

Opinions, Advice, and Legislation Quarterly News

Office of the
Maryland Attorney General



October – December 2006

OPINIONS

ALCOHOLIC BEVERAGES – LICENSES – WHETHER A *DE MINIMIS* INTEREST IN THE HOLDER OF A NONRESIDENT DEALER PERMIT DISQUALIFIES A PERSON FROM OWNING A LICENSED WHOLESALER

Article 2B, §2-101(i)((2)(ii) of the Annotated Code of Maryland, prohibits the issuance of a nonresident dealer permit for alcoholic beverages to one who has an interest in a licensed Maryland wholesaler. If the holder of a nonresident dealer permit were to purchase a Maryland wholesaler, the dealer should relinquish the permit or the permit could be cancelled by the Comptroller.

Question: Would the same result obtain if a corporation which shares some common ownership with a nonresident dealer were to purchase a Maryland wholesaler? The question is based on two corporate structures of a corporation that would become the owner of a Maryland wholesaler. In one scenario, three individuals would collectively own 100% of the wholesaler; those individuals also collectively own 5.6% of the nonresident dealer, again through corporate entities. In a second scenario, the corporation purchasing the Maryland wholesaler would be owned by an individual who also owns 0.33% of the nonresident dealer through a corporate entity.

Answer: An ownership of a 5.6% interest in the nonresident dealer would not be permissible under §2-101(i)(2)(ii). By contrast, ownership of a 0.33% interest in the nonresident dealer is a *de minimis* interest and thus would not offend §2-101(i)(2)(ii).

91 *Opinions of the Attorney General* 239
December 11, 2006

BUDGETARY ADMINISTRATION – STATE’S ATTORNEYS – VICTIMS – ADMINISTRATION OF THE VICTIM AND WITNESS PROTECTION AND RELOCATION PROGRAM

Question: Is the Governor’s Office of Crime Control and Prevention (“GOCCP”) responsible for monitoring the expenditure of funds by State’s Attorney’s offices under the State’s Victim and Witness Protection and Relocation Program (“Program”)? Alternatively, may GOCCP accept a certification from the State’s Attorneys’ Coordinator (“Coordinator”), and, may the Coordinator be audited by the Legislative Auditor?

Answer: The Coordinator is responsible for approving expenditures of Program funds by the individual State’s Attorneys in accordance with the statute governing the Program. GOCCP has no authority to second-guess those decisions. However, because the Program funds appear in GOCCP’s budget, GOCCP is responsible for ensuring that the Coordinator has approved the expenditure of funds, that an authorized disbursement of funds appears to be consistent with the purposes of the Program, and that the disbursements do not exceed the amount of the appropriation. GOCCP may fulfill these functions by obtaining documentation from the Coordinator, but need not audit the Coordinator itself. The Legislative Auditor may audit the use of Program funds by the Coordinator and individual State’s Attorneys’ offices.

91 *Opinions of the Attorney General* 208
October 23, 2006

CONDOMINIUMS – INTERPRETATION OF STATUTORY REQUIREMENT THAT DEVELOPER WHO CONVERTS RENTAL PROPERTY TO CONDOMINIUM MUST PROVIDE EXTENDED LEASES TO CURRENT TENANTS WHO ARE ELDERLY OR DISABLED

The Maryland Condominium Act governs the conversion of rental housing to a condominium

regime. Under the Act, the developer of a condominium must offer extended leases to current occupants who meet specified eligibility standards – referred to as “designated households” in the statute. That statute caps the developer’s obligation to grant extended leases to 20% of the units within the condominium.

Question: If some designated households reject an offer of an extended lease, must the developer offer the leases to other designated households until the 20% cap is reached or does the developer satisfy its obligation under the statute by simply offering extended leases to 20% of the households?

Answer: A developer does not satisfy its obligations by offering extended leases to only 20% of the current tenants. The statute requires the developer to notify *all* tenants of the impending conversion and of the right to extended leases for those tenants who qualify as “designated households.” Because the statute caps the developer’s obligation to enter into extended leases at 20% of the total number of units, the developer may decline to accept some of the proffered leases only if the total number of designated households seeking extended leases exceeds the 20% cap.

91 *Opinions of the Attorney General* 232
December 11, 2006

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**PUBLIC DEFENDER – TORTS – IMMUNITY –
WHETHER ATTORNEYS WHO ACCEPT
REFERRALS OF INDIGENT CLIENTS FROM THE
PUBLIC DEFENDER FOR PRO BONO
REPRESENTATION ARE COVERED BY THE
MARYLAND TORT CLAIMS ACT**

Questions: Does a private attorney rendering *pro bono* legal representation to a client otherwise eligible for representation by the Office of Public Defender (“Public Defender”) possess the same immunity from liability for tortious acts or omissions as an Assistant Public Defender employed by the State of Maryland?

