days for the year 1990 or 1991, as buyer determines in his sole discretion, from Freestate Raceway to Rosecroft Raceway." Freestate is expected to request that the Commission authorize the transfer of Freestate's 1990 race meet, *and all subsequent race meetings*, from Freestate Raceway to Rosecroft Raceway, located in southern Prince George's County. Rosecroft Raceway is the location where Rosecroft Trotting and Pacing Association, Inc., a Maryland corporation, has been licensed by the Commission to conduct its trotting and pacing race meets.[2]

---

[1] Pursuant to a "Share Purchase Agreement," dated May 24, 1988, Mark R. Vogel purchased 100 percent of the shares of stock of Freestate Racing Association, Inc., then the general partner of Freestate Racing Association Limited Partnership. The Limited Partnership retained ownership of the real property on which Freestate Raceway is located.

[2] Mark R. Vogel, the owner of Freestate, also is the owner of Rosecroft Trotting and Pacing Association, Inc., and Ocean Downs Racing Association, Inc. - the other two entities licensed by the Commission to conduct harness races in Maryland.

II

Awarding of Racing Dates

Article 78B, §17(a) authorizes the Commission to "issue licenses for the holding of trotting and pacing meetings at which there may be offered stakes, purses or awards, and at which there may be exercised pari-mutuel betting privileges ...."[3] However, those licenses may be issued to no more than three racing associations, and no more than one trotting and pacing license may be issued in any county or Baltimore City. *Id.* Article 78B, §17(b)(5) provides that no more than 115 days of racing (67 days plus 48 "additional" days) may be awarded to any single licensee.[4]

An entity desirous of conducting racing during any calendar year must apply to the Commission for a license to do so, specifying in the application "the days on which such racing is desired to be conducted or held ...." Article 78B, §7(a). Upon review of the applications, the Commission awards all dates for races in Maryland, including harness races, on or before December 1 of each calendar year for racing to be conducted in the ensuing calendar year. Article 78B, §§ 7(b) and 17(b)(5).[5]

---

[3] This statutory provision first was enacted in 1947 to provide for the licensure of harness racing, although harness races have been conducted in Maryland at least since 1919. *See* 72 *Opinions of the Attorney General* 313, 317 n.8 (1987).

[4] For a further discussion of Article 78B, §17(b)(5), *see* note 10 below and accompanying text.

[5] In a 1974 opinion, the Attorney General concluded that all dates for trotting and pacing races, like all dates for thoroughbred racing, must be awarded by the Commission on or before December 1:

> While Section 17, which governs the award of racing dates for harness tracks, does not contain the provision that the Commission shall award the racing dates on or before December 1 for the ensuing year, it does provide that the Commission "shall have supervisory powers over such meetings and those licensed in the same manner and to the same extent, where not inappropriate, as it has by virtue of the provisions of Sections 7 and 15 of this article." It is our opinion that this reference to Section 7 was intended to incorporate the pertinent provisions of Section 7 and therefore the requirement in Section 7(b) that racing dates be awarded on or before December 1 for the ensuing year applies to the award of racing dates made by the Commission to the harness tracks pursuant to the authority of Section 17. 59 *Opinions of the Attorney General* 591, 592-93 (1974). By the same token, the provisions of §7(a) concerning the application for a license are applicable to harness racing.

Upon the award of dates to an applicant, and payment of the prescribed license fee, the Commission issues a license for the holding of a meet or meetings during the days awarded to the applicant. Article 78B, §10. The Commission historically has not issued the license itself until several days before the commencement of the days of racing (race meet) previously awarded by the Commission, and a separate license is issued for each race meet awarded to a licensee.

III

Transfer of Race Meet or Meetings

The General Assembly has vested in the Commission the discretion to permit a trotting and pacing race licensee "to transfer its race meet or meetings from its own track, or place for holding [races, to the track or place for holding] races of any other person, corporation or association licensed under this article to conduct racing ...." Article 78B, §18.[6]

When §18 was first enacted by Chapter 44 of the Laws of Maryland 1950, it gave the Commission broad authority to grant a request for the transfer of harness race meetings "at any time or times ...."[7] The following year, the provision was amended to allow transfers only at "any time or times of emergency or unfavorable weather conditions ...." Chapter 696, Laws of Maryland 1951 (amending former Article 78B, §17A).[8] That restriction was repealed,

---

[6] The bracketed material was included in §18 as originally enacted; however, when the statute was amended in 1970, a drafting error omitted this material. *Compare* Chapter 44, Laws of Maryland 1950, *with* Chapter 664, Laws of Maryland 1970. Therefore, these words appear in brackets in the current edition of the Maryland Code.

[7] A similar statutory provision dealing with the transfer of thoroughbred race meets is found in Article 78B, §7(d).

[8] Concomitantly, §17 was amended to specify four named racing associations to which trotting and pacing race days could be awarded. *See* Chapter 696, Laws of Maryland 1951. Previously, there was no statutory restriction on the number of racing associations to which trotting and pacing race days could be awarded.

In 1979, one of the four named racing associations (Baltimore Trotting Races, Inc.) was deleted from §17 (Chapter 623, Laws of Maryland 1974), and in 1980, §17

(continued...)

however, nineteen years later, by Chapter 664 of the Laws of Maryland 1970, leaving the authorization of a transfer to the discretion of the Commission, so long as the owner or lessee of the "receiving" track consents to the transfer.

The deletion of the restriction permitting transfers of racing dates only in times of emergency or due to unfavorable weather conditions was, in our view, a legislative recognition that circumstances not involving the weather nor amounting to an emergency also may justify a transfer of the location of harness races. The determination of whether circumstances have arisen to justify a transfer of dates is accordingly left to the discretion of the Commission, which has the expertise to judge the matter (provided that the actions of the Commission are not arbitrary or capricious).

A perceived restriction on transfers, however, is found in the provision of §17(a) that "not more than one license [to conduct trotting and pacing races] with pari-mutuel betting privileges shall be issued in any county or in Baltimore City ...."[9] However, we do not think that permitting a *transfer* of a race meet of one licensee to a county in which another licensee is conducting harness racing would violate §17(a)'s prohibition against the *issuance* of two licenses in the same county.

Section 17(a), like any other statute, must be construed to effectuate its legislative objective, goal, or purpose. *Kaczorowski v. City of Baltimore*, 309 Md. 505, 513, 525 A.2d 628 (1987). To that end, statutes that relate to the same subject matter are to be considered together so that they will harmonize with each other and be consistent with their general object and scope. 309 Md. at 516. Further, statutes should be construed to avoid illogical or absurd results. 309 Md. at 517.

The prohibition against the issuance of more than one license to conduct harness racing in the same county (as well as a prohibition

---

[8](...continued)
was again amended by the replacement of the specific reference to the three remaining named racing associations with a generic reference to "not more than three racing associations."

[9] Section 17(a) also prohibits the issuance of any license in Carroll, Dorchester, Frederick, Montgomery, and Wicomico counties.

against any such license being issued in certain named counties) set forth in §17(a) was included when legislation for the licensing and regulation of harness racing was first enacted in 1947 and has remained unchanged and in effect to date. *See* Chapter 502, Laws of Maryland 1947, sec. 4 (enacting former Article 78B, §16). Thus, by retaining this provision, the General Assembly consistently has discouraged a proliferation of harness racing in any one county.

Yet neither §17(a) nor any other provision restricts the *number of days* of racing that may be conducted in any one county. To be sure, Article 78B, §17(b)(5) provides for a limit of 115 days for any licensee.[10] This section also provides, however, for Commission approval of agreements between licensees to conduct up to 30 of the "additional" days assigned to one licensee to be run at the track of another licensee. Further it provides that if two licensees wish to run the "additional" days of a licensee having an average daily wager of less than $166,666.67 (referring to Ocean Downs Racing Association, Inc.), then these "additional" days must be awarded equally between the other two licensees. Thus, by agreements approved by the Commission, more days may be raced in a particular county than the 115 originally awarded.

In short, if the General Assembly had intended to restrict the number of days to be raced in a particular county, it easily could have done so. It did not, suggesting that such a restriction was not its objective, goal, or purpose.

Moreover, if §17's prohibition against the issuance of more than one harness racing license in any one county (or Baltimore City) were construed to prohibit the transfer of a race meet of one harness licensee to the race track of another harness licensee, the transfer provisions of §18 would be rendered meaningless. Because the statute permits transfers only to the track of another licensee, the General Assembly must have intended that the transfer be either to another operating harness track or to an operating thoroughbred track. But the transfer of a harness race meet to a thoroughbred track would require the

---

[10] Each of the three racing associations that may be licensed is awarded 67 racing days. In addition, the Commission is authorized to award a total of 144 "additional" days; however, not more than 48 days (144 days divided by three) may be awarded to any one licensee.

extraordinary step of resurfacing the track or constructing an inner oval.[11]

Thus, as a practical matter, if a harness licensee cannot use its track during its current license year, unless its race meet can be transferred to an existing harness track, its racing days will be lost not only to it but also to the racing industry and the public. We cannot suppose this to have been the legislative objective.

Consequently, when the General Assembly provided for the transfer of harness race meets, it must have contemplated a transfer to an existing harness race track, although the result is that two licensed racing associations necessarily will *conduct* harness racing in the same county.

Therefore, in our opinion, while §17(a) establishes a prohibition that applies to the initial issuance of licenses, it does not prevent the Commission from exercising its transfer authority if the Commission finds that circumstances exist to justify a transfer.[12] In effect, the General Assembly has left to the discretion of the Commission the authority to permit two licensees to operate in the same county in a given licensing year when circumstances arise that justify doing so.

IV

Prospective Transfer

From the time when transfers of trotting and pacing race meets were first authorized, a prerequisite to such a transfer has been the licensure of both the transferring and the "receiving" entities under §17: Section 18 authorizes a transfer from the track of an entity "licensed under §17" to the track of another entity "licensed under this

---

[11] At the Meadowlands race track in New Jersey, such a resurfacing is done when a thoroughbred meet concludes and a harness meet is about to commence and vice versa. This arrangement, however, is conducted on a permanent annual basis, as opposed to a temporary basis to accommodate a transfer of racing days.

[12] The only statutory restriction on any transfer of racing dates, in addition to requiring the approval of the "receiving track," is a requirement that the Commission hold a public hearing at a location not more than ten miles from the "receiving track" to permit any person to testify for or against the transfer of the days. Article 78B, §7(e).

article." Indeed, without a license, the applicant would simply have nothing to transfer under §18, for no applicant has any rights in racing dates until the dates have been awarded to it. §17(b)(5).

Considering the prohibition against issuing multiple licenses in one county, the Commission must know where an applicant intends to conduct racing at the time that the Commission issues a license. Therefore, in order to receive a license to conduct a harness racing meet, the applicant must necessarily have a place at which it will conduct the races.

Moreover, because the number of racing dates that may be awarded is limited, these dates are not awarded on speculation. The maintenance of Maryland's attractiveness to horsemen requires that the full number of racing dates authorized be actually used each year if at all possible. *See* Committee Report on Senate Bill 595 (1983) (enacted as Chapter 144, Laws of Maryland 1983). Accordingly, if an applicant does not in any sense have "its own track or place for holding races" at the time it applies for racing dates, it will not be awarded dates.

Further, the requirement of §7(b) and §17(b)(5) that racing dates be awarded "on or before December 1 of each year for racing for the ensuing year" means that the process for the award of dates and the resultant issuance of licenses must be accomplished annually. The Commission is meant to exercise continuing supervision over the conduct of harness racing. §7(a). *See also* §7(c) (all enforcement powers granted to Commission by §§11 and 13 applicable to harness racing).[13] The annual licensure requirement was designed to further that supervision, by allowing the Commission to conduct an annual review of each licensee's performance and, if appropriate, reapportion racing dates among the applicants or deny a license to a previous licensee altogether.[14]

Any grant of a license for more than one year would to that extent contravene the legislative intent that the Commission review the

---

[13] Those powers include the power to compel the production of licensees' records; to require the removal of any official or employee of a licensee; and to conduct on-site investigations, hearings, and audits.

[14] This power is severely diminished, if not in practical terms eliminated, under the current single ownership of the three racing associations licensed by the Commission.

conduct of harness racing annually. An indefinite grant of a license would wholly nullify the annual review system. Hence, a license may be granted only for the year following that in which the grant occurs. Because only race meetings awarded to a licensee may be transferred under §18, a transfer of a race meet likewise may be authorized only for a single year.

We do not think that these statutory provisions can be satisfied by the Commission's simply declaring, at a time when an entity *does* have its own track or place for holding races, that all future meetings that would have been run at the place where the entity currently is conducting racing may be run at a different track where harness race meetings are also to be run under a different license. Section 18's reference to the transfer of a "race meet or meetings" must be read as referring to the meet or meetings previously awarded to a licensee for a particular year, rather than to the meetings that might be awarded to the licensee in future years. The contrary interpretation would effectively nullify §17(a)'s prohibition against issuing more than one license in the same county. Statutes should not be construed to nullify their provisions. *Kaczorowski*, 309 Md. at 519.

Moreover, an indefinite grant of permission to transfer all future race meetings would effectively recognize that a particular entity has a vested right to conduct harness racing. Patently, the General Assembly never intended that the right to racing days should be vested in any person, association, or corporation. Article 78B, §17(b)(5) expressly states that the award of additional racing dates to the tracks "do[es] not provide any right of ownership in the days to any track or any other person" and that "the award of all dates shall constitute a license and not a franchise."[15] *See also* 44 *Opinions of the Attorney General* 309, 314 (1959).

The Commission itself has interpreted the provisions of §§17 and 18 as prohibiting it from authorizing a transfer for any year after that for which the requester has been licensed to conduct racing. In 1974, the Commission licensed racing at Laurel Raceway for 1975 on the understanding that the then owner would make certain needed capital improvements to the raceway. Maryland Racing Commission Minutes (November 22, 1974). Before that meet began, however, it became

---

[15] Similar language is found in Article 78B, §7(b) and §15(a), applicable to the awarding of racing dates for the conduct of thoroughbred racing.

clear that the owner would need more time to complete the improvements. For that reason the Commission approved a transfer of the Laurel Raceway 1975 meet to Rosecroft; however, the chairman of the Commission expressly stated that the transfer was approved for 1975 *only*. Maryland Racing Commission Minutes (May 5, 1975). Later that year, the Commission awarded a license for racing at Laurel Raceway in 1976. Maryland Racing Commission Minutes (October 1, 1975). In 1976, the Commission granted approval for the transfer of the Laurel Raceway 1976 meet to Rosecroft because the improvements could not be completed in time to conduct the meet at Laurel Raceway. Maryland Racing Commission Minutes (May 20, 1976).

Thus, even when the Commission has permitted the transfer of two consecutive years of racing, it has done so by two separate actions, each applicable to only one year. We believe that the Commission correctly interpreted the provisions regarding licensure and transfer of race meetings as authorizing it to permit a transfer of only the meet or meetings that a licensee has been awarded for a single year.

Viewing the practicalities of Freestate's current situation - the expiration of Freestate's lease at Freestate Raceway together with the likelihood that Freestate Raceway will no longer exist as such in the near future - it appears that after 1991, Freestate will no longer have a track or place for holding races. Hence, the Commission may not grant Freestate a license for any year after 1991 unless Freestate secures a new location at which to conduct harness races in a county in which no other license to conduct such racing during that year has been issued or unless the General Assembly acts on the matter. Legislative action might entail an amendment to §17(a) to allow the issuance of more than one license for holding harness race meetings in a county; an amendment to §17(b)(5) to allow more than 115 days of racing to be conducted by one licensee in a given year; or new legislation expressly providing for the consolidation of harness racing in Maryland.[16]

---

[16] In the *Report of the Legislative Council Committee on Racing*, (December 1960), consolidation of Rosecroft and Freestate Raceways was encouraged:

> The harness tracks operating south of Baltimore testified that a study of automobile license plates in their parking lots during meetings indicates that nearly two thirds of their patronage is from Washington and Virginia. In view of this source of patronage of two of the harness tracks, it is the thought of this

(continued...)

V

Conclusion

In summary, we conclude that the Commission may authorize the transfer of the trotting and pacing race meet or meetings of a licensed racing association from the county in which the racing association is licensed to a county in which another racing association is licensed, if in the Commission's judgment circumstances exist that justify such a transfer. However, a transfer may be authorized only for the year for which the racing association requesting the transfer holds a license to conduct trotting and pacing races.

J. Joseph Curran, Jr.
Attorney General

Bruce C. Spizler
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

---

[16](...continued)

> Committee that the two tracks south of Baltimore be encouraged to combine their operations to lighten the overhead of each in order to provide for the expansion and improvement of facilities for the public and the horsemen.

To accomplish this end, a bill was proposed for introduction in the 1961 General Assembly that would have permitted consolidation and an assignment of all racing days to one licensee "notwithstanding any other provisions of this Article." This bill, however, was not passed by the General Assembly.

