

# Opinions, Advice, and Legislation Quarterly News

Office of the  
Maryland Attorney General



July – September 2006

## OPINIONS

### ALCOHOLIC BEVERAGES – LICENSES – HOLDER OF NONRESIDENT DEALER PERMIT MAY NOT HAVE AN INTEREST IN A LICENSED WHOLESALE

Alcoholic beverages in Maryland are distributed by a three-tier system of suppliers (also called dealers or manufacturers), wholesalers, and retailers. A provision of State law explicitly forbids the issuance of a nonresident dealer's permit to an entity with an interest in a licensed wholesaler.

**Questions:** May the Comptroller issue a nonresident dealer permit to an applicant after the normal review process if the applicant is in compliance with all the requirements of the alcoholic beverages law at that time, but the Comptroller believes that the applicant will purchase a licensed wholesaler in the future?

If, after obtaining a nonresident dealer's permit, the non-resident dealer purchases a licensed wholesaler, must the dealer relinquish the permit?

**Answers:** If an applicant for a nonresident dealer permit satisfies the statutory prerequisites at the time of application, the Comptroller may not deny the permit solely on the basis of an anticipated future acquisition. If the dealer should later obtain an interest that would render it ineligible for the issuance of a permit, the dealer should relinquish the permit; otherwise, the Comptroller may cancel the permit.

*91 Opinions of the Attorney General 174*  
September 8, 2006

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### EDUCATION – PUBLIC SCHOOLS – APPLICATION OF LOCAL ZONING REGULATIONS TO CHARTER SCHOOLS

An amendment of the Anne Arundel County zoning specifically addresses charter schools and

restricts the location of public charter schools in certain zoning districts through a special exception or conditional use process not applicable to other public schools.

**Question:** Does State law authorizing public charter schools preempt such local regulations?

**Answer:** The application of local zoning requirements to public charter schools depends on whether the State has a property interest in the facility housing the school. If the school is operated in a facility owned or leased by a State entity, such as the local board of education, local zoning requirements do not apply. However, if the school is operated in a facility not owned or leased by a State entity, that facility would be subject to local zoning requirements. Thus, a local government with zoning authority could provide that a privately-owned facility may house a public charter school within certain zoning districts only pursuant to a special exception or as a conditional use.

*91 Opinions of the Attorney General 164*  
September 1, 2006

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### EDUCATION – PUBLIC SCHOOLS – WHETHER COUNTY BOARD OF EDUCATION IS REQUIRED TO SUBMIT TO AN AUDIT BY COUNTY INSPECTOR GENERAL

**Question:** Does the Montgomery County Inspector General ("inspector general") have "general audit authority" over the Montgomery County Board of Education ("county board of education")?

**Answer:** The county may authorize the inspector general to audit the board of education's financial transactions and accounts, but may not require the board to submit to a performance audit by the inspector general without the board's assent. If the board and county cannot agree on such an audit by the inspector general and the county desires to have the benefit of a performance audit, it may

request that Maryland State Department of Education contract for a performance audit of the county school system.

91 *Opinions of the Attorney General* 145  
July 10, 2006

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**LOCAL GOVERNMENT – ENVIRONMENT  
– TAXATION – NATURE OF THE  
“SYSTEM OF CHARGES” THAT A COUNTY  
OR MUNICIPALITY MAY IMPOSE  
TO SUPPORT STORMWATER  
MANAGEMENT PROGRAMS**

**Questions:** A local government is authorized to impose a “system of charges” for stormwater management programs under the Annotated Code of Maryland, Environment Article (“EN”), §4-204(d). Are the authorized charges in the nature of a regulatory fee or a tax; if the authorized charges are in the nature of a tax, would the tax be an *ad valorem* property tax or an excise tax; and if the authorized charges are an excise tax, may that tax be assessed other than on submission of a stormwater management plan?

**Answers:** EN §4-204(d) allows the governing body of a county or of a municipal corporation to impose charges in the form of either a regulatory fee or a tax, or a combination of fee and tax, for the purposes set forth in the statute. The appropriate characterization of the charge will depend on the terms of local legislation implementing the charges. To the extent that a charge imposed is an excise tax, it need not be limited to charges collected upon the filing of a stormwater management plan.

