

# Opinions, Advice, and Legislation Quarterly News

Office of the  
Maryland Attorney General



October-December 2000

## OPINIONS

### BUSINESS AND PROFESSIONS

**Question:** A statutory loan guarantee program administered by the Maryland Small Business Development Financing Authority is designed to assist businesses whose owners are “socially or economically disadvantaged.” What is the meaning of the phrase “economically disadvantaged” in this context?

**Answer:** An individual who owns a small business is “economically disadvantaged” if the business is unable to obtain adequate financing on reasonable terms through normal channels because the owner has an economic impediment beyond his or her control. The owner must suffer from a specific and identifiable impediment beyond the owner’s control and independent of race, ethnicity, gender, or physical disability ) which are covered by other provisions of the statute. The impediment must prevent the business from competing on a level playing field with other businesses in the same industry.

*Opinion No. 00-027  
October 16, 2000*

### COUNTIES

**Question:** Assisted living facilities provide housing and support services to individuals who need assistance in performing the activities of daily living. Does State law preempt Anne Arundel County from requiring these facilities to have emergency power sources?

**Answer:** A local ordinance that would establish physical plant and emergency resource requirements specifically for assisted living facilities would be preempted by State law. However, fire and building regulations that apply to structures generally, including buildings used to provide assisted living services, would not be preempted.

*Opinion No. 00-026  
October 13, 2000*

### FAMILY LAW

**Question:** Is “surrogate adoption” legal in Maryland if a fee is paid to the birth mother?

**Answer:** Surrogacy contracts that involve the payment of a fee to the birth mother are, in most instances, illegal and unenforceable under Maryland law. However, the decision whether to grant an adoption petition turns on the best interests of the child. In the context of a “surrogate adoption,” a court may consider the payment of a surrogacy fee to the extent that it bears on the best interests of the child or on related issues such as the voluntariness of the birth mother’s consent to the adoption. The payment of a surrogacy fee does not by itself bar approval of an adoption petition.

*Opinion No. 00-035  
December 19, 2000*

### GAMING

**Question:** Must a volunteer fire department, or a fraternal, civic, war veterans’, religious, or

charitable organization or corporation, obtain a permit from the Board of County Commissioners before conducting a charitable bingo event in Calvert County?

**Answer:** Yes.

*Opinion No. 00-32  
December 18, 2000*

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## HEALTH

**Question:** The following four questions were posed in light of major changes made in 1993 to the Health Care Decisions Act:

**1Q:** May tube feeding be administered if a patient's nutritional needs can be met through feeding by mouth?

**A:** If a patient's nutritional needs can be met through reasonable efforts to feed the patient by mouth, a health care facility in Maryland may not administer tube feeding.

**2Q:** Does tube feeding fall within the category of "life-sustaining procedures" that may be foregone in an advance directive or a decision by a health care agent or surrogate?

**A:** Tube feeding is a "life-sustaining procedure," the use of which may be addressed in an advance directive or decided by a health care agent or surrogate decision maker. If a decision to withhold or withdraw a feeding tube is based on an instruction in an advance directive or on the decision of a surrogate pursuant to the Health Care Decisions Act, the patient must first be certified to be in a terminal or end-stage condition or in a persistent vegetative state.

**3Q:** Under what circumstances would tube feeding meet the Health Care Decisions Act's definition of "medically ineffective treatment," which may be withheld or withdrawn from a patient in an end-stage condition without prior court approval?

**A:** Tube feeding meets the Act's definition of "medically ineffective treatment" when a patient's attending and consulting physicians have concluded that tube feeding would neither contribute to the patient's health status nor prevent the patient's impending death.

**4Q:** Under what circumstances would the functional impairments related to advanced dementia be consistent with an "end-stage condition," as defined by the Health Care Decisions Act?

**A:** The functional impairments related to advanced dementia, to the extent that they mark a patient's severe, generalized infirmity, are consistent with the Act's definition of "end-stage condition."