Consolidation also was considered nine years later in the *Report of the Legislative Council Committee on Racing* (November 26, 1969). Although dealing primarily with incentives for the reduction of the number of mile (thoroughbred racing) tracks to enhance the cost feasibility of capital improvements to those tracks, the Special Committee on Racing proposed a bill that would have removed the statutory requirements, existing at that time, of legislative approval for the transfer of racing dates regarding one mile tracks. The Committee noted that "with some modifications harness racing can be conducted on thoroughbred tracks and the Committee feels this should be a matter within the province of the Racing Commission." The only legislation resulting from the Report that related to harness racing was the 1970 amendment to §18 deleting the "emergency and unfavorable weather conditions" prerequisites to transfer of dates from one track to another. *See* Chapter 664, Laws of Maryland 1970.

RETIREMENT SYSTEMS

Civilian Paramedics - "Fireman's Position" - The Position Of Civilian Paramedic Is Not A "Fireman's Position" And Therefore Is Not Excluded From Social Security

May 1, 1989

The Honorable Hilda E. Ford
Secretary of Personnel

You have requested our opinion on whether the position of civilian paramedic in the Baltimore City Fire Department is a "fireman's position." This term is used in a provision of federal law describing the scope of an exclusion from Social Security. In practical terms, if civilian paramedics hold firemen's positions, they are properly to be included in the advantageous Fire and Police Employees' Retirement System.

Our task is to apply this provision of law consistently with the cases and other pertinent materials that have construed it in the past. It may well be that the scope of the provision is too narrow, in the sense that it does not reflect the broadened responsibilities that the City Fire Department has undertaken in recent years. Nevertheless, for the reasons stated below, we are constrained to conclude that the position of civilian paramedic is not a "fireman's position."[1]

---

[1] This conclusion addresses the position of civilian paramedic, as such. Some paramedics, as a result of prior training or the nature of their particular job assignments, might occupy firemen's positions. *See* note 8 below. We are not able to make case-by-case determinations that might turn on particular facts. Our conclusion is limited to the legal question presented - that a person does not hold a fireman's position solely because the person is a civilian paramedic in the Fire Department.

I

Background

On January 26, 1988, the City of Baltimore enacted Ordinance No. 5, which amended its existing Ordinance No. 1156. The objective of this legislation was to transfer paramedics, paramedic assistants, and persons performing substantially similar duties from the Employees' Retirement System ("ERS") to the Fire and Police Employees' Retirement System ("F&P System"). However, the ordinance imposed a condition: that these employees would be removed from coverage under the federal old age, survivors and disability insurance ("FICA") currently provided to members of the ERS. Ordinance No. 5 obliged the Mayor and City Council to request an opinion from the appropriate State or federal agencies that the desired realignment of the retirement programs was legally permissible.

Accordingly, Mayor Kurt Schmoke wrote William Goldsborough, of the State Department of Personnel, and asked him to determine whether a paramedic or similar employee could be considered to hold a "fireman's position" and thus be properly excludable from the ERS and includable in the F&P System. As we explain in Part II below, this term is used in the federal law describing the scope of the exclusion. Mr. Goldsborough relayed this request to the United States Department of Health and Human Services, Social Security Administration. Mr. Sandy Crank, Associate Commissioner for Retirement and Survivors Insurance, in turn replied that the scope of the term "fireman's position" was for the State to determine and referred the matter back to Mr. Goldsborough.[2] You then referred the matter to this office.

II

Prior Construction of "Fireman's Position"

Prior to 1954, state and local government employees in positions covered by retirement systems were excluded from eligibility for the

---

[2] Although federal officials defer to state interpretation of the term, the Social Security Administration's own analysis is pertinent to our understanding of congressional intent. *See* Part III below.

insurance provided under the Federal Old Age and Survivors' Insurance Act. In 1954 Congress amended the law to include state and local employees covered by a retirement system if a majority of such employees voted in favor of inclusion. 42 U.S.C. §418(d). However, Congress retained the exclusion for employees "in any policeman's or fireman's position"; they could not vote in any referendum to obtain FICA coverage. 42 U.S.C. §§418(d)(3) and (d)(5).

In 1958 the City of Baltimore Employees' Retirement System conducted a referendum on whether its members, except those in any policeman's or fireman's position, would be covered under FICA. In order to determine who was eligible to vote in the referendum, the State Division of Social Security asked the Attorney General for an opinion defining the phrase "fireman's position."

This office concluded that the fireman's position exclusion was "applicable only to the employees of a fire department who are engaged primarily in the duty of extinguishing fires and protecting lives. These are firemen in common parlance." 43 *Opinions of the Attorney General* 300, 302 (1958). Applying this understanding of the term, the opinion concluded that two categories of employees were properly excluded from the referendum as firefighters: "the personnel who combat the conflagration at the scene"; and "the personnel of the Fire Department who are trained, qualified and classified as fire fighters but are not presently assigned to the fire fighting forces ...." 43 *Opinions of the Attorney General* at 302-03. Thus, clerical and administrative employees of the Fire Department were to be considered firefighters, provided that they were trained, qualified, and classified as firefighters - even if they were no longer assigned to firefighting forces.[3]

At approximately the same time that this office was rendering its opinion, the Fire Fighters Association, the union representing employees of the Fire Department, was threatening legal action over the determinations being made by the State Employees' Retirement System and the City as to which Fire Department employees would be

---

[3] This opinion relied heavily upon an earlier opinion, 40 *Opinions of the Attorney General* 420 (1955), in which Attorney General Sybert discussed the exclusion as it applied to police officers. The earlier opinion analyzed the legislative history of the 1954 amendments to the Federal Old Age and Survivor's Insurance Act and concluded that the phrase "in any policeman's or fireman's position" was not meant to embrace all persons employed by a police or fire department. 40 *Opinions of the Attorney General* at 422-23. *See* Part III below.

subject to the referendum. The union took the position that "everybody under the supervision of the Fire Board" should have been considered to have been in firemen's positions. *Baltimore Sun*, April 30, 1958. The State and City took the position, on the other hand, that no classification other than the firefighter's classification should be excluded from the referendum.

The referendum was conducted and a majority of employees in the ERS voted to be covered by FICA. Certain Fire Department employees who had participated in the referendum contested their inclusion in the ERS and exclusion from the F&P System. They brought suit in the Circuit Court for Baltimore City seeking a judgment that they should have been considered to be in firemen's positions. *William M. Augustine, et al. v. Mayor and City Council of Baltimore, et al.*, Docket 1960 A, Folio A/487-58, File No. A-38147.

In an opinion delivered on June 9, 1960, Judge Joseph Allen found that certain Fire Department employees should have been excluded from the referendum. Judge Allen stated that "the exclusion applies to every employee of the Fire Department whose services bear a substantial and direct relationship to extinguishing fires or protecting lives and/or property endangered by fires, even though such services are rendered away from the fire scene." Slip. op. at 6. Applying this reading of the term "fireman's position," Judge Allen determined that two employees engaged as high-pressure pump tenders, a machinist who inspected automotive and other motor equipment and attended all multiple alarm fires, and a fire alarm operator responsible for safeguarding lines of communication could be considered to be firefighters. However, clerical and other employees not "proximately and substantially associated with extinguishing fires and/or saving lives and property" were not in firemen's positions. Slip op. at 7.

The Fire Department subsequently requested an opinion from the Baltimore City Solicitor classifying all of the employees of the Fire Department as to whether or not they were to be included within FICA coverage. The City Solicitor demurred and suggested that a suit be filed in order to determine whether to include or exclude the remaining employees of the Fire Department.

The result was another case in the Circuit Court for Baltimore City, *George J.W. Merle, et al. v. Mayor and City Council of Baltimore, et al.*, Docket 1960 A, Folio 875, File No. A-40985. Judge

Allen, again presiding, determined that two electricians who did not respond to the fire scene should not be considered to be in firemen's positions. The affected employees filed a petition to correct the decree and stated that they had neglected to point out earlier that they also were required to respond to the fire ground in all second or greater alarm fires. Based upon these additional facts, Judge Allen corrected the original decree and held that the employees were within firemen's positions.[4]

Despite reaching different conclusions, Judge Allen's opinions in *Augustine* and *Merle* and this office's opinion differed only slightly in their interpretation of the phrase "in any ... fireman's position." Judge Allen stated that every employee "whose services bear a substantial and direct relationship to extinguishing fires or protecting lives and/or property endangered by fires ..." was in a fireman's position. The 1958 Attorney General's opinion stated that employees who are "engaged primarily in the duty of extinguishing fires and protecting lives ..." were in firemen's positions. The major difference between the Attorney General's opinion and Judge Allen's ruling was Judge Allen's conclusion that some services performed away from a fire scene, such as tending high-pressure pumps, also qualified an employee for a fireman's position, because such services were "necessary function[s] immediately associated with and substantially important to 'extinguishing fires.'" *Augustine*, slip. op. at 5.

All of the employees discussed in the Attorney General's and the court's opinions apparently were exclusively devoted to the business of fighting fires, either directly or indirectly. They performed no role other than protecting lives and property endangered by fire. For example, in *Merle* the two plaintiffs originally were thought to be primarily engaged in the installation and repair of electrical equipment. Had they performed no other duties, they would not have been considered to be in firemen's positions. Because they also had to respond to the fire scene, Judge Allen found that they were acting as

---

[4] In 1963 the then City Solicitor, Francis B. Burch, advised the City of Baltimore that an employee in the position of "instrument mechanic" was not in a fireman's position. Reviewing Judge Allen's decisions in *Augustine* and *Merle*, Solicitor Burch found determinative the fact that an instrument mechanic's "primary and sole duties seem to be limited to the installation, inspection, maintenance and repair of mechanical equipment used by the Fire Department ..." and did not include response to the scene of fire. Therefore, the position was not a "fireman's position" and was to be covered by the ERS, not the F&P System.

firemen. Still, all of their responsibilities, either on-the-scene or in the engine house, were directed toward only one goal: enabling the Fire Department to protect property and lives endangered by fire.

III

Analysis of Paramedics' Position

Paramedics, at least those who are not qualified in fire suppression, do not primarily function as firefighters. While the position of paramedic may be "connected with" the position of firefighter, they are separate and distinct positions.

Statistics provided by the Fire Department show that during calendar year 1988 the Fire Department's medic units were dispatched to the fire ground on stand-by status on 654 occasions. During fiscal year 1988, those medic units responded to 98,885 calls for assistance. Thus, responses to the scene of a fire are but an extremely small fraction of the total number of responses to calls for assistance performed by paramedics.

These statistics highlight the fact that paramedic services and firefighting are only incidentally related to one another. Although paramedics are called upon to assist persons imperiled by fire, they are also called upon to render assistance whenever the medical need arises. Paramedics respond to medical emergencies irrespective of the cause of the emergency.

In the performance of their respective duties and responsibilities, firefighters and civilian paramedics both render services of inestimable value to the community. In drawing distinctions between the two positions, we do not intend to understate the importance of either. However, the significant differences between firefighters and paramedics lead us to the conclusion that the paramedics' positions cannot be considered to be firemen's positions. The primary duty of a paramedic is to respond to medical emergencies, regardless of their source. In a vast majority of cases, paramedics render assistance to victims of emergencies unrelated to fire.

In Judge Allen's phrase, a "fireman" is one who "perform[s] a necessary function immediately associated with and substantially important to 'extinguishing fires.'" *Augustine*, slip op. at 5. Conversely, one who performs a function, however important to public welfare, that is *not* "immediately associated with and substantially important to" fire suppression is not a "fireman."[5]

This analysis comports with the apparent congressional intent. In 40 *Opinions of the Attorney General* 420, 422 (1955), the opinion discussing the "policeman's" position exclusion, the Attorney General quoted at length from Memorandum 14:F:C from the former Department of Health, Education and Welfare (February 9, 1955). In that memorandum, the Department discussed the legislative history of the policeman's exclusion. In an early version of the legislation, the exclusion was recognized as applying to "employees in positions with functions which might include enforcement of the police power but which were not primarily or exclusively policeman positions." *Id.* However, as the memorandum noted, the provision was redrafted to exclude services in a "policeman's position." The effect of the change was to "narrow the positions subject to the exclusion." *Id.*

Our conclusion is also bolstered by recently readopted regulations of the Social Security Administration. *See* 53 Fed. Reg. 23972, 23980 (August 29, 1988). As amended, 20 C.F.R. §404.1212(a) provides as follows:

> For Social Security coverage purposes under §218 of the Act, a policeman's or fireman's position is any position so classified under State statutes or court decisions. Generally, these positions are in the organized police and fire departments of incorporated cities, towns, and villages. In most States, a policeman is a member of the "police" which is an organized civil force for maintaining order, preventing and detecting crimes, and enforcing laws. The terms "policeman" and "fireman" do not include services in positions which, although connected with

---

[5] Our reasoning parallels that of the court in *Sosa v. City of Corpus Christi*, 739 S.W.2d 397, 403 (Tex. App. 1987), in which the Texas appellate court held that a city's director of emergency medical services was not a "fireman," within the meaning of that term in a civil service law, because "his duties range much further and encompass many more responsibilities than merely *fire-related* emergency medical care." (Emphasis in original.)

police and firefighting functions, are not policeman or fireman positions.

In other words, the Social Security Administration's current view is that a person is not a firefighter simply because the person's work is "connected with" firefighting; the employee must actually function as a firefighter.

To be sure, under a different federal statutory scheme the result would be different. The federal Fair Labor Standards Act exempts "any employee in fire protection activities" from certain of the laws's overtime requirements. 29 U.S.C. §§207(k) and 213(b)(20). According to the regulations of the U.S. Department of Labor implementing the exemption, the term "fire protection activities" extends to "rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection activities." 29 C.F.R. §553.210(a). These personnel are within the exemption, the regulations elaborate, if they "have received training in the rescue of fire ... victims or fire fighters ... injured in the performance of their ... duties" and if they "are regularly dispatched to fires ...." 29 C.F.R. §553.215.[6]

The City Fire Department's civilian paramedics fit this description. Nevertheless, we do not find it possible to say that the Labor Department's interpretation of its statute, in furtherance of its own specific purpose, can control the interpretation of another statute having a wholly different purpose - particularly in light of the Social Security Administration's recent, narrower construction of "fireman's position."

[6] If they perform comparable rescue activities in connection with crime or accident victims or injured law enforcement officers, they would also fall within the exemption for "law enforcement activities." 29 C.F.R. §553.211(b).

IV

Conclusion

In summary, it is our opinion that the position of paramedic is not a "fireman's position."[7] We regret the result of this opinion, for it means that a benefit which in fairness ought to be provided to civilian paramedics as a group can less readily be provided.[8] However, we are convinced that the better reading of the pertinent language, as it has consistently been construed, leads to this conclusion.

J. Joseph Curran, Jr.
Attorney General

David R. Durfee, Jr.
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

---

[7] This opinion is limited to the question of whether a paramedic position or paramedic assistant's position now covered by the ERS comes within the definition of a fireman's position. It does not extend to any positions that are now a part of the F & P System.

[8] A civilian paramedic who, apart from his or her status as a paramedic, has already been certified as a firefighter or who receives appropriate training in fire suppression and who thereafter holds a fireman's position would properly be included in the F & P System.

STATE'S ATTORNEY

Counties - Application Of County Budget And Fiscal Policies To State's Attorney's Office

March 9, 1989

The Honorable Elizabeth Bobo
County Executive

The Honorable William R. Hymes
State's Attorney for Howard County

You have each requested our opinion concerning the relationship between the budget and fiscal policies of Howard County and the conduct of the Office of State's Attorney, as this relationship is determined by State law. The specific question is whether the county's chief budgetary official may disapprove the State's Attorney's request for certain out-of-state staff training.

For the reasons stated below, we conclude that the Office of the State's Attorney is generally subject to the county's budget and fiscal policies, including county policies on such matters as out-of-state training. Hence, the county is generally free to determine the particular circumstances under which goods or services are to be obtained by the State's Attorney. However, the county may not apply its policies so as to prevent the State's Attorney from carrying out an aspect of his official duties if the State's Attorney certifies that failure to pay the item would prevent the proper conduct of his office.

I

Background

This question arises out of a disagreement between the County Administrator and the State's Attorney for Howard County over a proposal to train certain clerical employees at a training site in California. The State's Attorney's office is purchasing a particular computer system to serve its case management needs. The system, sold by a California company, will be tailored to the characteristics of Maryland law and the particular requirements of the State's Attorney's office.

In order to make effective use of the system, the staff of the office must be trained. The six secretaries who were to be trained had three options: go to a training center in Sacramento, California, where the vendor is located; attend training in the office, conducted by representatives of the vendor; or attend training in Washington, D.C., conducted by the vendor's representatives. In the latter two cases, the expenses of the vendor's representatives would have to be paid by the office. The State's Attorney concluded that the first option, sending the secretarial staff to California, was the least expensive. However, the County Administrator declined to authorize payment for the trip, apparently on the view that less costly arrangements were possible.[1]

II

Constitutional and Statutory Provisions

Under the Constitution, "the State's Attorney shall perform such duties ... as shall be prescribed by the General Assembly." Article V, §9 of the Constitution. That same section of the Constitution authorizes the General Assembly to provide for the payment of the "expenses for conducting the Office of the State's Attorney ...."