91 *Opinions of the Attorney General* 152  
July 11, 2006

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**WASHINGTON SUBURBAN SANITARY  
COMMISSION – PROCUREMENT – MINORITY  
BUSINESS ENTERPRISES – WSSC MAY NOT  
CONTINUE MBE PROGRAM FOLLOWING  
EXPIRATION OF STATUTES AUTHORIZING  
THE PROGRAM**

The Washington Suburban Sanitary Commission (“WSSC”) has asked about its authority to adopt a “Stop Gap MBE Program” after the recent expiration of statutes that authorized it to

adopt race and gender conscious programs to increase the participation of minority business enterprises (“MBEs”) in WSSC contracting. WSSC is delaying implementation of that program until it is determined whether the program is lawful.

**Questions:** Would adoption, implementation, and enforcement of the Stop-Gap MBE Program be lawful? If the Stop-Gap MBE program is not lawful, may the WSSC lawfully adopt other race and gender-conscious policies to promote the award of WSSC contracts to MBEs?

**Answers:** In the absence of statutory authority, the WSSC MBE program should not be continued, even under a new temporary name. The continuation of the latest version of the WSSC’s MBE program, even as a temporary “Stop-Gap MBE Program,” may not comply with constitutional standards, in light of a recent disparity study that compared the agency’s utilization of MBE contractors to their availability in the marketplace. Moreover, it is unlikely that the WSSC has authority under State law to implement an MBE program as the Legislature permitted the existing authority to expire, despite being advised that legislation was necessary for the continuation of the program. However, the WSSC may constitutionally undertake outreach efforts to MBEs. In addition, the WSSC may implement other programs that do not award contracts on a race or gender-conscious basis – such as programs designed to increase the participation of small businesses – but that are likely to increase the participation of disadvantaged contractors of all races and genders. Finally, the agency may continue to collect data about its contracting activities, as such data may be important in any future discussion concerning the existence of discrimination in WSSC contracting.

91 *Opinions of the Attorney General* 181  
September 8, 2006

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**ADVICE LETTERS**

**CANDIDATE HIGHWAY OVERPASS  
CAMPAIGNING – COUNTY ROADS**

**Question:** Transportation Article §21-1003(h) provides that a “person may not stop, stand, or park a vehicle on any bridge, or other elevated structure

on a highway.” Does this provision prevent a candidate from standing in or on a vehicle with a campaign sign on a county road that overpasses a controlled access State highway?

**Answer:** Yes. The term “highway” in this statute includes all roads used by the public for vehicular travel, and thus includes a county road.

*Letter to  
Delegate Donald H. Dwyer, Jr.  
August 21, 2006*

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### COPYRIGHT LAWS – “FAIR USE”

**Question:** Would a campaign brochure detailing a legislator’s involvement in the passage of stem cell legislation and containing a portion of a copyrighted news story from the *Washington Post* constitute a “fair use” permitted by the U.S. Copyright laws?

**Answer:** Yes. Under 17 U.S.C. §107, the factors to be considered in determining when the use of a copyrighted work is a fair use include: 1) the purpose, character, and use of the work; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion used; and 4) the effect of the use on the market or the value of the copyrighted work. Upon balancing of these factors, the particular campaign brochure’s inclusion of copyrighted material would be a “fair use” permitted under U.S. copyright laws.

*Letter to  
Delegate Kumar P. Barve  
July 28, 2006*

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### CRIMINAL LAW – CAMPAIGN WEBSITE HACKING

**Question:** Was it a crime to hack a candidate’s web site in a way that altered its usefulness to the candidate?

**Answer:** Criminal Law Article §7-302(c)(1) provides that a “person may not intentionally, wilfully, and without authorization access, attempt

to access, cause to be accessed, or exceed the person’s authorized access to all or part of a computer network, ... computer system ... or computer database.” While it appears that improper access may have rendered the system completely unavailable and inaccessible, whether this provision has been violated would depend on how the site was altered and other facts of the particular case.