*Opinion No. 00-029  
November 16, 2000*

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## INSURANCE

**Question:** The State insurance code requires a title insurer to carry out an on-site evaluation of each "principal agent" that conducts real estate settlements involving its title insurance policies. How does that provision apply to an insurer that has elected to issue all of its policies through a single entity, which it has designated as its "principal agent"?

**Answer:** The insurance code requires the insurer to perform an on-site review of each settlement company it has authorized to conduct real estate settlements, and not simply of the one entity it has designated as its "principal agent." The insurer has this obligation even though a title agency authorized to conduct settlements does not itself issue insurance policies on the insurer's behalf.

*Opinion No. 00-028  
October 30, 2000*

**Questions:** Can a member of a health maintenance organization (“HMO”) enter into a private contract with a health care provider having no relation to the HMO; would the statutory prohibition against balance billing of HMO members apply to such a contract?

**Answer:** An HMO member may contract with a health care provider for health care services that are not covered by the member’s HMO. As part of that private contract, the member may agree not to rely on the HMO plan and to pay the provider’s full rate for services. If the HMO member makes an informed and voluntary decision to enter into such a contract, the prohibition against balance billing of HMO members does not apply.

*Opinion No. 00-030  
November 21, 2000*

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### PHYSICIANS

**Question:** Is a volunteer retired physician who renders health care through a charitable organization required to carry liability insurance for simple negligence in order to have the benefit of immunity conferred by statute?

**Answer:** No.

*Opinion No. 00-031  
December 18, 2000*

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### SHERIFFS

**1Q:** May the Sheriff of Allegany County make decisions concerning the County’s new detention center during its construction, before the facility is turned over to the Sheriff?

**A:** No, but he may, and should, participate in planning related to the operation of that facility.

**2Q:** May the Sheriff decline to provide a consultant hired by the County with access to the current detention center, for the purpose of training

detention center employees on correctional methods to be used at the new detention center?

**A:** As long as the Sheriff retains responsibility for operating the County detention center, the Sheriff need not use a consultant selected by the

County Commissioners to train detention center employees on correctional matters.

*Opinion No. 00-034  
December 19, 2000*

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## TOBACCO REGULATION

**Question:** May a charter county or municipality require licensed tobacco retailers to display tobacco products only in areas that are normally inaccessible to customers, such as behind the counter, in an overhead rack, or in a locked case, if the proposed law provides exemptions for vending machines and for stores specializing in tobacco products?

**Answer:** Such an ordinance would be within the police power of a charter county or municipality and would not be preempted by State or federal law.

*Opinion No. 00-033  
December 18, 2000*

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## ADVICE LETTERS

### BOARD OF PUBLIC WORKS

**Question:** Must the Board of Public Works hold a meeting on the first Wednesday in January?

**Answer:** The State Constitution provides that the Board is to meet on the first Wednesday in January, April, July, and October “and oftener, if necessary.” However, the requirement that the Board hold a meeting on those dates is “directory”;

the failure of the Board to meet on the first Wednesday in January would not invalidate Board action at a subsequent meeting.

*Letter to  
Sheila McDonald  
Secretary, Board of Public Works  
December 18, 2000*

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## DRUGS AND DRUG TESTING

**Question:** Under the State substance abuse policy, may an agency terminate a “sensitive employee” solely because the employee failed a random drug test?

**Answer:** Under the 1991 Executive Order that sets forth the current substance abuse policy, an agency must suspend for 15 days a sensitive employee who fails a random drug test and must require successful participation in a drug treatment program. The Executive Order does not provide for termination of the employee based *solely* on failure of a random drug test.

*Letter to  
Irwin Brown, General Counsel MTA  
October 13, 2000*

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## ENVIRONMENT

**Question:** May the Department of the Environment require a poultry company to obtain a water discharge permit for chicken litter at farms where chickens owned by the poultry company are raised?

**Answer:** Yes.

*Letter to  
Senator J. Lowell Stoltzfus  
October 10, 2000*

## GUN SHOWS

**Question:** Would it be constitutional for the Legislature to pass a law that (1) bans gun shows at publicly-owned facilities, like the Maryland National Capital Park and Planning Commission's Show Place Arena, and (2) prohibits any private organization that receives public funding through a bond bill from allowing the use of its facilities for gun shows?