In Article 10, §40(a) of the Maryland Code, the General Assembly has provided the following general rule for the payment of the office expenses of each State's Attorney:

> The State's Attorneys in the several counties of the State shall receive annually the respective salaries set forth for performing the duties required of them by their respective public local laws and by the public

---

[1] We understand that the budget of the State's Attorney's office contains sufficient funds to defray the training costs, whichever alternative is chosen. This opinion does not address the circumstances, if any, in which a county might be compelled to provide nonbudgeted funds to a State's Attorney's office. *See generally* 58 *Opinions of the Attorney General* 201 (1973). *Cf.* 60 *Opinions of the Attorney General* 647 (1975).

> general laws, and such expenses as are provided by law and by the current practice in the several counties. The State's Attorneys shall receive annual payments for office, traveling, and other expenses. All payments for salaries and expenses shall be made by the respective counties ....

Article 10, §40 then sets out more particular provisions for each county. The provision for Howard County, §40(n), itemizes certain detail about the salaries of the State's Attorney and others in the office. It also expressly authorizes an audit by the county auditor. Article 10, §40(n)(5).

In addition, Article 24, §8-101(2) provides that the State's Attorney's office for each county "is subject to the budget and fiscal policies and purchasing laws of the county in which it is located." For purposes of this opinion, we assume that the fiscal policies of Howard County require the approval of the County Administrator for the kind of out-of-state training contemplated by the State's Attorney for the six secretaries.[2]

III

Analysis

In 73 *Opinions of the Attorney General* 92 (1988), we considered the validity of Article 24, §8-101 as applied to the Circuit Court for Prince George's County. Like a State's Attorney's office, a circuit court "is subject to the budget and fiscal policies and purchasing laws of the county in which it is located." We analyzed the statute against the separation of powers requirements of Article 8 of the Maryland Declaration of Rights.[3] We concluded that the General Assembly did not violate Article 8 by subjecting the circuit court to the "budget and

---

[2] In accordance with our office policy, we express no views on any local law questions that might be raised in connection with the proposed expenditure.

[3] Article 8 provides as follows: "That 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 said Departments shall assume or discharge the duties of any other."

fiscal policies and purchasing laws" of the county in which the court sits. We advised, however, that the constitutional prohibition would be violated if a county's application of its regulations to the court "would deprive the court of adequate and suitable facilities, equipment, or personnel reasonably necessary to carry out the court's judicial function. 73 *Opinions of the Attorney General* at 92.

Our analysis of the present question is similar. The General Assembly has acted within its constitutional power by generally subjecting each State's Attorney's office to the budgetary and fiscal supervision of each county. However, problems of a constitutional dimension would arise if a county exercised this grant of power so as to prevent a State's Attorney from carrying out his or her constitutional responsibilities. *See generally Murphy v. Yates*, 276 Md. 475, 348 A.2d 837 (1975). Article 24, §8-101 should be applied so as to avoid these problems. *See Yangming Transport v. Revon Products*, 311 Md. 496, 509, 536 A.2d 633 (1988).[4]

Paraphrasing our earlier opinion about Article 24, §8-101, we see it as the county's obligation to refrain from exercising its supervisory power over fiscal matters if its supervision would prevent the State's Attorney's office from obtaining "adequate and suitable goods or services" to meet the office's needs. 73 *Opinions of the Attorney General* at 96.

Disagreements over the necessity of a particular item of expenditure usually are resolved through discussion. Indeed, because disputes of this kind ordinarily get worked out, we are aware of no case in Maryland or elsewhere that sheds light on the situation when a county and a State's Attorney are at loggerheads.

In our view, a disagreement of this kind should be resolved in favor of the State's Attorney if the State's Attorney asserts that application of the county's fiscal procedures would pose unacceptable interference with the conduct of the State's Attorney's office. Were it otherwise - that is, if a county were free to insist upon its view of the necessity of a purchase of goods or services - the threat to the conduct

---

[4] In a very recent opinion, we construed a statute governing the approval of certain procurement contracts to avoid the possibility of interference with the Attorney General's prosecutorial discretion. 74 *Opinions of the Attorney General* 230 (1989). *See also* 61 *Opinions of the Attorney General* 166 (1966).

of the State's Attorney's office that we regard as constitutionally unacceptable will have materialized.[5]

To use the current dispute as an example, it is our view that the State's Attorney for Howard County may determine that a particular form of training is required for the effective conduct of his office. If the State's Attorney so determined, the county may not exercise its fiscal powers so as to prevent the training. However, we see no State law impediment to the county's deciding the site of training (assuming no significant difference in the quality of training among the sites). Whether the secretaries are trained in one place rather than in another does not, of itself, affect the conduct of the State's Attorney's office, so long as they are trained.

IV

Conclusion

In summary, our opinion is as follows: Howard County should defer to the determination of the State's Attorney for Howard County that a particular kind of training is essential to the conduct of his office. However, the State's Attorney should defer to the county's determination about the cost-effectiveness of one training site over another, because the exercise of the county's powers as to *that* question does not pose a threat to the effective conduct of the State's Attorney's office.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

---

[5] Of course, if a county declined to approve an item of expenditure even in the face of the State's Attorney's certification of its necessity, the matter would then need to be resolved through litigation.

TAXATION

Municipalities - Special Taxing District - Property Tax - Excise Tax - City of Frederick Lacks Authority To Impose Tax On Construction Costs

March 15, 1989

The Honorable Ronald N. Young
Mayor of Frederick

You have requested our opinion on whether the City of Frederick has the authority to establish a special taxing district supported by a tax based on construction costs.

For the reasons given below, we conclude that, although the city has authority to establish the special taxing district, it does not have authority to impose a tax on construction costs for the support of the district.[1]

I

Proposed Ordinance

The City of Frederick wishes to create a source of revenue to finance its program to stabilize and revitalize the Carroll Creek Linear Park area. To that end, it is considering the establishment of a special taxing district to be known as the Carroll Creek Linear Park Tax District.

The proposed ordinance would generally levy a tax of two percent of construction costs on construction "on or within a lot of record which in any part is immediately adjacent to Carroll Creek or real estate owned by the City which is adjacent thereto." Proposed Resolution, §2A. Within the remainder of the district, the ordinance

---

[1] Thus, we agree with the advice previously given to you by the City Attorney. Letter from W. Milnor Roberts, Esquire (April 27, 1988).

would levy a tax of one percent of construction costs on construction. Proposed Resolution, §2B. However, the tax would not apply to the construction of single-family or duplex residential structures. Proposed Resolution, §3. "Construction" would be defined to include not only the erection of any structure, but also alteration, repairs, renovation, demolition or removal of any structure and excavation, filling, and grading for construction. The revenue to be generated by the tax is to be placed in a separate account and expended solely to finance the design, acquisition, construction, and maintenance of storm drain systems, public parking facilities, pedestrian malls, streets, and lighting.

II

Authority to Levy Taxes

As a municipal corporation, Frederick enjoys home rule status under Article XI-E of the Maryland Constitution. However, §5 of Article XI-E limits the power of municipalities to levy taxes and fees in the following terms:

> No such municipal corporation shall levy any type of tax, license fee, franchise tax or fee which was not in effect in such municipal corporation on January 1, 1954, unless it shall receive the express authorization of the General Assembly for such purpose, by a general law which in its terms and its effect applies alike to all municipal corporations in one or more of the classes provided for in Section 2 of this Article.[2]

The only "express authorization" for municipal corporations to establish special taxing districts and levy taxes for their support is found in Article 23A, §44 of the Maryland Code. 68 *Opinions of the Attorney General* 295, 299-300 (1983).

Article 23A, §44(a) expressly authorizes municipal corporations to establish special tax districts for the purpose of financing storm

---

[2] Pursuant to Article XI-E, §2 of the Constitution, all municipal corporations have been grouped into a single class. Article 23A, §10 of the Maryland Code.

drainage systems, public parking facilities, pedestrian malls, street and area lighting, or a commercial district management authority.[3] To provide financial support for special tax districts, §44(a) confers on municipal corporations the following power:

> *[T]o levy on all real and personal property* located within these special taxing districts *an ad valorem tax* at a rate sufficient to provide adequate annual revenues to pay the principal and interest on any bonds or other obligations of the municipality issued for these purposes as the principal and interest become due, and to pay the costs of operating and maintaining these facilities and activities. These taxes shall be levied in the same manner, upon the same assessments, for the same period or periods, and as of the same date or dates of finality as are now or may hereafter be prescribed.

(Emphasis added.)

III

Validity of Proposed Ordinance

At least with respect to the purpose of the special tax district, Frederick's proposed ordinance was evidently drafted with reference to §44(a). The purposes specified in the proposed ordinance are essentially the same as those mentioned in §44(a), except that there is no reference in the proposed ordinance to a commercial district management authority.[4] However, because §44(a) authorizes only ad

---

[3] The reference to commercial district management authorities in §44 was added after this office concluded in 68 *Opinions of the Attorney General* 295 that the statute did not authorize the establishment of a special tax district for this purpose. The same act also enacted §2(b)(35), authorizing the establishment of commercial district management authorities. Chapter 752, Laws of Maryland 1984.

[4] The proposed ordinance refers to the financing of "street and lighting areas," while §44(a) refers to financing "street and area lighting." We assume the wording of the proposed ordinance is inadvertent. To the extent that the proposed ordinance dealt with streets and not merely street lighting, it would exceed the purpose specified

(continued...)

valorem property taxes, the question arises whether a tax based on construction costs is an ad valorem property tax.

In *Weaver v. Prince George's County*, 281 Md. 349, 356, 379 A.2d 399 (1977), the Court of Appeals noted that "[t]he line that separates an excise tax from a property tax is a difficult one to draw, and courts have not fully succeeded in developing a truly useful definition of either concept." However, "[t]he consensus of opinion appears to be that a property tax is a charge on the owner of property by reason of his ownership alone without regard to any use that might be made of it ...; a tax on the mere right to own or hold property is a property tax." 281 Md. at 357 (citations omitted). By way of contrast, an excise tax is a levy on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege. *Id.*

Property and excise taxes may be distinguished by the ways in which they are computed and imposed:

> Thus, it has been held that where a tax is levied directly by the Legislature without assessment and is measured by the extent to which a privilege is exercised by a taxpayer without regard to the nature or value of his assets, it is an excise tax. Where, however, the tax is computed upon a valuation of the property and is assessed by assessors, and where the failure to pay the tax results in a lien against the property, it is a property tax, even though a privilege might be included in the valuation.

281 Md. at 358.

A tax is not a property tax merely because the tax is calculated by reference to a value that is related to property. For example, Illinois imposed a tax on utilities "engaged in" certain activities, levied as a percentage of the utilities' "invested capital" - their book values, in other words. Yet the Illinois Supreme Court held that this was not a property tax: "That the tax is *measured by* a utility's invested capital

---

[4](...continued)
in the State statute. *See Mayor & Council of Mt. Airy v. Sappington*, 195 Md. 259, 263, 73 A.2d 449 (1950) (statutes granting powers to municipal corporations are strictly construed).

does not render it a property tax, since it is in all significant respects a tax imposed on the privilege of engaging in specified occupations." *Continental Illinois Nat. B. & Tr. Co. v. Zagel*, 401 N.E.2d 491, 502 (Ill. 1979) (emphasis in original).[5]

The tax to be imposed by the proposed ordinance is a stated percentage "of all construction costs for all construction." Thus, the tax would be levied directly by the legislative body of the town, rather than by assessment. In addition, the amount of the tax would be measured by the cost of construction, not the value of the property on which the construction might take place. Put another way, the proposed tax would be imposed on a particular activity engaged in on the property, not on the property itself. In light of these factors, we think that the proposed tax would be an excise tax, rather than a property tax. *See Weaver*, 281 Md. at 358-59 (tax on use of property, as distinguished from tax on ownership, is excise). Accordingly, it is not authorized by Article 23A, §44.

Even if we could conclude that the proposed ordinance would create a property tax, we would be compelled to conclude that the tax would be invalid. Article 23A, §44(a) authorizes municipal corporations to impose only an "ad valorem" tax - that is, a tax levied on property according to its actual value.[6] Because the tax to be imposed by the proposed ordinance would be based on the cost of construction, rather than the value of the property, it would be outside the ambit of Article 23A, §44 even as a property tax.[7]

Article 23A, §44(a)'s requirement of an ad valorem tax reflects the requirement implicit in Article 15 of the Maryland Declaration of Rights that taxes imposed directly upon property as such be based upon the actual value of the property. *See Weaver*, 281 Md. at 354 n.3.

---

[5] The Illinois Supreme Court also held that, even if the tax were a property tax, it was not ad valorem, "[s]ince the method of taxation ... does not assign a cash value to utility property and then levy a tax on that value ...." 401 N.E.2d at 503. *See* text accompanying note 7 below.

[6] Under the Tax-Property Article, "value" means "full cash value." §1-101(ll). Ordinarily, this is the price that a willing buyer would pay to a willing seller in the open market. *Bornstein v. State Tax Commission*, 227 Md. 331, 337, 176 A.2d 859 (1962).

[7] *See* note 5 above.

Article 15 of the Declaration of Rights also requires that taxes on property be imposed uniformly on each class of property. The tax imposed by the city's proposed ordinance would apply differently to properties of the same type, depending upon the type and extent of construction activity. Therefore, if it were a property tax, it would violate the uniformity requirement.[8]

Moreover, Article 23A, §44(a) requires that taxes imposed on properties in special taxing districts be levied "in the same manner, upon the same assessments, for the same period or periods, and as of the same date or dates of finality" as other property taxes. Supervision of the assessment of property for tax purposes is committed to the State Department of Assessments and Taxation, which prescribes the "standards or units for assessing various kinds of property." §2-202(4) of the Tax Property Article ("TP" Article).[9] In general, a municipal corporation's property taxes may be levied only on assessments made by the Department of Assessments and Taxation. TP §6-203(b).[10] Therefore, the City of Frederick does not have authority to determine for itself a special basis for assessing the value of property within its proposed special taxing district.

---

[8] However, the ad valorem and uniformity requirements of Article 15 of the Declaration of Rights apply only to property taxes. 281 Md. at 355.

[9] Especially with respect to commercial property, the assessing authorities may consider various factors to determine the property's value, including both the original and reproduction cost. *Bornstein*, 227 Md. at 337. In assessing income producing real property other than agricultural land, the supervisors of assessments are explicitly authorized to use "the capitalization of income method or any other appropriate method of valuing the real property." TP §8-105(a).

[10] However, until a property has been assessed by the Department of Assessments and Taxation or the supervisor of assessments for the county, the governing body of a municipal corporation may assess the property to prevent its escape from taxation. TP §6-203(b)(2).

IV

Conclusion

In sum, it is our opinion that, although the City of Frederick has authority to establish the proposed special taxing district, it does not have authority to impose a tax on construction costs for the support of the district.

J. Joseph Curran, Jr.
Attorney General

Richard E. Israel
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions and Advice

Taxation - Constitutional Law - Intergovernmental Tax Immunity - *Davis v. Michigan* - State Tax Exemption For Length Of Service Awards To Volunteer Fire and Rescue Personnel Is Not Unconstitutional

April 7, 1989

The Honorable Louis L. Goldstein
Comptroller of the Treasury

You have requested our opinion on the constitutionality of §10-207(o) of the Tax-General Article ("TG" Article), which exempts from State income tax certain "length of service award payments" to fire, rescue or ambulance personnel. The constitutionality of this provision was called into question as a result of the Supreme Court's recent decision in *Davis v. Michigan Department of Treasury*, 109 S.Ct. 1500 (1989).

For the reasons stated below, we conclude that the *Davis* case does not affect TG §10-207(o). This provision is not unconstitutional.[1]

I

Tax Treatment of Length of Service Payments

As a general matter, the starting point in the computation of an individual's Maryland income tax is that individual's adjusted gross income for federal income tax purposes. TG §10-204. However, TG §10-207 enumerates a number of circumstances under which an individual may subtract amounts from federal adjusted gross income, thus lowering the individual's Maryland tax liability. One of these subtractions from federal adjusted gross income is TG §10-207(o): "The subtraction [from federal adjusted gross income] includes a payment received under a fire, rescue, or ambulance personnel length of service award program that is funded by any county or municipal

---

[1] This opinion confirms advice previously provided to you by Assistant Attorney General Gerald Langbaum.

corporation of the State." This provision was enacted by Chapter 756 (Senate Bill 231) of the Laws of Maryland 1988.

