

Opinions, Advice, and Legislation Quarterly News

Office of the
Maryland Attorney General



January – March 2006

OPINIONS

BUDGETARY ADMINISTRATION – TRANSFER OF MONEYS BETWEEN TWO SPECIAL FUNDS ADMINISTERED BY THE MARYLAND ENERGY ADMINISTRATION

The Community Energy Loan Program (“CELP”) Fund was originally capitalized with moneys from the Energy Overcharge Restitution Fund (“Restitution Fund”). Both the CELP Fund and Restitution Fund are administered by Maryland Energy Administration (“MEA”).

Question: Is it permissible for the Director of MEA to transfer funds from the CELP Fund to the State Agency Loan Program (“SALP”) account of the Restitution Fund.

Answer: The CELP Fund may only be spent in accordance with the statute creating that fund; a transfer of funds to the SALP account is not currently authorized by the CLEP statute. Excess or unestimated receipts in the CELP Fund may be transferred to another fund by an approved budget amendment. Thus, funds may be transferred from the CELP Fund to the SALP account only if the General Assembly passes a law authorizing such a transfer or expanding the purposes of the CELP Fund or if an appropriate budget amendment is approved in accordance with State law.

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CHILD CUSTODY AND SUPPORT – VEHICLE LAWS – LICENSING – EXTENT OF AUTHORITY TO SUSPEND DRIVER’S LICENSE FOR FAILURE TO PAY CHILD SUPPORT

When an individual, typically a non-custodial parent, is delinquent in making child support payments, a statute authorizes the Child Support Enforcement Administration (“CSEA”) of the Department of Human Resources (“DHR”) to notify the Motor Vehicle Administration (“MVA”) of the delinquency, requires the MVA to suspend the individual’s driving privileges, and permits the MVA to issue a work-restricted driver’s license to the individual.

Question 1: If the individual continues to fail to make court-ordered child support payments, may CSEA request the MVA to revoke the individual’s work-restricted license?

Answer: No. The relevant statutes do not authorize CSEA to seek revocation of a work-restricted license. The General Assembly has authorized suspension of driving privileges of a non-custodial parent who fails to make child support payments, but has provided for the issuance of a work-restricted license to ensure that the individual may maintain employment and earnings from which the child support arrearage could be recovered. Even if the individual remains delinquent after suspension of his or her license and the issuance of a work-restricted license, CSEA has other remedies to recover child support from that income stream, such as an earnings withholding order directed to the individual’s employer.

Question 2: If the CSEA has such authority, must it seek revocation in all such cases or does it have discretion not to take action in a particular case?

Answer: Because CSEA does not have authority to seek revocation of a work-restricted license, we need not address the second question.

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**CONDOMINIUMS – CONVERSION NOTICE MUST
INCLUDE PURCHASE OFFER WITH SPECIAL
PRICE FOR TENANT’S UNIT**

The conversion of a residential rental property to a condominium is regulated by the Maryland Condominium Act (“Act”), Annotated Code of Maryland, Real Property Article (“RP”), §11-101 *et seq.* Among other things, the Act provides that a tenant may not be required to vacate his or her rental unit for at least 180 days after receiving notice of the condominium conversion (RP §11-102.1); and a notice that must be accompanied by an offer to sell the unit to the tenant (RP §11-136).

Question 1: Is the purchase offer given to the tenant valid if it does not contain a specific purchase price for the condominium unit?

Answer: No. The purchase offer required by RP §11-136 must include a specific price for the unit offered to the tenant.

Question 2: Is the 180-day time period triggered by the notice of the conversion tolled if the concurrent notice of the tenant’s right to purchase is not valid?

Answer: Yes. The failure to include a specific price in the purchase offer to a tenant tolls the beginning of the 180-day minimum period under RP §11-102.1.

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**CORRECTIONS – MARYLAND CORRECTIONAL
ENTERPRISES – SALE OF PRISON-MADE GOODS
TO INMATES AT PRISON COMMISSARY**

State law restricts the sale of prison-made goods. The Division of Correction is contemplating an arrangement under which Maryland Correctional Enterprises, previously known as State Use Industries, would become the sole provider of apparel and textile goods to prison commissaries as a part of a contract with a private vendor that would centralize commissary operations.

Question: Are sales to inmates at commissaries governed by the State law that restricts sales of prison-made goods on the “open market”?

Answer: While inmates participate in the “open market” to some degree, the purchase of an item in a commissary that is not open to the general public is not a transaction on the “open market.” Moreover, the State law governing the sale of prison-made goods and services specifically allows sales on the “open market” for use by a State contractor in performing a contract with the State. Accordingly, prison-made goods may be sold to a commissary contractor for resale to inmates.