**Answer:** Yes.

*Letter to  
Senator Ida Ruben  
October 30, 2000*

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## HISTORIC PRESERVATION

**Question:** Does a proposed grant by the Prince George's County Redevelopment Authority to the Mount Victory Baptist Church, for exterior renovations to the church, violate the Establishment Clause?

**Answer:** The available facts regarding the grant proposal and the applicable case law suggest that the proposed grant will not violate the Establishment Clause if the funds are used for a project that serves the ends of historic preservation and neighborhood revitalization, and if grants are available for similar projects of other organizations without reference to religion.

*Letter to  
Delegate Rushern L. Baker, III*

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## MUNICIPAL ORDINANCES

**Question:** Does a municipality have authority to adopt an ordinance prohibiting "cruising" on a State highway located in the municipality?

**Answer:** Yes, so long as the ordinance is approved by the State Highway Administration and any warning signs conform to SHA specifications.

*Letter to  
Senator Donald F. Munson*

October 27, 2000

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## PROPERTY TAX

**Question:** Is proposed legislation authorizing the Howard County Board of Education to impose a property tax to fund public school operations and expenses constitutional?

**Answer:** Yes. While the General Assembly is prohibited by the State Constitution from enacting a public local law for a single charter county on a subject covered by the Express Powers Act, the proposed measure does not impermissibly legislate on a subject covered by that Act. Nor would it result in any inequality in assessments or in tax rates that would offend the uniformity requirement of the Constitution.

*Letter to  
Delegate Donald E. Murphy  
November 15, 2000*

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## PUBLIC INFORMATION ACT

### Financial Information

**Question:** Does the Public Information Act grant the right to inspect and copy public records relating to the compensation of public officials and employees?

**Answer:** The Public Information Act grants a broad right of access to records on the compensation of public officials and employees. However, an exception in the Act mandates denial of access to records of certain retirement benefits.

*Letter to  
Senator Richard F. Colburn  
November 17m, 2000*

### Personnel Records

**Question:** Does the personnel record exemption in the Public Information Act bar access to biographical information concerning the members of State Forestry Citizen Advisory Committees?

**Answer:** A mandatory exemption to the PIA requires a custodian to deny access to “a personnel record of an individual, including an application, performance rating, or scholastic achievement information.” SG §10-161(i)(1). Because the exemption concerns records related to “individuals,” rather than to State employees, this exemption applies to personnel records concerning members of an advisory committee.

*Letter to  
Senator Jennie M. Forehand  
October 6, 2000*

## Social Security Numbers

**Question:** What is the scope of the recently enacted statute prohibiting public agencies from using Social Security numbers on identification cards?

**Answer:** Chapter 328 (2000) provides that the State and local governments may not print their employees’ Social Security numbers “on any type of identification card.” While the law’s reference to “any type of identification card” could include a health insurance identification card, the bill’s legislative history suggests, that the bill was intended to apply to cards issued by public agencies for the specific purpose of identifying their employees, and not to health insurance identification cards.

*Letter to  
Delegate John F. Wood, Jr.  
November 29, 2000*

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## QUI TAM ACTIONS

**Question:** Does Maryland have a *qui tam* statute similar to the one in the federal False Claims Act, or does Maryland common law permit *qui tam* actions?

**Answer:** Maryland does not have a statutory *qui tam* action, nor is one recognized by the common law. There is no constitutional objection, however, to the enactment of a *qui tam* statute in Maryland.

*Letter to  
Delegate Kevin Kelly  
October 6, 2000*

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### STATE USE INDUSTRIES

**Question:** Does State law either authorize or require a State agency to contract with State Use Industries for maintenance, repair, or construction projects, where SUI simply subcontracts the work to private contractors, assessing an administrative fee, and where there is little or no involvement of inmates?

**Answer:** No. Such an arrangement is contrary to the purposes of the statute regarding State agency use of SUI.

*Letter to  
Mr. Brian Losover  
October 3, 2000*

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