The term "length of service award program" in TG §10-207(o) has a specific reference to various programs authorized by the General Assembly or adopted by home rule jurisdictions. At the 1988 Session, for example, the General Assembly enacted Article 25, §32.6: "The Washington County Commissioners, by resolution or ordinance, may establish and fund a volunteer length of service award program for qualified members of volunteer fire departments, rescue squads, and ambulance corps." Chapter 59, Laws of Maryland 1988. Comparable provisions for other "length of service award programs" likewise are limited to volunteer fire, rescue, and ambulance personnel. *See* Article 25, §§13A, 13B, 13C, 13D, and 32.5; Article 38A, §43.

Unpaid volunteer firefighters are neither public officers nor public employees. "The municipality may not even know that the volunteer exists, much less is performing services in the fire company, and it cannot compel the volunteer to act." *Macy v. Heverin*, 44 Md. App. 358, 364, 408 A.2d 1067 (1979). Although their voluntary efforts certainly promote the public welfare, "[t]he giving by the citizens of their time and effort does not ... make them public officers or public employees." *Id. See also Utica Mut. Ins. Co. v. Gaithersburg-Washington Grove Fire Dep't*, 58 Md. App. 589, 455 A.2d 987 (1983). The distinction between career firefighters paid by a governmental entity and volunteer firefighters is also reflected in the Good Samaritan Law, which applies to members of "any State, county, municipal, or volunteer fire department, ambulance, or rescue squad ...." §5-309(b)(2) of the Courts Article. *See generally* Opinion No. 87-055 (November 17, 1987) (unpublished).

Given its wording and context, the tax exemption in TG §10-207(o) does not apply to retirement allowances received by paid firefighting personnel through any State or local retirement system. It applies only to the payments made to volunteers. *See Kaczorowski v. City of Baltimore*, 309 Md. 505, 525 A.2d 628 (1987).

Our construction of TG §10-207(o) is confirmed by your agency's administration of the statute. As a recent publication explained:

> The Length of Service Awards Program (LOSAP) is a defined established program pertaining to *volunteer* fire,

> rescue, or ambulance personnel who have met the criteria established by the county. *Generally*, the criteria are that the individual is at least 60 years of age with 25 years of qualifying service as a *volunteer* fireman, rescue or ambulance person. In certain counties, an individual with 25 years of qualifying service can begin receiving benefits at 50 years of age.
>
> ...
>
> Generally, paid firemen, rescue or ambulance personnel (county, city, government or private employees) do not qualify for LOSAP *unless* they are also *volunteers* and qualify for LOSAP as a volunteer.

Maryland Income Taxgram, vol. X, no. 3, at 1-2 (March 17, 1989) (emphasis in original). "[T]he view taken of a statute by administrative officials soon after its passage is strong, persuasive influence ... and should not be disregarded except for the strongest and most urgent reasons." *Holy Cross Hospital v. Health Services Cost Review Commission*, 283 Md. 677, 685, 393 A.2d 181 (1978).

II

Constitutionality of TG §10-207(o)

A. The Davis Case

Under Michigan's income tax law, retirement benefits received by former state and local government employees are tax-exempt; retirement benefits received by former federal employees, as well as by private sector employees, are not. Davis, a retired federal employee, sued for a refund for the tax that he had paid on his retirement benefits, claiming that a tax break afforded to state but not federal retirees was impermissible under federal law.

The Supreme Court agreed. *Davis v. Michigan Dep't of Treasury*, 109 S.Ct. 1500 (1989).

"[T]he dispositive question in this case," the Court wrote, is whether the tax imposed on [Davis] is barred by the doctrine of intergovernmental tax immunity." 109 S.Ct. at 1507. This doctrine originated in Chief Justice Marshall's opinion in *McCulloch v. Maryland*, 4 Wheat. 316 (1819), in which the Supreme Court invalidated a discriminatory tax imposed by Maryland on the Bank of the United States. As it has evolved, the doctrine prohibits "only those taxes that were imposed directly on one sovereign by the other or that discriminated against a sovereign or those with whom it dealt ...." *Davis*, 109 S.Ct. at 1505.[2]

The Supreme Court found that the Michigan scheme "discriminates in favor of retired state employees and against retired federal employees." 109 S.Ct. at 1507. Such a discrimination could be justified constitutionally only if "the inconsistent tax treatment is directly related to and justified by 'significant differences between the two classes.'" *Id.* (quoting *Phillips Chemical Co. v. Dumas Independent School Dist.*, 361 U.S. 376, 383 (1960)).[3] Michigan's asserted justifications - that the tax exemption served the state's interest in hiring and retaining qualified civil servants, and that state retirement benefits were less generous overall than federal retirement benefits - were rejected by the Court. It concluded that "the Michigan Income Tax Act violates principles of intergovernmental tax immunity by favoring retired state and local government employees over retired federal employees." 109 S.Ct. at 1508.

B. Application to TG §10-207(o)

Maryland has no tax exemption like Michigan's. Under this State's income tax law, federal pensions and State and local government pensions are taxed alike.

However, in his dissenting opinion, Justice Stevens listed a number of state laws that he characterized as "special tax exemptions for

---

[2] With respect to the taxation of compensation, the doctrine of intergovernmental tax immunity has been embodied in a statute, 4 U.S.C. §111. *See* 109 S.Ct. at 1506-07.

[3] The Court found irrelevant the fact that federal retirees and private sector retirees were treated identically. The constitutionally relevant discrimination was between federal and state retirees. 109 S.Ct. at 1507 n. 4.

retirement income to state and local government employees that [the states] do not grant to federal employees." 109 S.Ct. at 1504 (Stevens, J., dissenting). One statute on his list was TG §10-207(o). 109 S.Ct. at 1504 n. 3.

As discussed in Part I above, however, TG §10-207(o) simply does not address State and local government employees as such; rather, it provides a tax break to *anyone* with sufficient service as a volunteer with fire or rescue squads, if a local government has funded a "length of service award program." That a volunteer might also have had an employment relationship with the federal or State government is wholly immaterial; the tax benefit does not discriminate on that basis. Indeed, a federal employee or retiree who rendered volunteer service would derive precisely the same benefit from TG §10-207(o) as would a similarly situated State or local government employee or retiree. This fact demonstrates the inapplicability of *Davis* to TG §10-207(o).

The core teaching of the *Davis* case is this: When a person is compensated by the federal government, a state may tax that compensation only if it does so on the same terms as it taxes the same kind of compensation from the state or a local government.[4] As the Supreme Court earlier put it: "[I]t does not seem too much to require that the State treat those who deal with the Government as well as it treats those with whom it deals itself." *Phillips Chemical*, 361 U.S. at 385.

TG §10-207(o) does not offend this principle, for it applies only to persons who volunteer their services to nongovernmental fire and rescue companies. It does not treat at all, and therefore does not treat differently, transactions between either sovereign and its employees.

[4] We note that the proper comparison is between similarly situated groups affected by the tax provision in question. Thus, in *Davis*, the comparison was between federal and state retirees. In an earlier case, *Phillips Chemical Co. v. Dumas Independent School Dist.*, the comparison was between federal and state lessees. 361 U.S. at 380. Even if, contrary to its actual intent and application, TG §10-207(o) were viewed as a tax exemption for retired state fire and rescue personnel, the legal issue would turn on the tax status of the comparable group of retired federal employees - retired federal fire and rescue personnel - *not* retired federal employees generally.

III

Conclusion

In summary, it is our opinion that TG §10-207(o) is not unconstitutional.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

Taxation - Recordation Tax - Indemnity Mortgages And Deeds Of Trust - Responsibility For Payment Of Tax - Effect Of Failure To Pay Tax

July 28, 1989

The Honorable Mary R. Bell
Clerk of the Circuit Court
for St. Mary's County

You have requested our opinion concerning the process by which recordation tax is to be collected for indemnity mortgages and deeds of trust.[1] Specifically, your inquiry raises the following questions:

1. Who has responsibility for payment of recordation tax on an indemnity mortgage that is being foreclosed?

2. What effect, if any, does the unpaid tax have on the status of the lien created by the indemnity mortgage?

3. Is the unpaid recordation tax a priority item payable out of the foreclosure sale?

4. If the borrower cures the default that led to the institution of the foreclosure action, and the action is dismissed, is the recordation tax still due?

For the reasons stated below, we conclude as follows:

1. The guarantor/mortgagor is responsible for payment of the recordation tax due on the indemnity mortgage.

2. The lien created by the mortgage is not invalidated by reason of the non-payment of the recordation tax.

3. The State's claim for unpaid recordation tax does not take precedence over payment of the debt due the secured party.

---

[1] In this opinion, we shall use the term "indemnity mortgage" to refer to both kinds of instruments.

4. A curing of the default by the borrower does not relieve the guarantor of the obligation to pay the recordation tax that had become due.

I

Applicability of Recordation Tax To Indemnity Mortgage

An indemnity mortgage works this way: A lender agrees to loan money to a borrower, but on two conditions - that a third party guarantee repayment of the loan, and that the guarantor execute a mortgage on real property to secure the guarantee. An indemnity mortgage is the instrument embodying the pledge of the property. An indemnity mortgage is recorded so as to establish a lien on the property.

Under §12-102(1) of the Tax-Property Article ("TP" Article), "recordation tax is imposed on an instrument of writing ... recorded with the clerk of the circuit court for a county." An "instrument of writing" includes "a mortgage, deed of trust, or other contract that creates an encumberance on real property." TP §12-101(c)(2)(ii).

Ordinarily, the recordation tax must be paid at the time that the instrument is submitted to the clerk to be recorded.[2] Under TP §12-105(f)(1), however, "if the total amount of secured debt has not been incurred at the time of recording or filing the instrument of writing, the recordation tax applies only to the principal amount of the debt incurred at that time."

In 58 *Opinions of the Attorney General* 792 (1973), the Attorney General considered the applicability of the predecessor to TP §12-105(f)(1) to an indemnity mortgage. "The pertinent inquiry," the Attorney General stated, "is when can a guarantor, for purposes of the tax in question, properly be said to have 'incurred' a 'debt'?" 58 *Opinions of the Attorney General* at 794. The Attorney General pointed out that the guarantor's liability is contingent on the occurrence of other events - most importantly, the default by the borrower. 58

[2] The tax rate is set by each local jurisdiction. TP §12-103(b).

Opinions of the Attorney General at 795-96. The Attorney General thus concluded that the guarantor under an indemnity mortgage will not have incurred a taxable debt at the time of recordation. "Accordingly," the Attorney General advised a clerk of the circuit court, "we believe that when a mortgage securing a guarantee is presented to you for recordation, and you are satisfied by an examination of the note and guarantee, by a certification, or otherwise, that the guarantor is not a party primarily liable, *e.g.*, as a co-maker of the note, ... the mortgage may be recorded without payment of the tax." 58 *Opinions of the Attorney General* at 797.[3] We reaffirm this conclusion.

II

Responsibility for Payment Upon Default

No prior opinion addresses the issue of payment of the recordation tax when the event occurs upon which the guarantor's liability is contingent. However, TP §12-105(f)(2) provides that within seven days after the debt is incurred, "a statement under oath of the amount of ... debt shall be filed with the clerk of the circuit court ... , and the recordation tax shall be paid on the ... debt by the debtor." The responsibility for paying the recordation tax on an indemnity mortgage is imposed on the guarantor; the guarantor is the person who has "incurred" the debt that is secured by the indemnity mortgage.

III

Effect on Nonpayment on the Lender's Lien

The answer to the second question, regarding the effect of non-payment of the tax when due on the lien created by the mortgage, is suggested by the 1973 opinion discussed above and caselaw. In 58

---

[3] In an earlier opinion, this office concluded that a mortgage given by two individuals to secure a corporate debt was subject to recordation tax where the mortgage stated that it had "the same force and effect as if the Mortgagors were primarily indebted to the Mortgagee." 49 *Opinions of the Attorney General* 503 (1964). In that case, the mortgagors' liability was not contingent upon the occurrence of a future event. In a later opinion, 60 *Opinions of the Attorney General* 722 (1975), this office concluded that a mortgage was taxable upon recording where the mortgagors included the parties primarily liable on the debt.

Opinions of the Attorney General at 797, the Attorney General commented that "the Legislature may wish to make a lien or conveyance valid only *pro tanto* to the required tax which has been paid." This comment clearly implies that unless the General Assembly provides otherwise, the lien is valid for the amount stated even if the applicable recordation tax is not paid. The General Assembly has never enacted a provision similar to the one suggested in the 1973 opinion.[4]

In 1977, the Court of Special Appeals addressed the issue of whether the lien created by a financing statement was limited to the amount of debt stated in the financing statement upon which recordation tax was paid. In *Genn v. CIT Corp.*, 40 Md. App. 516, 522, 392 A.2d 1135 (1978), the Court held as follows:

> The appellant claims that the inaccurate statement of the principal amount secured and the failure to pay the appropriate recordation tax should render the appellee's security interest unperfected as to any amount greater than the amount stated on the face of the financing statement. We disagree. Even though the failure to pay the appropriate recordation tax may constitute a violation of [the statute] and subject the recording party to a penalty, it does not necessarily follow that the amount of the secured debt is limited to that amount stated on the financing statement or on which the recordation tax was paid.

The Court of Special Appeals based its holding, in large part, on the fact that a financing statement is simply "an instrument of notice" and not "an instrument of legal effect equivalent to a security agreement."

Although an indemnity mortgage is not just a notice instrument like a financing statement, the rationale of the *Genn v. CIT* holding appears to apply. It is also consistent with the position implied in 58 *Opinions of the Attorney General* 792 that the lien of the mortgage, absent legislation, is not limited to the amount on which tax is paid and,

---

[4] In 1983 a bill, Senate Bill 405, was introduced to amend former Article 81, §277(k) to provide for payment of recordation tax by the debtor before any additional secured debt is incurred. This bill was not enacted.

therefore, would not be invalidated by the failure to pay the recordation tax when due.

IV

Priority in Foreclosure

In a recent case, a borrower defaulted on a guaranteed loan. The lender then filed a foreclosure action against the guarantor's property, which had been pledged under an indemnity mortgage to secure the loan.[5] The State sought to intervene in the foreclosure action, asserting an equitable lien entitling it to priority for the unpaid recordation tax out of the proceeds of the foreclosure sale.[6]

In that context, of course, the State was an advocate, urging a litigation theory in support of its efforts to obtain collection of the unpaid tax. The State hoped to obtain a judicial determination of the validity of its position.

The State's motion has not been heard, and very likely never will be. Hence, the State's theory will not quickly be adjudicated. We are advised that this situation - a litigation position by the State asserting a priority claim to a portion of the proceeds of a foreclosure sale, but no prospect of an early judicial determination as to the State's position - has adversely affected the willingness of lenders and title insurers to enter into indemnity mortgages. This portion of our opinion is intended to resolve the uncertainty by stating our opinion that, whether

---

[5] A temporary accommodation between the lender and borrower stopped the foreclosure action. A settlement of the matter is highly likely.

[6] No statute expressly provides that unpaid recordation tax due under TP §12-105(f) is a lien on the property or a charge against the proceeds from sale of the property with respect to which the tax is due. Nevertheless, a reasonable argument can be made that principles of equity entitle the State to such a lien. *See, e.g., Griffith v. Dale,* 109 Md. 697, 72 A. 471 (1909); *State v. Balto. & Susq. Steam Co.*, 13 Md. 181 (1859).

The State undoubtedly may file a separate action against the guarantor to collect the unpaid tax. *See* TP §§14-864 through 14-869. In some instances, however, the foreclosed property might be the guarantor's only asset.

In addition, the State may pursue criminal charges against the guarantor. TP §14-1011.

or not the State has an equitable lien arising from the unpaid tax, the State is not entitled to priority in the foreclosure action.

In *Farmers and Merchants Bank v. Schlossberg*, 306 Md. 48, 507 A.2d 172 (1986), the Court of Appeals held that "a tax claim will be accorded priority over an antecedent lien, including a perfected security interest, only when the applicable statute clearly so provides." 306 Md. at 67. Otherwise, a statutory lien in favor of the State for unpaid taxes will take whatever position its timing gives it.

The lien created by an indemnity mortgage arises at the time of the recording of the indemnity mortgage. If the State has an equitable lien for unpaid recordation taxes, it would arise only later, when the guarantor's liability is fixed. We think it most unlikely that a court would accord more advantageous status to the State's equitable lien for unpaid taxes than it would were there an express statutory lien. Hence, under *Schlossberg*, the State's lien would not be senior to that of the lender, because no statute gives the State's lien a priority.

V

Effect of Cure of Default

The answer to the final question - whether cure of the default excuses payment of the recordation tax - may be derived from the pertinent statute, TP §12-105(f). The statute provides that once the debt is incurred, the tax is due. The only recognized exception is set forth in TP §12-105(f)(3), which provides that no tax is due on an additional debt incurred if the sole purpose of the new advance is to make payment on an earlier advance. This exception is not applicable to the indemnity mortgage situation, where the guarantor incurs the debt by reason of the borrower's default. A subsequent curing by the borrower of the default, or payment of the debt by the borrower or guarantor to avoid foreclosure on the property, does not negate the fact that the debt was incurred by the guarantor and the recordation tax became due.