*Letter to  
Delegate Samuel I. Rosenberg  
August 15, 2006*

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### EDUCATION – PUBLIC SCHOOLS

**Question 1:** What authority does the Frederick County Board of Education (“Board”), have to use certain “alternative financing methods” to finance the construction of a new central administration building. Specifically, may the Board lease school system property to a financial institution in connection with the financing of the building; and do regulations issued under Education Article (“ED”), §4-126, which authorizes boards of education and county governments to employ certain alternative financing methods, apply to the financing and leasing of the building?

**Answer 1:** Neither ED §4-126 nor regulations issued under its authority was intended to encompass administration buildings. As several Attorney General opinions have explained, the Board had authority under prior law to enter into certain types of alternative financing transactions with respect to school system property. Regardless of whether or not ED §4-126 supersedes that authority with respect to school buildings, the authority still exists with respect to projects not encompassed by ED §4-126. The regulations to be adopted under ED §4-126 would not pertain to the transaction that the Board contemplates.

**Question 2:** What authority does the Board have to lease excess space in the building to “third party” tenants?

**Answer 2:** The Board holds property in trust for the school system. As outlined in several opinions of the Attorney General, any lease of that property to third parties must be consistent with that obligation. Leases of excess space to other governmental entities or to private tenants that provide services reasonably related to the

functioning of a schools administration building would satisfy that obligation.

*Letter to  
Timmy F. Ruppberger, Esquire  
Frederick County Board of Education  
August 29, 2006*

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#### **ELECTRONIC CAMPAIGN SIGNS**

**Question:** Transportation Article §8-714 provides that “a person may not erect or maintain an outdoor sign within 500 feet of a State highway, unless that person has been issued a permit issued by the [State Highway] Administration for that sign.” Are bumper stickers on vehicles driven on or visible from State highways covered by this law?

**Answer:** No. Section 8-701(e) defines “outdoor sign” as “any outdoor sign, display, light, structure, figure, painting, drawing, message, plaque, placard, poster, billboard, device or other thing that is designed, intended, or used to advertise or inform the traveling public.” Section 8-714 does not apply to bumper stickers affixed to vehicles operating on State highways.

*Letter to  
Delegate Michael D. Smigel, Sr.  
July 12, 2006*

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#### **GAMBLING – POKER TOURNAMENTS – STATE’S ATTORNEY**

**Question:** 91 *Opinions of the Attorney General* 64 (2006) discusses the application of laws prohibiting gambling to poker tournaments. May a State’s Attorney supersede that opinion and may a particular business that provides a certain poker style gambling operate in Maryland?

**Answer:** 91 *Opinions of the Attorney General* 64 (2006) noted that the three elements of gambling – consideration, chance, and prize – must be present in order for a poker tournament to constitute gambling. If the element of consideration is absent, the game would not be gambling. Also, as set forth in the opinion, however, “it is a question of fact for determination by the State’s Attorney and ultimately a court whether the elements of reward and consideration are present in particular

circumstances.” A State’s Attorney, then, would not be “superseding” the opinion or the basic law it describes, but rather applying that law to the facts of a particular situation.

*Letter to  
Senator Nancy Jacobs  
August 23, 2006*

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#### **MUNICIPAL TRAFFIC CONTROL**

**Question:** Does State law permit a municipality to enact an ordinance setting a maximum speed limit for roads and authorizing the regulation of parking and traffic control devices within the municipality?

**Answer:** Generally, a municipality may regulate parking and traffic control devices and may set maximum speed limits on municipal roadways and streets. However, a municipal parking and traffic control ordinance may conflict with the Maryland Vehicle Law with respect to enforcement of moving violations. In the case of conflict, the Maryland Vehicle Law governs.

*Letter to  
Delegate Richard F. Colburn  
July 12, 2006*

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#### **STATE’S ATTORNEYS – PUBLIC OFFICERS AND EMPLOYEES**

**Question:** What salary is to be paid to the State’s Attorney for Queen Anne’s County, pursuant to Maryland law, during the four-year term commencing in January 2007?

**Answer:** Beginning on July 1, 2007, the rate of pay is to increase to an annual salary of \$110,476.80. Beginning on July 1, 2008, the rate of pay increases to an annual salary of \$114,526.80. No additional salary increases may take effect thereafter until the beginning of the subsequent term in January 2011.

*Letter to  
Frank M. Kratovil, Jr.  
State’s Attorney for Queen Anne’s County  
August 21, 2006*

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