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**EDUCATION – PUBLIC SCHOOLS –
AUTHORITY OF LOCAL BOARD TO
ENTER INTO TRANSACTION INVOLVING
LONG TERM LEASE OF SCHOOL PROPERTY
FOR COMMERCIAL USE**

Question: May the Board of Education of Harford County (the “Board”) lease real property owned by the Board to a private corporation for a 99-year term in return for a \$500,000 cash payment and certain real property in fee simple?

Answer: In an opinion dated November 22, 2005, the General Counsel for the Board (“Board

Counsel”) concluded that the Board does not have such authority. We have reviewed Board Counsel’s opinion and agree with his analysis and conclusion.

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**FIREARMS – DISQUALIFICATION
UNDER MARYLAND LAW BASED ON
MISDEMEANOR CONVICTION**

A statute prohibits an individual from possessing or receiving certain classes of firearms if that individual has been convicted of a “disqualifying crime.” That statute defines “disqualifying crime” to include, among other offenses, a “violation classified as a misdemeanor in the State that carries a statutory penalty of more than two years.”

Question 1: Does the Maryland statute apply only to misdemeanor convictions under Maryland law or does it also encompass convictions in other states that would be classified in Maryland as misdemeanors that carry a penalty in excess of two years?

Answer: The phrase “disqualifying crime” includes out-of-State offenses, as well as those committed in Maryland. An offense in another state that would be classified as a misdemeanor in Maryland with a potential penalty under Maryland law in excess of two years imprisonment falls within that definition. Thus, an individual who has been convicted of such an offense may not possess a regulated firearm in Maryland.

Question 2: For purposes of determining whether a particular conviction falls within the definition of “disqualifying crime,” should one look to the maximum penalty associated with the offense at the time of conviction or to the penalty associated with the offense at the time of the firearms transaction?

Answer: Because the firearms law regulates the current possession or reception of a firearm, the

determination as to whether a particular misdemeanor “carries” a penalty in excess of two years should be made with reference to the penalty at the time of possession, if it is different from the potential penalty at the time of conviction.

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**GAMBLING – POKER – POKER TOURNAMENT
THAT AWARDS PRIZES CONSTITUTES
GAMBLING IF PLAYERS PAY CONSIDERATION,
EITHER DIRECTLY OR INDIRECTLY, TO
PARTICIPATE**

Question: Does a particular type of poker tournament fall within the criminal prohibition of gambling?

Answer: A poker tournament that awards prizes would not involve illegal gambling so long as the participants do not pay any money or other valuable consideration, directly or indirectly, in order to participate in the tournaments at any level.

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**MENTAL HEALTH –
HEALTH CARE DECISIONS ACT –
CIRCUMSTANCES UNDER WHICH MENTAL
HEALTH FACILITY MAY ACCEPT AN
INDIVIDUAL FOR VOLUNTARY ADMISSION
AT THE REQUEST OF THE INDIVIDUAL’S
HEALTH CARE AGENT**

Question: Can a facility that provides treatment for individuals with mental disorders accept an individual for voluntary admission at the request of a health care agent for the individual?

Answer: A facility that provides treatment for individuals with mental disorders may accept an individual for voluntary admission at the request of a health care agent for the individual if: (1) the health care agent is acting within the scope of his

or her authority under a then-effective advance directive; (2) the health care agent will monitor the circumstances of the patient's course of treatment so as to be able to exercise judgment about the patient's retention or release; and (3) the patient does not express disagreement with the voluntary admission.

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**MUNICIPALITIES – TAXATION –
MUNICIPALITY LACKS AUTHORITY TO IMPOSE
“STREET UTILITY FEE” WITHOUT ENABLING
LEGISLATION FROM THE GENERAL ASSEMBLY**

Question: Does the City of Cumberland (“City”) have authority to impose a “street utility fee” – a revenue source intended to assist the municipality in the maintenance of its streets?

Answer: No. The street utility fee envisioned by the City is more akin to an excise tax than a regulatory fee or a user fee. Accordingly, the City lacks authority to impose such a charge unless the General Assembly enacts enabling legislation applicable to municipalities generally.

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**PHYSICIANS – APPLICATION OF LAW
PROHIBITING PHYSICIAN SELF-REFERRAL
WITH RESPECT TO MRI SCAN**

A specific factual scenario served as a background for the following questions. Under this scenario a patient of a physician in a group practice goes to the physician complaining of pain in his knee and is referred for an MRI that is performed by the group practice using a leased MRI machine. The physician is present on the premises during the MRI. He may or may not have read the MRI scan, but he ultimately makes a diagnosis based on the scan results.

Question 1: Would it violate the self-referral law for a physician in an orthopedic practice group to refer patients for tests on the machines owned by the practice?