In 43 *Opinions of the Attorney General* 353 (1958), the Attorney General concluded that if recordation tax is prepaid before the debt is incurred and the debt is subsequently never incurred, the prepaid tax is refundable. Similarly, in 61 *Opinions of the Attorney General* 817

(1976), the Attorney General stated that no refund is authorized where the debt was, in fact, incurred, regardless of whether the money was spent or subsequently returned unused to the lender.

When the contingency occurs that gives rise to the guarantor's liability on the debt secured by an indemnity mortgage, the debt has been incurred. A subsequent renegotiation of the loan by the parties and dismissal of any foreclosure proceeding commenced with respect to the indemnity mortgage does not alter the fact that the debt was incurred by the guarantor. The recordation tax remains due and payable based on the principle amount of debt outstanding at the time the borrower's default occurred, thereby triggering the guarantor's direct liability.

VI

Conclusion

In summary, it is our opinion that: The guarantor is liable for payment of the recordation tax that becomes due on an indemnity mortgage when the contingency, usually the borrower's default, occurs that gives rise to the guarantor's liability. The tax remains due even if the default is subsequently cured and any foreclosure action on the indemnity mortgage is dismissed. The failure of the guarantor to pay the recordation tax does not invalidate the secured party's lien under the indemnity mortgage, however, nor does it give the State priority to payment out of the proceeds of the foreclosure sale.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions and Advice

VEHICLE LAW

Commercial Driver's License Act - Disqualification From Driving Commercial Motor Vehicle - MVA May Take Into Account Serious Offenses Committed Before Act's Effective Date In Determining Period Of Disqualification

September 15, 1989

W. Marshall Rickert
Administrator
Motor Vehicle Administration

You have requested our opinion concerning the applicability of certain provisions of Chapter 291 (House Bill 558) of the Laws of Maryland 1989, the Commercial Driver's License Act, to a commercial driver with a history of offenses deemed to be "serious" under the Act. Under the Act's regulatory scheme, the severity of sanctions will depend upon the driver's prior record. That is, a commercial driver will be subject to longer periods of disqualification from driving a commercial motor vehicle following an offense if the driver has previously committed serious offenses.

The pertinent portions of the Act become effective on January 1, 1990. You raise the question of whether the Motor Vehicle Administration may take into account serious traffic offenses that occurred prior to January 1990 in its determination of whether a commercial driver has committed multiple offenses.

For the reasons stated below, we conclude that the MVA may take into account any conviction for a serious offense in determining the period of disqualification, whether that conviction occurred prior to or after the effective date of the Act.

I

Disqualification Under the Commercial Driver's License Act

The Act establishes a new Subtitle 8 to Title 16 of the Transportation Article ("TR" Article). The purpose of the new subtitle is to strengthen the licensing and testing standards for commercial vehicle operators and to disqualify persons from driving commercial motor vehicles after certain criminal and serious traffic violations. TR §16-802.[1]

TR §16-812 itemizes both the grounds for and duration of disqualification from driving a commercial motor vehicle.[2] Under TR §16-812(a), a commercial driver is disqualified for one year if the driver is convicted of: driving while intoxicated or under the influence of alcohol or drugs; leaving the scene of an accident; committing a crime punishable by death or imprisonment for a term of more than one year, while driving a commercial motor vehicle; or refusing to undergo chemical testing for alcohol.[3]

Certain provisions in the Act increase the length of a disqualification if the conviction is for a second or subsequent offense. With respect to the offenses listed in TR §16-812(a), the MVA "shall disqualify any person from driving a commercial motor vehicle for life for two or more violations of any of [those] offenses ..., or any combination of those offenses, arising from two or more separate incidents." TR §16-812(c). Under TR §16-812(f), the MVA "shall disqualify any person from driving a commercial motor vehicle for a period of 60 days if convicted ... of 2 serious traffic violations committed in a commercial motor vehicle arising from separate

---

[1] This statute implements the federal Commercial Motor Vehicle Safety Act of 1986, Pub. L. No. 99-570, Title XII, 100 Stat. 3207-170, *codified at* 49 U.S.C. App. §§2701 through 2716.

[2] The disqualification applies only when the licensee is driving a commercial motor vehicle.

[3] TR §16-812(b) requires that the disqualification be for three years if the driver is transporting hazardous material. TR §16-812(c) imposes a lifetime disqualification for use of a commercial motor vehicle in drug-related felonies.

incidents occurring within a 3-year period."[4] Finally, TR §16-812(g) increases the period of disqualification to 120 days if the driver has been convicted of three serious offenses within three years.

Thus, it is important for the MVA to determine whether the commercial driver's current offense is a first or subsequent offense. To make that determination, the MVA must know whether offenses that occurred prior to January 1, 1990 are to be considered.

II

Construction of Statutes Heightening Sanctions After Multiple Offenses

A. Introduction

A law applies prospectively if it "operates on conduct, events, and circumstances which occur after its enactment"; it applies retroactively if it "operates on transactions which occurred ... before passage of the act." 2 *Sutherland Statutory Construction* §41.01, at 337 (4th ed. 1986).

It has long been established in Maryland that a statute is intended to be given prospective effect only, absent clear language or manifest legislative intent that it is to have retrospective application. *NCR Corporation v. Comptroller*, 313 Md. 118, 125, 544 A.2d 764 (1988); *Macon v. State*, 309 Md. 215, 219-220, 522 A.2d 1344 (1987); *Washington Sub. Sanit. Comm'n v. Riverdale Fire Co.*, 308 Md. 556, 560-61, 520 A.2d 1319 (1987).

There is no clear language or manifest legislative intent that the Act be applied retrospectively. Therefore, it should be applied only prospectively. It does not follow, however, that the MVA would be applying the Act retroactively if it were to consider convictions prior to 1990 in determining the length of the disqualification for an offense that occurs after 1990. To the contrary, we think the MVA's review

---

[4] "Serious traffic violation" means excessive speeding, reckless driving, a traffic violation incurred as a result of a fatal accident, or any other violation determined to be "serious" by the federal Secretary of Transportation. TR §16-803(h).

of the pre-1990 convictions is properly characterized as a prospective application of the Act.

B. Subsequent Offender Statutes

On several occasions, the Court of Appeals has considered whether a statute imposing heightened criminal penalties on a subsequent offender operates retrospectively. *Murray v. State*, 236 Md. 375, 203 A.2d 908 (1964); *Garrigan v. Superintendent*, 218 Md. 662, 146 A.2d 431 (1958); *Taylor v. Warden*, 213 Md. 646, 131 A.2d 720 (1956). All three of these cases dealt with persons convicted of violations of Maryland's narcotics laws. The challenged law provided that a greater penalty was to be imposed for a subsequent narcotics offense than would be imposed for a first offense.

In the leading case, *Taylor v. Warden*, the defendant argued that the 1951 narcotics law under which he was sentenced as a subsequent offender applied in an unconstitutional manner because the prior offense that resulted in the enhanced punishment was for a 1945 violation of Pennsylvania's narcotics laws. The defendant argued that he was, in effect, being punished for the first conviction that occurred prior to the enhanced penalty statute in 1951. The Court of Appeals disagreed, holding that "a statute imposing a greater punishment on a previously convicted defendant does not create a new offense but only an added penalty and is prospective in operation, not retrospective, and is constitutional." 213 Md. at 648. *Accord, Murray v. State*, 236 Md. at 380 ("a subsequent offender statute is prospective in operation, is not retroactive, and is constitutional"). *See also* 57 *Opinions of the Attorney General* 282 (1972).

The United States Supreme Court has adopted a similar construction of "subsequent offender" statutes in its application of the Constitution's *Ex Post Facto* and Due Process Clauses.[5] In *Gryger v.*

---

[5] Article I, §9, clause 3 of the Constitution provides that "[n]o ... ex post facto law shall be passed." While the proscription against *ex post facto* laws applies only to laws that are criminal or penal in nature, the Court's rulings in this area are helpful in viewing whether "subsequent offender" administrative proceedings violate a licensee's right to due process. *See United States v. Karnes*, 437 F.2d 284, 289-90 (9th Cir. 1971) (*ex post facto* and due process analysis largely the same as to civil disabilities). *See also* 2 *Sutherland Statutory Construction* §41.03, at 344 ("[P]rotection from improper retroactivity has been included within the due process clause.").

Burke, 334 U.S. 728 (1948), the Court upheld the sentencing of a defendant to life imprisonment as a "habitual criminal" when one of the four crimes that resulted in the sentence occurred before the state's habitual criminal act was passed. The Court concluded that the enhanced "penalty is for the latest crime, which is considered to be an aggravated offense because a repetitive one." 334 U.S. at 732. The consideration of the prior conviction did not make the habitual criminal act invalidly retroactive. *Id.*[6]

In *People v. Sweet*, 254 Cal. Rptr. 567 (Cal. App. 1989), the California Court of Appeals considered a new California statute that increased the punishment for a drunk driving conviction when the defendant committed a drunk driving offense within the seven years prior to the most recent drunk driving conviction. The defendant argued that it was unconstitutional for the court to consider any conviction that occurred prior to the amendment to the enhanced penalty statute. The court, citing *Gryger*, held that it is the present, and not the prior, offense for which the defendant is sentenced and that the "statute does not function retroactively 'merely because it draws upon facts antecedent to its enactment for its operation.'" 254 Cal. Rptr. at 570-71. *See also State v. Haverluk*, 432 N.W. 2d 871, 873-74 (N.D. 1988); *State v. Willis*, 332 N.W. 2d 180, 185 (Minn. 1983).

C. *Application to License Disqualification*

While the cases discussed thus far deal with the constitutionality of "subsequent offender" criminal laws, and while the Maryland courts have not had the opportunity to determine whether the principles of *Taylor* and *Gryger* would apply to a motor vehicle licensing proceeding, other states have dealt with the issue of an agency considering violations that occurred prior to the enactment of an enhanced penalty statute. In *Fowler v. State*, 221 S.E. 2d 9 (Ga. 1975)

---

[6] *See also U.S. v. Karlin*, 852 F.2d 968, 973-74 (7th Cir. 1988) (enhanced penalty for possession of weapon by career criminal); *Lawrence v. Jones*, 837 F.2d 1572, 1574 (llth Cir. 1988) (Alabama habitual offender statute); *Covington v. Sullivan*, 823 F.2d 37, 39 (2d Cir. 1987) (after the conviction of the predicate offense, and the later amendment of the subsequent offender statute to include this predicate offense, defendant is on notice that his future criminal conduct will subject him to enhanced penalties); *U.S. v. Sanchez*, 684 F. Supp. 173, 174 (N.D. Ill. 1988) (consideration of four convictions of armed robbery that occurred prior to sentence enhancement provisions of the Armed Career Criminal Act does not violate *ex post facto* clause).

a driver was disqualified from driving because he was an "habitual violator." The driver argued that, because the law "permits him to be declared a 'habitual violator' and bars him from operating a motor vehicle upon the public highways because of offenses which occurred prior to its adoption," it was an improper *ex post facto* law. 221 S.E.2d at 10. Citing *Gryger*, the Georgia Supreme Court rejected this argument: "The increased penalty is for the latest crime, which is considered to be an aggravated offense because a repetitive one .... The statute imposes punishment on none but future crimes and is not ex post facto." *Id.*

Similarly, in *Ragland v. McNeill*, 747 S.W.2d 701 (Mo. App. 1988), the Missouri Court of Appeals held that a driver's license was properly revoked by the State because the driver was a repeat offender of driving while intoxicated even though the first offense occurred in 1967, before the enactment of the enhanced penalty provision. The court reasoned that the statute did not violate the proscription against *ex post facto* laws since the licensee was being punished for "his latest offense on the basis of a demonstrated propensity for misconduct." 747 S.W.2d at 702. *See also Israel v. Cafer*, 262 S.E.2d 545, 546 (Ga. App. 1979). *Cf. Wilsch v. Bencar*, 219 N.E. 2d 311, 313 (Ohio App. 1966).

We believe that Maryland courts would view the "subsequent offender" provision of the Act in the same fashion as these courts viewed comparable laws. Consideration by the MVA of pre-1990 convictions would not constitute a retrospective application of the Act.[7]

III

Conclusion

In summary, it is our opinion that, in applying the provisions of the Commercial Driver's License Act that disqualify a commercial driver for a specified period of time predicated upon the commission of a

---

[7] The prior convictions to be considered under TR §16-812 are only convictions committed in a commercial motor vehicle. Since the MVA's records of offenses committed prior to January 1, 1990, do not indicate whether any offense was committed in a commercial motor vehicle, inquiry into that element will be a necessary part of a disqualification hearing.

prior offense, the Motor Vehicle Administration is to take account of all relevant prior offenses, whether they occurred before or after the effective date of the Act.

J. Joseph Curran, Jr.
Attorney General

Edward R.K. Hargadon
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

Vehicle Law - Drunk Driving Act - Commercial Driver's License Act - Effect Of Amendments To Same Section of Code

December 21, 1989

Mr. W. Marshall Rickert
Motor Vehicle Administrator

You have requested our opinion concerning the version of §16-205.1 of the Transportation Article ("TR" Article) that appears in the 1989 cumulative supplement to that article. After the passage of two major acts in the last session of the General Assembly amending that section, the version of TR §16-205.1 published in the 1989 supplement contains several significant inconsistencies.

For the reasons stated below, we conclude as follows:

1. The procedures for the scheduling of hearings are those set out in TR §16-205.1(g). The inconsistent procedures in TR §16-205.1(f)(1) and (2) were published in error and should be disregarded.

2. TR §16-205.1(b)(1)(iii) should be read to require a police officer to advise a commercial motor vehicle driver of the driver's ineligibility to operate a commercial motor vehicle only if the driver refuses to take the test for alcohol after being requested to do so by the officer.[1]

3. The MVA's authority to modify a suspension is set out in TR §16-205.1(l). The inconsistent provision in TR §16-205.1(f)(5) was published in error and should be disregarded. In addition, the suspension periods for refusal to take a test are those set out in TR §16-205.1(g)(4)(ii) and (g)(7)(iii)2, not those erroneously published in TR §16-205.1(f)(4).

4. Finally, we recommend that an emergency bill be introduced in the next session correcting the published version of TR §16-205.1.

---

[1] The officer should also provide the same information about license suspension as the officer would to any driver. *See* note 6 below.

I

Harmonizing The Drunk Driving Act And The Commercial Driver's License Act

The Drunk Driving Act of 1989, Chapter 284 of the Laws of Maryland 1989 ("Chapter 284" or "Drunk Driving Act"), and the Commercial Driver's License Act of 1989, Chapter 291 of the Laws of Maryland 1989 ("Chapter 291" or "CDL Act"), both of which take effect on January 1, 1990, contain several substantive amendments to TR §16-205.1. To cite perhaps the most important of its provisions, the Drunk Driving Act amended TR §16-205.1 to authorize the Motor Vehicle Administration ("MVA") to suspend the license of a person who drives with an alcohol concentration of .10 or more. Likewise, the CDL Act amended TR §16-205.1 to authorize the MVA to disqualify a person from operating a commercial motor vehicle if that person refused the test for alcohol.[2] Other amendments will dramatically change the procedures used by the MVA and the police in handling drunk drivers and the sanctions available to the MVA in disposing of a case brought before it under TR §16-205.1.

Article 1, §17 of the Maryland Code provides the background for our review of the amendments to TR §16-205.1 made by the Drunk Driving Act and the CDL Act. Article 1, §17 provides as follows:

> If two or more amendments to the same section or subsection of the Code are enacted at the same or different sessions of the General Assembly, and one of them makes no reference to and takes no account of the other or others, the amendments shall be construed together, and each shall be given effect, if possible, and with due regard to the wording of their titles. If the amendments are irreconcilable and it is not possible to construe them together, the latest in date of final enactment shall prevail.

---

[2] A "disqualification" means "a prohibition against driving a commercial motor vehicle ...." TR §11-111.1. A "commercial motor vehicle" is defined in TR §11-109.1 as generally including vehicles with a gross vehicle weight of 26,001 or more pounds, vehicles designed to transport 16 or more passengers, or vehicles transporting hazardous materials.

The CDL Act and Drunk Driving Act make no reference to each other. In determining the combined effect of their amendments to TR §16-205.1, we must try to discern the legislative intent from the purpose and language of the enactments. *Mass Transit Administration v. Baltimore County Revenue Authority*, 267 Md. 687, 695-96, 298 A.2d 413 (1973). While the CDL Act was signed after the Drunk Driving Act, that fact is to be considered only if the acts are irreconcilable and cannot stand together; repeal by implication is disfavored. *Prince George's County v. McBride*, 263 Md. 235, 242-43, 282 A.2d 486 (1971). The acts are each to be given full effect unless irreconcilable. *Mayor and City Council of Baltimore v. Clerk of Supervisor Court*, 270 Md. 316, 319-20, 311 A.2d 261 (1973).[3]

The purpose of the CDL Act, in pertinent part, is (1) to create a commercial driver's license, and (2) as it relates to TR §16.205.1, to require that operators of commercial motor vehicles "impliedly consent to take a chemical breath test if any alcohol is detected in the operator." *See* Chapter 291, title.

In contrast, the purpose of the Drunk Driving Act, as it relates to TR §16-205.1, is (1) to "alter provisions relating to the implied consent to take certain tests," (2) to "establish certain sanctions for certain test results," (3) "to establish certain procedures," and (4) to provide "for the issuance of a restricted license and modification of a license suspension under certain circumstances ...." *See* Chapter 284, title.

The two acts' amendments to TR §16-205.1 must be read with these different goals in mind. In our view, these amendments can and should be construed so as to give effect to the legislative intent of the two acts. The published version of TR §16-205.1 in the 1989 cumulative supplement to the Transportation Article does not properly reflect the legislative intent underlying the amendments to TR §16-205.1 in the several respects described below.

---

[3] The publisher of the Annotated Code did not view either of the acts making amendments to TR §16-205.1 as prevailing. Instead, the publisher published both sets of amendments to TR §16-205.1 and thus included inconsistent language in its publication.

II

Scheduling of Hearings

Under the language of TR §16-205.1(f)(2) in effect until January 1, 1990, a licensee who refuses a test for alcohol automatically is scheduled to receive a hearing within 30 days of the date of detention. Effective January 1, 1990, the Drunk Driving Act, Chapter 284, repeals TR §16-205.1(f) in its present form. Instead, the Drunk Driving Act enacted new procedures, which were designated by Chapter 284 to be a completely new TR §16-205.1(f). *See* Laws of Maryland 1989 at 2340-45. Under these new procedures, a person may submit a request for a hearing within 10 days of the date of the issuance of an order of suspension. This new provision, that the hearing be requested by the licensee, applies not only when the licensee refuses to test for alcohol but also when the licensee takes the test and is found to have an alcohol concentration of .10 or more.

Thus, as of January 1, 1990, when the Drunk Driving Act, becomes effective, the licensee must request a hearing within 10 days of the date of the issuance of an order of suspension. A hearing will no longer be scheduled automatically.

The CDL Act, Chapter 291, did not amend the present wording of TR §16-205.1(f)(2). Thus that act, standing alone, did not provide for any change in the procedures by which a licensee obtains a hearing at the MVA. Nevertheless, when the General Assembly enacted Chapter 284 and thereby repealed current TR §16-205.1(f) and enacted instead the new procedures discussed above, it unmistakably intended to provide that all hearings held under TR §16-205.1 comply with the new procedures.

The publisher, in printing amended TR §16-205.1 in the 1989 cumulative supplement, properly included the new procedures that the Drunk Driving Act had designated to be new TR §16-205.1(f). Because of the need to accommodate other subsections of TR §16-205.1, the publisher put these procedures in new TR §16-205.1(g). That redesignation is no problem. The problem, however, is that the publisher also printed, in the supplement's TR §16-205.1(f)(1) and (2), the same language about the automatic scheduling of hearings that the General Assembly had repealed in Chapter 284.

Although it is impossible to give effect to both TR §16-205.1(f)(1) and (2) and to TR §16-205.1(g), as set out in the 1989 supplement, it is certainly possible to discern what the General Assembly intended. In our view, TR §16-205.1(g) in the 1989 supplement properly represents the procedures that the General Assembly intended be followed by the MVA, the police, and the general public in those instances in which a test for alcohol is refused or the test result shows an alcohol concentration of .10 or more. The procedures outlined in TR §16-205.1(g) apply regardless of whether the driver was operating a commercial motor vehicle or a non-commercial motor vehicle.

III

Advice About CDL Eligibility

Currently, TR §16-205.1(b)(1) provides that a police officer is to advise the detainee of the licensing sanctions that are to be imposed if the detainee refuses the test for alcohol. As of January 1, 1990, the Drunk Driving Act requires the officer also to explain the licensing consequences in the event that the licensee is tested and the result indicates an alcohol concentration of 0.10 or more. Laws of Maryland 1989 at 2334-36. This new requirement is codified at TR §16-205.1(b)(1)(i) and (ii).

The CDL Act provides that the police officer must advise a driver detained in a commercial motor vehicle of the consequences to the driver's eligibility to operate a commercial motor vehicle if the driver refuses the test. *See* Laws of Maryland 1989 at 2453. The CDL Act does not provide that the driver may be disqualified from his or her commercial driving eligibility if the driver takes the test with a resulting alcohol concentration of .10 or more.[4]

The provision in the CDL Act regarding advice about disqualification is set out at TR §16-205.1(b)(1)(iii) in the 1989 supplement, following the provisions in the Drunk Driving Act. Thus

---

[4] Of course, that test result would lead to a suspension of the driver's license. During the period of the suspension, the person would be ineligible to drive a commercial vehicle. TR §16-808(5).

In 1992, it will become an offense for a person to drive a commercial motor vehicle with an alcohol concentration of .04 or more. *See* Chapter 291, §§3 and 7.

positioned, TR §16-205.1(b)(1)(iii) reads as if it requires the detaining officer to advise a commercial motor vehicle driver that the person may be disqualified from operating a commercial motor vehicle if the person takes the chemical test and the test result indicates an alcohol concentration of .10 or more. Since the person may be disqualified from operating a commercial motor vehicle only if the person refuses the test, there is no basis for the police officer's advising the person of any consequences to the person's eligibility to drive a commercial motor vehicle if the person takes the test, regardless of the test's results.[5]

Thus, it is our view that TR §16-205.1(b)(1)(iii), as printed in the 1989 supplement, should be construed to require the police officer to advise a commercial motor vehicle operator about disqualification only in the event that the person refused the test for alcohol.[6]

IV

Modification and Length of Suspensions

TR §16-205.1(g)(4) and (g)(7)(iii), as published in the 1989 supplement, correctly spell out the suspension periods for test results showing an alcohol concentration of .10 or more and for test refusals.[7] The published version of TR §16-205.1, however, contains inconsistent provisions regarding the authority of the MVA to modify this suspension.

The Drunk Driving Act allows the MVA to modify a suspension under TR §16-205.1 only when the suspended driver took the test, the person needs a license for employment or alcohol treatment, and the

---

[5] An advisement of that kind will be needed as of April 1, 1992, when the driver of a commercial vehicle with an alcohol concentration of .04 or more will be subject to being disqualified.

[6] The officer would also advise the driver about license suspension, as distinct from CDL eligibility, either in the event of test refusal or if the test showed an alcohol concentration of .10 or more.

[7] This language is the redesignation of the provisions enacted as TR §16-205.1 (f)(4) and (f)(7)(iii) by Chapter 284. *See* Laws of Maryland at 2340 and 2343-44.

person has no violations of TR §16-205.1 or convictions under TR §21-902 during the past five years. Chapter 284, Laws of Maryland 1989 at 2344-45. This narrow exception to the mandatory suspension periods otherwise provided for in TR §16-205.1 is set out at TR §16-205.1(l) in the 1989 supplement. The legislative intent is further evidenced by the General Assembly's repeal of the modification provisions in current TR §16-205.1(f)(5).[8]

The CDL Act, on the other hand, did not address the MVA's authority to modify a suspension; rather, that act dealt only with the mandatory disqualification periods for refusing a test. *See* TR §16-205.1 (f)(6) through (8), as enacted by Chapter 291, Laws of Maryland 1989 at 2456-57.

The publisher, rather than deleting the language of the current TR §16-205.1(f)(5) effective January 1, 1990, as envisioned by the General Assembly when it repealed that paragraph in Chapter 284, republished the paragraph as the new TR §16-205.1(f)(5). In our view, TR §16-205.1(f)(5), as printed in the 1989 supplement, should not be given effect. The only instance in which a suspension imposed under TR §16-205.1 may be modified is pursuant to the provisions of Chapter 284, redesignated as TR §16-205.1(l) in the 1989 supplement.

Finally, TR §16-205.1(f)(4) in the 1989 supplement contains an error. It indicates that the suspension period for refusal to take a test is 60 days to 6 months for a first offense and 120 days to one year for a second or subsequent offense. These suspension periods were repealed when current TR §16-205.1(f) was repealed by Chapter 284. Effective January 1, 1990 the longer, mandatory suspension periods enacted by Chapter 284 - 120 days for a first offense and one year for a second or subsequent offense - will be applicable, as set out in TR §16-205.1(g)(4)(ii) and (g)(7)(iii)2 in the 1989 supplement.

---

[8] Under the current provision, the MVA may modify a suspension or issue a restrictive license for alcohol treatment or employment reasons, even if the driver has a record of prior violations. Moreover, the current provision permits modification of a suspension even if the driver refused the test.

V

Conclusion

In summary, it is our opinion that the published version of TR §16-205.1, in the several respects discussed in this opinion, does not properly give effect to the goals of the General Assembly in enacting the Drunk Driving Act and the CDL Act.

Given the significance of these two acts, and the fact that most attorneys and the general public rely on the publisher's version of the law, we strongly recommend that the language of this section be clarified through technical amendments in the next session of the General Assembly. Also, because we understand that hearings at the MVA under this section are not expected to begin until early February, but that thousands of hearings will be held before the General Assembly adjourns in April, we recommend that the appropriate amendments to this section be enacted on an emergency basis.

J. Joseph Curran, Jr.
Attorney General

Edward R. K. Hargadon
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

Editor's Note:

Chapters 11 (Senate Bill 398) and 413 (House Bill 492) of the Laws of Maryland 1990 substantially rewrote the provisions discussed in this opinion.

Vehicle Law - Consumer Protection - "New" And "Used" Vehicles - Except In Unusual Circumstances, Dealer May Not Advertise Vehicle Reacquired From First Buyer As "New" - Dealer Must Disclose All Material Facts About Prior Ownership

December 22, 1989

Mr. W. Marshall Rickert
Motor Vehicle Administrator

You have asked several questions about the proper definition of a "new" versus a "used" vehicle. Whether a vehicle is properly described and treated as "new" has significant implications for enforcement by the Motor Vehicle Administration ("MVA") of various provisions of the Maryland Vehicle Law. The problem of differentiating between a "new" vehicle and a "used" one also might arise under various other laws, including the Maryland Consumer Protection Act and the Automotive Warranty Enforcement Act, commonly called the Lemon Law.

Your questions focus on the status of a vehicle that is first sold by a dealer to a consumer but then reacquired by the dealer shortly after the buyer takes possession. Specifically, you ask:

1. Is the MVA's policy of weighing certain factors to determine if a vehicle is "new" or "used" permissible? If so, must the MVA adopt regulations that identify these factors?

2. May or must the MVA refuse to return the certificate of origin to the dealer when the vehicle is reacquired by the dealer?

3. Under what circumstances must the MVA refund the excise tax collected from the buyer?

4. May a dealer again advertise the vehicle as "new" after it has been reacquired?

5. Must the dealer disclose a vehicle's prior ownership to a subsequent potential buyer?

For the reasons stated below, we conclude as follows:

1. The MVA's policy of weighing certain factors to determine if a vehicle is "new" or "used" is permissible. The MVA must adopt a regulation implementing this policy, however.

2. The MVA may not return the certificate of origin to the dealer if, applying its regulation, the MVA concludes that a vehicle is "used," notwithstanding the dealer's reacquisition of the vehicle.

3. The MVA must refund the excise tax to a buyer who returns a vehicle under the Lemon Law. The MVA has the authority to determine by regulation the criteria that it will use to decide whether to refund the excise tax under any other circumstance.

4. A dealer may not advertise as "new" a vehicle that has been reacquired by the dealer from an original buyer if: (i) the buyer drove the vehicle for more than a brief period of time or for a distance greater than that ordinarily involved in a test drive *or* (ii) the vehicle was damaged, altered, or subjected to unusual driving conditions.

5. A dealer must disclose all material facts about a vehicle's prior ownership to a subsequent potential buyer.

I

Background

In the typical sale of a new vehicle, the buyer makes the necessary down payment, arranges for financing, and takes possession of the vehicle under a conditional sale contract. The buyer then applies to the MVA to have the vehicle titled in his or her name. §13-104.1 of the Transportation Article ("TR" Article).[1] The dealer collects the tax and fees that are due and, within 20 days of the date on which the purchaser takes possession of the vehicle, forwards them to the MVA.

---

[1] The application must be on a form required by the MVA and must be accompanied by a certificate of origin. *See* TR §§13-104 and 13-104.1. The application must be accompanied by verification that the excise tax required by TR §§13-808 and 13-809 has been paid, along with any fees attendant to the titling of the vehicle. *See* TR §§13-809(d) and 13-901.

TR §13-113(e).[2] As long as the consumer has tendered a good down payment, obtains the necessary financing, and is satisfied with the vehicle, the transaction is complete.

However, matters are not always so simple. Through a practice known as "spot delivery," a dealer might release a vehicle to a buyer although financing is not yet complete, necessary insurance is not yet obtained, or the buyer's check has not yet cleared. Then, sometimes, the dealer cannot obtain the financing needed by the buyer, the buyer cannot get insurance, or the buyer's check is dishonored. In these cases, either the buyer will return the vehicle voluntarily or the dealer will retrieve it.[3]

In other cases, a vehicle might be returned to the dealer because of buyer dissatisfaction. Under Maryland's Lemon Law, a vehicle with an uncorrectable defect that "substantially impairs the use and market value of the motor vehicle" may be returned to the dealer. §14-1502(c)(1)(ii) of the Commercial Law Article ("CL" Article). A dealer might also agree to accept the return of a vehicle under a promotional program in which a buyer is permitted to "try out" the vehicle and return it to the dealer if dissatisfied for any reason.[4]

We understand that, while there are no regulations governing this subject, the MVA's general practices are as follows: If a customer's check is dishonored, or if the customer is unable to obtain financing, the MVA returns both the certificate of origin and the excise tax on the theory that no "sale" has been consummated. Similarly, if a vehicle is returned to a dealer for "mechanical" reasons within 30 days of the sale, the MVA returns both the certificate of origin and the excise tax. By contrast, the MVA generally will return neither the certificate nor the tax under other circumstances.

---

[2] The dealer must issue temporary tags good for 45 days to the buyer for display on the new vehicle. *See* TR §§13-602 and 13-605; COMAR 11.12.01.12.

[3] The latter is technically not a "repossession," because the dealer does not have a security interest in the vehicle. We assume that the dealer's right to retrieve the vehicle is defined in the contract between the buyer and the dealer.

[4] This list does not pretend to be exhaustive of the circumstances under which a vehicle leaves the control of a dealer and later is reacquired by the dealer. For example, a vehicle might be stolen and then recovered.

The MVA takes the position, for purposes of its enforcement responsibilities, that whether a vehicle is to be considered new or used depends on a variety of factors, including the miles traveled by the vehicle; whether the vehicle has been damaged, regardless of its mileage; and the status of the title - that is, whether the vehicle has been titled to a buyer.

II

"New" and "Used" Vehicles

A. Statutory Definition

A "new vehicle" is statutorily defined, with exquisite circularity, as a vehicle "(1) [t]he owner of which is a manufacturer, distributor, or licensed dealer; and (2) [t]hat never has been used to destroy its newness or to convert it into or make it a used or secondhand vehicle, as these terms are commonly used or understood in trade or business." TR §11-138.[5] A "used vehicle" means any vehicle that does not fit the definition of a new vehicle. TR §11-175.

B. Maryland Cases

In *Thomassen Lincoln-Mercury, Inc. v. Goldbaum*, 45 Md. App. 297, 304, 413 A.2d 218, *cert. denied*, 288 Md. 744 (1980), the Court of Special Appeals approved a jury's finding that an automobile sold as "new" was actually "used." The seller presented testimony from other dealers that they regarded the vehicle as new within the meaning of TR §11-138, because the MVA had not issued a certificate of title to the prior buyer, so that title remained with the dealer under the manufacturer's certificate of origin. 45 Md. App. at 310. Characterizing this as a "strained and inappropriate construction," the court concluded that "the far more significant circumstance [was] that

---

[5] This definition is substantially unchanged from its original enactment in Chapter 1007 of the Laws of Maryland 1943. *See* former Article 66 1/2, §1-152.

the car was in fact previously sold, previously used, and previously damaged." 45 Md. App. at 304.[6]

Three years later, the Court of Special Appeals explicitly held that, at least in the context of an auto buyer's action against the seller for fraud, "[w]hether a vehicle 'has been used to destroy its newness or to convert it into or make it a used or secondhand vehicle' is clearly a factual determination, not a legal one." *Wheaton Dodge City, Inc. v. Baltes*, 55 Md. App. 129, 133, 461 A.2d 38, *cert. denied*, 297 Md. 315 (1983).[7]

The teaching of these cases is that, when the MVA gives content to the definition in TR §11-138, it should look further than the status of the vehicle's title. What actually happened to the vehicle is more likely to be determinative.

C. *Out-of-State Cases*

Courts in other states have similarly indicated that a variety of practical factors, not merely the status of the vehicle's title or warranty, enter into the determination of whether a vehicle is new or used.