Answer: The self-referral law bars a physician in an orthopedic practice from referring patients for tests on an MRI machine or CT scanner owned by the practice, regardless of whether the services are performed by a radiologist employee or member of the group practice or by an independent radiology group.

Question 2: Would the answer to Question 1 be different if all of the scans were performed by or under the direct supervision of the referring practitioner?

Answer: No.

Question 3: Is the Health Occupations Article (“HO”) §1-302(d)(3) exemption inconsistent with the other provisions of the law that prohibit self-referrals?

Answer: No, if construed as set forth in this opinion.

Question 4: If all of the readings were performed by or under the direct supervision of the referring practitioner, would the referral be permitted under HO §1-302(d)(3)?

Answer: No.

Question 5: Because MRI services, radiation therapy services, and computer tomography scan services are specifically excluded from the definition of “in-office ancillary services” and not specifically excluded in the definition of health care services, does this mean that those three services are included under “health care service”?

Answer: HO §1-301(i) defines “health care service” as “medical procedures, tests and services provided to a patient by or through a health care entity.” The definition contains no exceptions and clearly includes MRI, CT scans and radiation therapy services.

Question 6: Does “health care service” refer to the ordinary medical activities performed by a physician in the course of treatment for the specific specialty (*i.e.* setting a broken arm for an orthopedist; performing an EKG for a cardiologist, etc)?

Answer: The defined term “health care services” clearly includes ordinary medical activities performed by a physician in the course of treatment.

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ADVICE LETTERS

BUDGET BILL – GENERAL ASSEMBLY RESTRICTIONS

Question: May the General Assembly amend the Budget Bill to stipulate that (1) an appropriation amount may not be expended for the purpose for which it was budgeted; and (2) that the amount shall remain unexpended until the end of the fiscal year, unless the Governor transfers the amount to another purpose of that department or of another department specified by the General Assembly?

Answer: Yes. The restrictive language amounts to a contingent reduction in the Budget Bill, which this Office has previously advised is constitutional.

Letter to
Warren Deschenaux
Department of Legislative Services
March 8, 2005

EXECUTIVE DEPARTMENT AND JUDICIARY FUNDING

Question: May budget funds be included in the Judiciary budget for the purpose of funding Executive Branch functions?

Answer: The provision of Executive Branch funding in the Judiciary budget is likely to be found unconstitutional.

Letter
David Juppe
Department of Legislative Services
February 14, 2006

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COUNTIES – EMINENT DOMAIN

Question: May a county enact an ordinance restricting the definition of “public purpose” for eminent domain purposes?

Answer: Yes. Charter, code and commissioner counties have this authority.

Letter to
Delegate Maggie McIntosh
March 21, 2006

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COUNTIES – HOUSING AND COMMUNITY DEVELOPMENT – BUILDINGS

Question: May a county exempt agricultural buildings from the minimum standards set forth in the Public Safety Article §12-505 if such buildings are open to the public?

Answer: No, unless the statute or implementing regulations are amended.

Letter to
Robert S. Wagner
County Council of Harford County
February 6, 2006

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**CREMATION – RETURN TO
FAMILY OF ARTIFICIAL HIP**

Question: Does any law or regulation prevent a crematorium from returning an artificial hip to a person’s family after cremation?

Answer: No.

*Letter to
Senator Nancy Jacobs
March 15, 2006*

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**EDUCATION – EQUAL PROTECTION –
DISABLED CHILDREN – DUE PROCESS**

Question: Is it constitutional for a public school system to deny special education services to a home-schooled student on the basis that the student attends neither a public school nor a private school?

Answer: Yes.

*Letter to
Senator James Brochin
April 4, 2006*

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**FAIR SHARE HEALTH CARE
FUND ACT OF 2005**

Question: Is the Fair Share Health Care Fund Act of 2005, which passed as Senate Bill 790 and House Bill 1284, and was vetoed by the Governor, preempted by the federal Employee Retirement Income Security Act of 1974?

Answer: No. The Fair Share Act is not preempted, because it does not regulate the benefits to be available through employee benefit plans, the eligibility for them, or the administration of them.

*Letter to
Speaker Michael E. Busch
January 9, 2006*

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FUNERAL SERVICES – ACCESS

Question: House Bill 850 basically prohibits blocking access to a funeral, memorial or burial service, or funeral procession, restricts incendiary speech and prohibits picketing at funeral services. Are these provisions constitutional?

Answer: The provision relating to labor picketing is probably unconstitutional. A provision establishing a 300 foot buffer zone raises substantial constitutional questions but is not unconstitutional. A provision preventing a person from blocking or interfering with a funeral is constitutional.