For example, in *Krause v. Eugene Dodge*, 509 P.2d 1199 (Or. 1973), the court rejected the seller's argument that the determining factors were whether the vehicle had been "licensed to another purchaser, and whether [it] could still qualify for the factory 'new car warranty'...." Rather, the court held:

---

[6] Goldbaum purchased a car for $10,600 that was represented to him as being "new." The car had been sold previously to a Mr. Booher for $10,300. Booher had driven the car 276 miles over a period of nearly two weeks and experienced overheating when driving the car, for which he returned the car several times for adjustments. The latest episode of overheating caused the car's wiring to catch fire, damaging not only the wiring itself but the air conditioner as well. Booher then rescinded the sale. He received all but $300 of his purchase price. The dealer deducted $300 to cover the loss he expected from having to resell the car as used.

[7] The van that Baltes bought from Wheaton Dodge had been purchased previously by a Mr. Burroughs, who had assumed possession under temporary tags, installed air conditioning, driven the van over 50 miles, returned it numerous times for repairs, and then rescinded the sale. Burroughs had paid $5,962.86 for the van; Baltes paid $7,978.45.

> It may be that among automobile dealers a current model car which had been previously sold to another purchaser ... and driven ... a distance of over 5,000 miles, would still be considered as a "new car," rather than a "used car," within the trade meaning of that term as used by automobile dealers.... It does not follow, however, that members of the public who purchase automobiles are bound by the "trade meaning" among automobile dealers of the words "new car." Indeed, a member of the public who purchases a car which is represented to him as a "new car" is entitled to understand the words "new car" by giving those words their ordinary meaning, at least in the absence of evidence that he understood and intended that term to have some other meaning.

502 P.2d at 1208.

In *Brooks v. Hurst Buick-Pontiac-Olds-GMC, Inc., 491 N.E.2d 345, 350 (Ohio App. 1985)*, the court held that a jury had properly found a seller to have misrepresented a used vehicle as new, albeit the vehicle had never been transferred to a buyer other than the plaintiff. The vehicle had apparently been damaged by the carrier in transit to the seller's place of business. Notwithstanding testimony that similar damage is not uncommon and that the damage in this case was not significant, the court concluded that the jury, "us[ing] its own common sense," properly determined on the basis of the damage that the vehicle was used. *Accord, Bell v. Kent Brown Chevrolet*, 561 P.2d 907 (Kan. 1977); *Lewis v. Worldwide Imports*, 395 P.2d 922 (Or. 1964). *See also Watkins v. Roach Cadillac, Inc.*, 637 P.2d 458 (Kan. App. 1981) (leased car repainted by lessor because of inferior factory paint job was held not "new" because materially different from the new vehicle it was held out to be).

In *Buechin v. Ogden Chrysler-Plymouth*, 511 N.E.2d 1330, 1336 (Ill. App. 1987), the dealer argued that its representation of a previously owned vehicle as new could not have defrauded the buyer because the buyer knew of the vehicle's mileage, albeit she did not know it had been previously owned.[8] In rejecting this argument, the court held that it would "not focus on the number of miles on the car, but on whether Buechin got a 'new' car as she and the general public understand the ordinary meaning of that word, that is, a car which has not been previously owned."

Similarly, in *Jack Criswell Lincoln-Mercury, Inc. v. Haith*, 590 S.W.2d 616, 619 (Tex. Civ. App. 1979), the dealer argued that the automobile at issue was new because it was owned by a dealer, sold on a manufacturer's certificate, and covered by a manufacturer's 12,000 mile warranty, regardless of the number of miles it had been driven prior to sale. The court found no error in the trial court's determination that the vehicle, which had been driven more than 600 miles, was used. *See also Search v. Bend Garage Co.*, 592 P.2d 558 (Or. 1979) (car driven 4,590 miles is not new); *McInnis & Co. v. Western Tractor & Equipment Co.*, 388 P.2d 562 (Wash. 1964) (tractor that had been used as a demonstrator for 68 hours and showed evidence of wear was not new).

D. Federal Regulation

The Federal Trade Commission has adopted a trade regulation rule prohibiting certain misrepresentations and requiring certain disclosures when a dealer sells a used vehicle. The FTC's definition of "used vehicle," like the cases differentiating between new and used vehicles in consumer transactions, focuses on the actual operation of the vehicle: "'Used vehicle' means any vehicle driven more than the limited use necessary in moving or road testing a new vehicle prior to delivery to a consumer ...." 16 C.F.R. §455.1(d)(2).

E. Conclusion

The case law and the FTC rule reflect a common principle: The consumer's understanding of the facts that change a "new" vehicle into a "used" one is the focus of the inquiry, even if the industry prefers to focus solely on titling and warranty status.

---

[8] The vehicle had been sold to another person, driven for some 650 miles, and then returned.

To be sure, not every operation of a new vehicle necessarily transforms it into a used one. Any buyer will recognize that a new vehicle will have been driven some miles during test drives by prospective buyers or the transport of the vehicle to the dealer; driving of this kind, incidental to the sales process, does not deprive a vehicle of its "newness." *See* 16 C.F.R. 455.1(d)(2); *Weigel v. Ron Tonkin Chevrolet Co.*, 690 P.2d 488, 491 (Or. 1984).

We can even envision the extraordinary case in which a vehicle has been sold and then returned so promptly, and after such minimal driving, that its status as a new vehicle is not compromised. For example, suppose that a dealer agrees to take back an undamaged vehicle that was sold the day before and driven no more miles and under no different circumstances than the typical road test. Under such circumstances, that vehicle "never has been used to destroy its newness ..." and therefore may be sold as "new."[9]

But whenever a dealer releases a vehicle to be driven by the buyer as he or she pleases, the vehicle's status as "new" is jeopardized. If the buyer then drives the vehicle more than an insignificant number of miles, damages it, alters it, or subjects it to unusual driving conditions (racing, for instance), the vehicle is no longer "new," regardless of the status of its title. As the Court of Special Appeals held in *Baltes*:

> "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.

55 Md. App. at 132.

---

[9] The fact of the vehicle's prior ownership undoubtedly is material, however, and must in any event be disclosed to a subsequent buyer. *See* Part VI below.

III

MVA's Interpretation

A. Current Practice

As explained in your letter, the MVA primarily considers three factors in determining whether a vehicle is "new" or "used," for purposes of its administration of the Vehicle Law: (i) the miles traveled by the vehicle; (ii) whether the vehicle has been damaged, regardless of its mileage; and (iii) the status of the title.

We have no doubt that MVA may continue to use these criteria to determine whether a vehicle "has been used to destroy its newness or to convert it into or make it a used or secondhand vehicle ...." TR §11-138. (As discussed in Part II above, the third of these - whether a certificate of title has been issued to the buyer - is by no means dispositive.) Although the list of factors considered by the MVA is not exhaustive, these factors are consistent with those relied on by courts in similar contexts. Indeed, as long as the MVA does not depart from the principles discussed in Part II above, it has the discretion to add pertinent additional factors to those it already considers.[10]

B. The Need for Regulations

The Motor Vehicle Administrator has broad authority to "adopt rules and regulations to carry out" all provisions of law enforced by the MVA. TR §12-104(b). Under §10-101(e) of the State Government Article ("SG" Article), a "regulation" is defined as follows:

> "Regulation" means a statement or an amendment or repeal of a statement that:
>
> (i) has general application;
>
> (ii) has future effect;

---

[10] For example, the MVA might choose to identify in its regulation specific durational or mileage limits beyond which a vehicle could not be considered "new."

(iii) is adopted by a unit to

1. detail or carry out a law that the unit administers;

... and

(iv) is in any form, including:

1. a guideline;
2. a rule;
3. a standard;
4. a statement or interpretation; or
5. a statement of policy.

The factors that the MVA uses to determine whether a vehicle is new or used amount to a statement having "general application" and "future effect," adopted to detail or carry out the law regulating motor vehicle dealers. Hence, the criteria used amount to a "regulation" under SG §10-101(e)(1).[11]

The MVA, like many other units of State government, not only has the authority to adopt regulations but also the corresponding duty to adopt them in accordance with the procedures set out in SG §§10-105 through 10-117. In short, the MVA must spell out by regulation its approach to determining whether a vehicle is "new" or "used." The regulation should include all of the factors that the MVA currently uses to make its determination, as well as any other factors it finds relevant. Of course, the regulation must be consistent with the proper construction of TR §11-138, discussed in Part II above.

In addition, as we explain in Part VI below, other statutes - in particular, the Consumer Protection Act - require disclosure of all material facts about a vehicle. For example, if the MVA's regulation defined narrow circumstances under which a vehicle that was sold and promptly reacquired by a dealer may be sold again as "new," nevertheless the fact of prior ownership must be disclosed to a

---

[11] The criteria used by MVA do not qualify under the "internal management" exception in SG §10-101(e)(2)(i), given their substantial effect on the public. *See generally* 72 *Opinions of the Attorney General* 230, 234-36 (1987).

subsequent buyer. The MVA's regulation should be consistent with the dealer's affirmative disclosure obligations.

IV

Return of Certificate of Origin

A "certificate of origin," as defined in TR §13-101, is a "certification by the manufacturer ... that ... the vehicle described in it has been transferred to the dealer or other person named and that the transfer is the first transfer of the vehicle in ordinary trade and commerce ...." The certificate of origin travels with the vehicle from the manufacturer to the distributor to the dealer and serves to evidence the dealer's interest in the vehicle, just as a certificate of title evidences a subsequent owner's interest. *See* TR §13-102(2) (certificate of title not required for new vehicle owned by manufacturer or dealer and held for sale). *Compare* TR §13-104(d) *with* TR §13-104.1.

Possession of a certificate of origin also indicates that the vehicle to which it applies is indeed new. The return of the certificate of origin to a dealer after possession and any significant use of the vehicle by a buyer is inconsistent with the changed status of the vehicle and is inherently deceptive. Hence, the MVA should return the certificate of origin only if, by applying its regulation, the MVA determines that the vehicle is still "new."[12]

V

The Excise Tax

Under TR §13-809(b)(1), "an excise tax is imposed ... [f]or each original and each subsequent certificate of title issued in this State for

---

[12] Even if the certificate of origin is not returned to the dealer because the vehicle is no longer "new," the dealer may easily sell the vehicle as used. If the dealer already has sent the required paperwork to the MVA, but the transaction is not yet complete, the MVA, upon request of the dealer, may return the title to the dealer in the name of the first "buyer." The "buyer" will assign the title to the dealer in a tax-free transaction, known as a "sale on the title."

a motor vehicle ...."[13] Invariably, when a dealer sells a vehicle, the dealer collects the excise tax and remits it to the MVA. *See* TR §§13-113(e) and 13-812.

Except when the Lemon Law applies, the MVA has broad discretion to decide whether to refund the excise tax after a vehicle has been returned to the dealer. TR §13-817(b) provides as follows:

> The [MVA] *may* refund the full or any portion of the excise taxes paid by a consumer for a motor vehicle, if the dealer, manufacturer, factory branch, or distributor, by voluntary agreement or subject to the provisions of §14-1502 of the Commercial Law Article, refunds the full or any portion of the purchase price or accepts return of the motor vehicle.

(Emphasis added).

If the return is made under the Lemon Law, the MVA's discretion is limited. Once the MVA determines that the provisions of CL §14-1502 have been satisfied, it is required by the Lemon Law to refund the excise tax paid for the titling of that vehicle:

> If a dealer, manufacturer, factory branch, or a distributor is required under a judgment, decree, arbitration award, or settlement agreement to accept, or by voluntary agreement accepts, return of a motor vehicle from a consumer, the consumer *shall be entitled to recover* from the [MVA] the excise taxes originally paid by the consumer ....

CL §14-1503(a) (emphasis added).

If the dealer has accepted return of a motor vehicle for some reason other than an uncorrectable mechanical defect, the MVA may exercise its discretion about the refund of the excise tax. This grant of discretion to the MVA is in notable contrast to the statute requiring

---

[13] The tax is 5% of the fair market value of the vehicle. TR §13-809(c).

refund of the sales and use tax if a sale is cancelled and the purchase price returned. §11-403(c) of the Tax-General Article.[14] Presumably, this statutory difference reflects the differing events that give rise to the respective taxes: "The Retail Sales Tax is an excise tax upon the occurrence of an event, a purchase.... The Motor Vehicle excise tax is a tax upon the occurrence of a different kind of event, the issuance of a certificate of title." 61 *Opinions of the Attorney General* 851, 858 (1976).

These two events are indeed different for purposes of tax refunds: When an item is returned and the purchase price refunded, it is as if the original sales transaction - the event giving rise to the sales tax -did not occur. But the issuance of a vehicle title - the event giving rise to the excise tax - cannot be treated as a nullity. A new title can be issued on the same vehicle, of course, but that subsequent event is also taxable and does not undo the prior issuance of a title.[15]

We recommend that the MVA adopt a regulation setting out the criteria under which it will exercise its discretion to refund the excise tax. In this regulation, the MVA may take into account whatever factors it reasonably considers pertinent to this judgment - for example, the time that has elapsed since issuance of the title, the reasons given for the return of the vehicle, and any simultaneous sales transaction between the consumer and the dealer.

---

[14] This provision is as follows:

> A vendor shall refund to a buyer the proportionate amount of sales and use tax that the buyer has paid if:
> (1)(i) A sale is rescinded or cancelled; or
>
> (ii) The property sold is returned to the vendor; and
>
> (2) The purchase price is wholly or partially repaid or credited.

[15] Moreover, in the real world of vehicle transactions, the MVA is entitled to view with skepticism an assertion that a vehicle has been accepted for return long after the issuance of a title. The decline in the value of a new vehicle coincident with its use after sale suggests that at least some purported returns of vehicles long after sale are in fact disguised trade-ins.

VI

Dealer's Obligation to a Subsequent Buyer

Only the Lemon Law explicitly requires disclosure of the fact that a vehicle offered for sale has been previously sold and returned by a buyer. CL §14-1502(g)(2). *See also* COMAR 11.12.01.14J(2). However, several other consumer protection statutes also potentially apply if a dealer advertises or sells a vehicle as "new" when it is in fact used or if a dealer fails to disclose the material facts about its prior ownership and use.

TR §15-312(b) prohibits "any material misrepresentation in obtaining a vehicle sales contract." Similarly, TR §15-313(a) prohibits any advertisement "that is in any way false, deceptive, or misleading." Violation of these prohibitions would subject a dealer to any or all of a variety of sanctions, including refusal, suspension, or revocation of a license or imposition of a fine not exceeding $1,000 for each violation. *See* TR §§15-315(a)(4) and 15-315(b); COMAR 11.12.01.14A, E(1) and (4), I, J, and K; COMAR 11.12.01.16; and COMAR 11.12.01.20.

The Maryland Consumer Protection Act also prohibits a variety of unfair or deceptive trade practices. These practices include any "[f]alse, falsely disparaging, or misleading oral or written statement, visual description, or other representation of any kind which has the capacity, tendency, or effect of deceiving or misleading consumers" [CL §13-301(1)]; any representation that "[d]eteriorated, altered, reconditioned, reclaimed, or secondhand consumer goods are original or new" [CL §13-301(2)(iii)]; any representation that consumer goods "are of a particular standard, quality, grade, style, or model which they are not" [CL §13-301(2)(iv)]; and any "[f]ailure to state a material fact if the failure deceives or tends to deceive" [CL §13-301(3)]. A finding that a merchant has engaged in any of these practices may invoke a variety of enforcement provisions, including civil fines, criminal penalties, and liability to the consumer for damages. *See* CL §§13-406 through 13-411.

In addition, the false advertising provisions of the Commercial Law Article prohibit the use of "any advertisement, including a label, which is misleading in a material respect." CL §11-701. A determination of whether an advertisement is misleading must be based on consideration of "[t]he extent to which the advertisement fails to reveal a fact which, in light of any representation made, is material with respect to the advertised commodity or service ...." CL §11-704(2). The statutory remedy for such a violation is $500 per violation assessable in a civil action instituted by the Attorney General. CL §11-705. These provisions do not affect the right of a consumer to bring an individual action against a false advertiser. CL §11-707.

Finally, a dealer who improperly sells a used vehicle as new may be liable to the consumer for breach of the statutory warranties encompassed in CL §2-313(1):

> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

These consumer protection provisions raise the question of whether the facts about a vehicle's prior use and return are "material." "An omission is considered material if a significant number of unsophisticated consumers would attach importance to the information in determining a choice of action." *Golt v. Phillips*, 308 Md. 1, 10, 517 A.2d 328 (1986). In our view, the fact that a vehicle was previously transferred from the control of the dealer to a buyer and then returned to or otherwise reacquired by the dealer is unquestionably material to a subsequent buyer of that vehicle. Surely a significant number of consumers, unsophisticated or not, would attach importance to this information about a vehicle's prior history in determining whether to buy it or what to offer to pay for it.[16]

---

[16] In *State v. Action TV Rental*, 297 Md. 531, 467 A.2d 1000 (1983), the Court of Appeals affirmed without analysis the trial court's finding that an appliance rental agency did not violate the Consumer Protection Act by failing to disclose that the appliances it rented were used, rather than new. The trial court's reasoning was that the advertising of appliances "for rent" sufficiently conveyed the fact that they were likely to be used. 297 Md. at 556-57. Neither court intimated that the fact of prior use was not material.

Hence, a dealer generally may not sell or advertise a vehicle as new after it has been "physically used by anyone for purposes beyond the uses incidental to the sales process ...." *Weigel v. Ron Tonkin Chevrolet Co.*, 690 P.2d at 491.[17] In addition, a dealer must disclose all material facts about a vehicle's history to a subsequent buyer.[18]

VII

Conclusion

In summary we conclude as follows:

1. The MVA's policy of weighing certain factors to determine if a vehicle is "new" or "used" is permissible. The MVA must adopt a regulation implementing this policy, however.

2. The MVA may not return the certificate of origin to the dealer if, applying its regulation, the MVA concludes that a vehicle is "used," notwithstanding the dealer's reacquisition of the vehicle.

3. The MVA must refund the excise tax to a buyer who returns a vehicle under the Lemon Law. The MVA has the authority to determine by regulation the criteria that it will use to decide whether to refund the excise tax under any other circumstance.

4. A dealer may not advertise as "new" a vehicle that has been reacquired by the dealer from an original buyer if: (i) the buyer drove the vehicle for more than a brief period of time or for a distance greater than that ordinarily involved in a test drive *or* (ii) the vehicle was damaged, altered, or subjected to unusual driving conditions.

---

[17] The only conceivable exception is if a vehicle is returned so quickly, and had been driven so little, that its post-sale use is indistinguishable from a typical test drive. *See* Part IIE above.

[18] If a vehicle has been used as a "demonstrator," as defined in COMAR 11.12.01.14I(2), that fact must be disclosed to a subsequent buyer. *See* COMAR 11.12.01.14J. This opinion is not intended to address disclosure or other issues regarding demonstrators, a unique and long-accepted subcategory of vehicles.

5. A dealer must disclose all material facts about a vehicle's prior ownership to a subsequent potential buyer.

J. Joseph Curran, Jr.
Attorney General

Risselle Rosenthal Fleisher
Assistant Attorney General

Jack Schwartz
Chief Counsel
Opinions & Advice

WORKERS' COMPENSATION

Coverage - Unpaid Student Placements - Students Are Not Covered By Act And May Not Gain Coverage Through Joint Election Procedure

February 3, 1989

The Honorable Ronald A. Guns
Maryland House of Delegates

You have requested our opinion concerning the applicability of the Workers' Compensation Act to a program under which handicapped students are placed with private employers in unpaid work positions. Your specific questions are as follows:

1. Are the students covered by the Workers' Compensation Act?

2. If not, may an employer and a student voluntarily bring themselves within the coverage of the Act by filing a joint election under Article 101, §31?

3. Assuming that such an election is possible, would it immunize the employer from civil liability for negligence if the student were injured while at work?

For the reasons stated below, we conclude as follows:

1. The students are not covered by the Workers' Compensation Act.

2. The joint election procedure of Article 101, §31 is not available.

3. Because a joint election of Workers' Compensation Act coverage would be ineffective, an employer would remain liable to a student injured at work as a result of the employer's negligence.

I

Background

You describe the program in question as follows:

> Cecil County schools currently place handicapped students with private employers in unpaid work positions. These placements are part of the handicapped students' "individualized education plan", a mandated program combining education and work experience which prepares handicapped persons for permanent employment. These students do work typical of the employers' business, but neither they nor the schools receive compensation.

We assume that this program is an element of the plan for special educational services of the Cecil County Board of Education. *See* §8-404 of the Education Article; COMAR 13A.05.01.06D.

II

Coverage of the Act

The Workers' Compensation Act covers "employees." Article 101, §21(b) of the Maryland Code. The Act then enumerates several categories of persons who are "employees," the broadest category of which is "[e]very person, including a person under eighteen years of age, ... in the service of an employer under any contract of hire or apprenticeship, express or implied ...." §21(b)(1). As this office pointed out some years ago: "The natural import of the language 'contract of hire' describes the situation whereby a relationship exists between an employer and one rendering a service to an employer, in which the employer is obligated to provide wages or remuneration to the one rendering service." 61 *Opinions of the Attorney General* 662, 664 (1976). *See Moats v. State*, 215 Md. 49, 136 A.2d 757 (1957) (Act inapplicable to inmate of State institution for the mentally retarded who engaged in uncompensated work for the institution).

The compensation mechanism at the heart of the Act depends upon the employee's "actual weekly wages." §36. For that reason, when the General Assembly has determined to extend the scope of the Act to certain volunteers, it has done so expressly and has provided ways of determining the salary or wages upon which compensation is to be based. *See* §§34(b), 35A(b) and 35B(b). Provisions of this kind "give rise to the strong inference" that other persons who engage in unpaid work, like the students in question here, are not covered. *Moats v. State*, 215 Md. at 53. *See also Lockerman v. Prince George's County*, 281 Md. 195, 377 A.2d 1177 (1977).[1]

III

Election of Coverage

Article 101, §31 provides as follows: "Any employer, his employee or employees engaged in works not within the meaning of this article, may by their joint election, filed with the Commission, accept the provision of this article, and such acceptances when approved by the Commission, shall subject them to the provisions of this article to all intents and purposes as if they had been originally included in its terms."[2] The form devised by the Workers' Compensation Commission to implement §31 likewise speaks in terms of the "employer" and the "employees."[3]

The purpose of this provision is to allow an employer and its employees who are engaged in an activity excluded from the Act to opt in voluntarily. *See Keeney v. Beasman,* 169 Md. 582, 590-91, 182 A. 566 (1936). We do not believe that §31 allows persons who do not

---

[1] From your letter, we gather that a student placed with an employer under this program is not regarded as "an apprentice, trainee, or retrainee, who is regularly employed ...." §21(a)(7). We need not address the applicability of the Act to unpaid apprentices or trainees. *Cf. Norfolk & W. Ry. Co. v. Bondurant's Admn'r, 59 S.E. 1091, 1093 (Va. 1908)* (describing circumstances under which master-servant relationship arises from service as unpaid trainee).

[2] As originally enacted, §31 began as follows: "Any employer, his employee or employees engaged in works not extra-hazardous within the meaning of this Act ...." Chapter 800, Laws of Maryland 1914. In Chapter 119 of the Laws of Maryland 1971, the General Assembly reenacted the provision without the word "extra-hazardous."

[3] Form A-21 reads as follows: "We the undersigned employer and his employees ... hereby jointly elect to accept and to be bound by the provisions of said law as authorized in Section 31 thereof. This joint election is to be effective at any and all times when the aforesaid relation of employee shall exist."

have an employer-employee relationship in the first place to obtain coverage under the Act. Cases involving §31 (or its predecessor provisions) all involve "employees" who would have been covered by the Act but for a statutory exception. *See General Electric Co. v. United States*, 603 F. Supp. 881 (D. Md. 1985); *Apitsch v. Patapsco & Back Rivers R.R.*, 385 F. Supp. 495 (D. Md. 1974); *Cox v. Sandler's Inc.*, 209 Md. 193, 120 A.2d 674 (1956); *Keeney v. Beasman*, 169 Md. at 585.

In Part II above, we concluded that the students in question are not "employees" subject to coverage under the Act because they are not compensated. For the same reason, we believe that they are not "employees" who could enter an election under §31. In this regard, we point out that the absence of wages would present the same problem in determining compensation as led the General Assembly to make special provision for the unpaid volunteers that it wished to be covered under the Act.

IV

Effect on Liability

Under §15 of the Act, the payment of workers' compensation is the "exclusive" remedy for "an accidental personal injury sustained by the employee arising out of and in the course of his employment without regard to fault as a cause to such injury ...." In such circumstances, the employee may not bring a negligence action against the employer. *E.g., Kanoche v. Cox*, 282 Md. 447, 385 A.2d 1179 (1978).

Because we have concluded that the students are not now covered by the Act and may not gain coverage under the joint election procedure of §31, it follows that a student injured at the work place retains a right of action in tort against the employer. *Tilghman Co. v. Conway*, 150 Md. 525, 537, 133 A. 593 (1926).

V

Conclusion

In summary, it is our opinion that the Workers' Compensation Act does not apply to students who are placed in unpaid work positions as part of their educational program. Nor, under present law, may the students gain coverage through voluntary election with an employer under Article 101, §31. Legislation would be necessary, therefore, to extend the Workers' Compensation Act to these students.

J. Joseph Curran, Jr.
Attorney General

Jack Schwartz
Chief Counsel
Opinions and Advice

Editor's Note:

The State Workers' Compensation Act has been recodified as Title 9 of the Labor and Employment Article.

SYNOPSES

OF

UNPUBLISHED

OPINIONS

Synopses of Unpublished Opinions

ADMINISTRATIVE LAW

HEARINGS - ATTORNEY GENERAL - CONSUMER PROTECTION DIVISION ARBITRATION

The program of voluntary arbitration of consumer disputes within the Consumer Protection Division of the Attorney General's Office is not subject to Chapter 788 of the Laws of Maryland 1989, which created the Office of Administrative Hearings.

Opinion No. 89-046	To:
	The Hon. John W. Hardwicke
December 14, 1989	*Chief Administrative Law Judge*

HEARINGS - DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES

Chapter 788 of the Laws of Maryland 1989 applies only to hearings in contested cases, as that term is defined by SG §10-201(c). Moreover, Chapter 788 does not apply to hearings conducted by units within the Department of Public Safety and Correctional Services that do not employ or engage hearing officers.

Opinion No. 89-036	To:
	The Hon. Bishop L. Robinson
September 15, 1989	*Secretary of Public Safety and*
	Correctional Services

EDUCATION

SCHOOL CONSTRUCTION - LEASE/LEASEBACK TRANSACTION

The Board of Education of Baltimore County has the authority to enter into a certain multi-step lease/leaseback transaction to acquire a school building.

Opinion No. 89-041

October 20,1989

To:
Dr. Robert Y. Dubel
Superintendent

GAMING

SLOT MACHINES - USE OF PROCEEDS

A donation of slot machine proceeds to a government entity would be charitable in nature. Hence, the recipient government entity can be properly viewed as a "charity," within the meaning of Article 27, §264B.VI(C)(5).

Opinion No. 89-037

September 15, 1989

To:
The Hon. Walter M. Baker
Senate of Maryland

GENERAL ASSEMBLY

COMPENSATION - "OFFICERS" OF HOUSE AND SENATE

The Opinion presents an analysis of various questions regarding the salary differential for legislative leaders and committee chairmen.

Opinion No. 89-044

November 29, 1989

To:
George A. Nilson
Chairman, General Assembly Compensation Commission

HANDGUNS

DEALER LICENSING - OUT-OF-STATE SELLERS

A person who frequently serves as a conduit for purchases of pistols and revolvers by Maryland residents from out-of-State sellers must obtain a Maryland pistol and revolver license under Article 27, §443.

Opinion No. 89-049

December 22, 1989

To:
The Hon. Thomas V. Mike Miller
President of the Senate

HEALTH OCCUPATIONS

OPTOMETRISTS - STATUTES

HO §10-404(b)(2) does not preclude the Board of Examiners in Optometry from treating as qualified to administer diagnostic eyedrops those optometrists who took a Board-approved course in pharmacology within seven years of July 1, 1988, the intended effective date of the statute.

Opinion No. 89-012

March 21, 1989

To:
Harold S. Glazier, O.D.
President, Board of Examiners in Optometry

INSURANCE

VEHICLE LAWS - CITY OF BALTIMORE

The City of Baltimore may alter its self-insurance program to exclude certain of its employees from "no fault" personal injury protection coverage ("PIP"), otherwise provided for in Article 48A, §§539 and 541(c), and "uninsured motorists" coverage, otherwise required by §17-103(b) of the Transportation Article.

Opinion No. 89-005 To:
Ambrose T. Hartman, Esquire
February 15, 1989 *Deputy City Solicitor*

JUDGES

RECALL OF RETIRED JUDGES - EXEMPTIONS

Amendments made to Chapter 560 of the Laws of Maryland 1989 that exempt four political subdivisions from certain provisions governing the recall of retired judges apply to both resident former judges and nonresident former judges assigned to the subdivision in question. However, a former judge in one of the excepted subdivisions may qualify and be assigned to serve as a recalled judge in a non-exempt county.

Opinion No. 89-042 To:
James H. Norris, Jr., Esquire
October 25, 1989 *State Court Administrator*

LOCAL GOVERNMENT

FREDERICK COUNTY - HUMAN RELATIONS DEPARTMENT - SUBPOENA POWER

Chapter 224 of the Laws of Maryland 1988 authorizes the Frederick County Commissioners to grant subpoena power to the Frederick County Human Relations Department.

Opinion No. 89-029

August 10, 1989

To:
John S. Mathias, Esquire
County Attorney for Frederick County

NATURAL RESOURCES

FISHING - TIDAL FISH LICENSES

Natural Resources §4-703 authorizes the Department of Natural Resources to issue a license to any person who previously held a similar license that was valid on September 1, 1988, even if the person applies for a renewal of the license after its expiration date.

Opinion No. 89-043

November 8,1989

To:
The Hon. Torrey C. Brown, M.D.
Secretary of Natural Resources

PROCUREMENT LAW

CONTRACT TERMINATION - MIGRATORY WATERFOWL STAMP ACCOUNT

Payment of funds from the Migratory Waterfowl Stamp Account to settle a certain case over the termination of a State contract was lawful.

Opinions No. 89-034
August 11, 1989

To:
The Hon. Frederick Malkus, Jr.
Senate of Maryland

STATE ACCIDENT FUND

FINANCIAL REPORTING

In light of the enactment of Chapters 584 and 585 of the Laws of Maryland 1987, the State Accident Fund should no longer be included in the financial reporting entity of the State of Maryland.

Opinion No. 89-016
April 19, 1989

To:
Arnold G. Holz, Director
General Accounting Division
Office of the Comptroller

TAXATION

PROPERTY TAX - CONSTITUTIONAL LAW - UNIFORMITY CLAUSE - HOMESTEAD EXEMPTION - TOWN OF OXFORD

The Town of Oxford may not exempt a flat dollar amount of the value of homestead property from taxation. However, it may separately classify and tax such property at a different rate than other residential property.

Opinion No. 89-030
August 10, 1989

To:
Robert J. Merriken, Esquire

VEHICLE LAWS

RULES OF THE ROAD - LIABILITY FOR SPEEDING

Only the driver of a vehicle is subject to a citation for speeding, unless it is shown that a passenger intentionally directed or knowingly permitted the violation.

Opinion No. 89-032

August 11, 1989

To:
The Hon. Martha S. Klima
Maryland House of Delegates

CITATORS

AND

INDEX

OPINIONS

OF THE

ATTORNEY GENERAL

CITED

OPINIONS OF THE ATTORNEY GENERAL CITED

Page

ACTS OF

THE

GENERAL ASSEMBLY

ACTS OF THE GENERAL ASSEMBLY
Construed or Referred To:

CONSTITUTION OF THE
UNITED STATES
AND
CONSTITUTION OF MARYLAND

CONSTITUTION OF THE UNITED STATES

CONSTITUTION OF MARYLAND

Page

CODE OF

PUBLIC GENERAL LAWS

CODE OF PUBLIC GENERAL LAWS

Page

Page

AGRICULTURE ARTICLE

Page

BUSINESS OCCUPATIONS AND PROFESSIONS ARTICLE

COMMERCIAL LAW ARTICLE

CORPORATIONS AND ASSOCIATIONS ARTICLE

COURTS AND JUDICIAL PROCEEDINGS ARTICLE

Page

EDUCATION ARTICLE

ENVIRONMENT ARTICLE

ESTATES AND TRUSTS ARTICLE

FAMILY LAW ARTICLE

FINANCIAL INSTITUTIONS ARTICLE

Page

HEALTH - GENERAL ARTICLE

HEALTH OCCUPATIONS ARTICLE

LABOR AND EMPLOYMENT ARTICLE

Page

STATE GOVERNMENT ARTICLE

TAX-GENERAL ARTICLE

TAX-PROPERTY ARTICLE

TRANSPORTATION ARTICLE

Page

CODE OF

MARYLAND REGULATIONS

(COMAR)

CODE OF MARYLAND REGULATIONS (COMAR)

TOPICAL

INDEX

TO

OPINIONS

TOPICAL INDEX

—A—

—I—

—J—

—K—

—L—

—T—

—U—

—V—

VEHICLE LAW—

"VIDEO-CONFERENCING"—

See PAROLE COMMISSION

VOLUNTEER FIRE AND RESCUE PERSONNEL—

See TAXATION

—W—

WORKERS' COMPENSATION—

—XYZ—

ZONING—

HISTORIC AREA ZONING—

PLANNING COMMISSION—