*Letter to
Delegate Joseph F. Vallario, Jr.
March 17, 2006*

Note: HB 850 passed with amendments as Chapter 357.

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IMPEACHMENT PROCEDURE

Question: What is the proper procedure to bring impeachment charges in the General Assembly against a judge, in accordance with Maryland Constitution, Article III, §26 and Article IV, §4?

Answer: Impeachment or address could be initiated by either a resolution or memorial setting forth the proposed grounds for impeachment or removal.

*Letter to
Delegate Donald H. Dwyer, Jr.
January 24, 2006*

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LOBBYING TAXES

Question: May a tax or fee be charged on lobbying expenditures?

Answer: Courts around the country are divided on the constitutionality of the tax; thus, the tax is not clearly violative of the First Amendment.

*Letter to
Delegate John G. Trueschler
March 29, 2006*

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MUNICIPAL ELECTIONS – NONRESIDENT PROPERTY OWNERS

Question: House Bill 1508 provided that if more than 75% of the property in a municipal corporation is owned, by persons who reside outside municipal limits, the municipal corporation shall grant nonresident property owners the right to vote and participate in municipal elections. Is this measure constitutional?

Answer: A Fourth Circuit decision and an unreported U.S. District Court of Maryland decision cast doubt on the constitutionality of the bill.

*Letter to
Delegate K. Bennett Bozman
March 20, 2006*

Note: HB 1508 received an unfavorable report and did not pass the General Assembly.

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PAROLE AND PROBATION

Part of the CSAFE (Collaborative Supervision and Focused Enforcement) initiative involves the establishment of HEAT (Heightened Enforcement Accountability and Treatment) teams in specified areas. The core members of a HEAT team are local law enforcement officers and probation agents.

Question 1: May probation agents share criminal history record information concerning the individuals under supervision with law enforcement officers on the HEAT team?

Answer: Yes.

Question 2: May probation agents share digital photographs of individuals under supervision with law enforcement officers on the HEAT team?

Answer: Yes.

Question 3: May probation agents share information about offenders who fit the description of a suspect when a law enforcement officer brings a description of an unsolved crime to the HEAT team?

Answer: Yes.

*Letter to
Alan C. Woods, III
Director, Crime Control and Probation
March 28, 2006*

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PROPERTY TAX ASSESSMENTS

Question: The Department of Assessments and Taxation assesses all residential property in an area at the same level. Is this system legally permissible?

Answer: Yes. The methodology for the valuation of the land in a subdivision is that the valuation is developed for lots in the subdivision, or an area of the subdivision, that is then applied to all of the lots in the area. Adjustments are permitted for lots that are significantly larger than other lots in the neighborhood.

*Letter to
Delegate Peter A. Hammen
January 23, 2006*

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PROPERTY TAX CREDITS – ELDERLY

Question: Senate Bill 395, as proposed, would authorize Prince George's County and a municipal corporation in the County to grant, by law, a

property tax credit against the county or municipal property tax imposed on the real property of a dwelling owned by an individual at least 65 years old. Does the bill violate the Uniformity Clause? Must the bill incorporate a sunset provision in order for it to be constitutional?

Answer: No, the bill does not violate the Uniformity Clause because it does not freeze assessments but simply authorizes the tax credit. Nor must the bill incorporate a sunset provision.

*Letter to
Senator Leo E. Green
February 23 2006*

Note: SB 395 did not pass the General Assembly.

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**SCHOLARSHIPS –
SCOUTS AWARD RECIPIENTS**

Question: House Bill 1303 establishes scholarships for Eagle Scouts and recipients of the Girl Scout Gold Award to be administered by the Office of Student Financial Assistance at the Maryland Higher Education Commission. Is this program constitutional in light of the requirement imposed by the Boy Scouts that members swear a belief in God?

Answer: No, the bill is not unconstitutional because it has a secular legislative purpose, does not define its recipients by reference to religion, does not result in government indoctrination and does not create an excessive governmental entanglement with religion.

*Letter to
Delegate Robert A. McKee
March 23, 2006*

Note: HB 1303 received an unfavorable report and did not pass the General Assembly.

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**TRANSPORTATION –
MASS TRANSIT ADMINISTRATION**

Question: Would §§7-902 and 7-506 of the Transportation Article, Annotated Code of Maryland, preclude the Mass Transit Administration from closing the Boyd and Dickerson MARC train stations because it would constitute a reduction in the levels of service that were established in the 1981 and would require notice of the closing of these stations.

Answer: The closing of these two stations does not constitute a reduction in the levels of service and the mandatory notice provision does not apply to the closing of MARC stations.

*Letter to
Delegate Brian Feldman
February 10, 2006*

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