Answer: A private attorney who provides *pro bono* legal services to an indigent client eligible for representation by the Public Defender enjoys the same immunity from liability as an Assistant Public Defender if the attorney is either recognized as a volunteer by the Public Defender or is part of

a formal volunteer program of that Office to provide such services.

91 *Opinions of the Attorney General* 201
October 17, 2006

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**RETIREMENT SYSTEMS – TRANSFER FROM
NONCONTRIBUTORY TO CONTRIBUTORY PLAN
– INTEREST RATE TO APPLY IN CALCULATING
BENEFIT REDUCTION**

Question: State law permits a member of a State retirement system to transfer to another State retirement system subject to certain requirements. One such scenario involves a transfer from a *noncontributory* system to a *contributory* system. Under Annotated Code of Maryland, State Personnel and Pensions Article (“SPP”), §37-203(f)(2), the contributory retirement system to which a member is transferring (the “transferee system”) is required to reduce the retirement allowance that the individual will receive “by the actuarial equivalent of the accumulated contributions that would have been deducted if the individual had earned the transferred service credit under the new system, *including interest on those contributions.*” What rate of interest should be applied?

Answer: The interest rate is that payable by the transferee system on member contributions – a rate that is often referred to as the “regular” rate of interest.

91 *Opinions of the Attorney General* 219
November 8, 2006

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ADVICE LETTERS

ELECTIONS - ELECTION JUDGES

Question: May a polling place open for voting if one or more election judges fail to appear at their assigned polling places on Election Day?

Answer: Yes. The State election law does not require that the polls be shut down if some judges fail to appear. This failure to appear does not justify abridgement of the constitutional right to

vote. However, a local election board should, at the earliest possible time, appoint a substitute judge, who has previously undergone training; if at all possible, the substitute judge should be of the same party as the missing judge. If the local board is unable to supply a trained substitute judge, the judges present at the polling place may appoint a substitute judge from the same party as the missing judge.

Letter to
Delegate Samuel I. Rosenberg
Delegate Peter Franchot
October 24, 2006

FIRST AMENDMENT – POLITICAL SPEECH - TELEPHONE SOLICITATIONS

Question: Would federal law preempt a State law barring unsolicited political phone calls?

Answer: Recent cases suggest that federal law would not preempt a State law barring unsolicited phone calls. However, the State statute must be carefully drawn to avoid unconstitutional regulation of political speech protected by the First Amendment.

Letter to
Senator Allan H. Kittleman
December 12, 2006

FIRST AMENDMENT– POLITICAL SPEECH - CAMPAIGN ADVERTISING

Question: Election Law Article §16-201(a)(5) provides that a person may not willfully and knowingly “influence or attempt to influence a voter’s voting decision through the use of force, threat, menace, intimidation, bribery, reward, or offer of reward.” A proposed amendment to this section would encompass fraud and would apply to literature that falsely implies that an individual or political party supports a certain candidate. Would such an amendment criminalizing political speech raise First Amendment problems?

Answer: Yes. The proposed amendment would raise significant First Amendment concerns. In particular, the statute, a criminal provision, would require proof beyond a reasonable doubt that

the person or party in question did not support the candidate, that the voters relied on the statement and that the reliance was reasonable. This is a difficult showing to make. Moreover, because of the importance of political speech to the First Amendment, the statute must be limited to statements made with actual malice, *i.e.*, those known by the speaker to be false or made with reckless disregard for the truth. Some cases, however, have found that even a requirement of actual malice is not enough to insure that such a statute is constitutional. To insure that the statute is narrowly tailored, the amendment should address only those fraudulent representations made so close to the election that a candidate would lack a meaningful opportunity to respond.

Letter to
Delegate Samuel I. Rosenberg
November 22, 2006

PUBLIC UTILITIES – BGE REPAYMENT FEE

Question: As a result of SB 1, 2006 Special Session, Baltimore Gas and Electric is authorized to charge consumers a \$2.19 monthly repayment fee over the next ten years. Does the charge violate the federal Truth-in-Lending Act (“FILA”) or any other federal law?

Answer: No. The charge was approved by the Public Service Commission and is thus exempt from the FTILA. Nor does any other federal statute prevent the charge.

Letter to
Delegate Tanya T. Shewell
October 30, 2006

MUNICIPALITIES – “CRIME FREE HOUSING”

Question: Does a municipal corporation have the authority to adopt a “Crime Free Housing” ordinance under which landlords would be required to attend a training session to help them prevent crime on their rental properties and would be subject to fines for excessive police calls related to the properties?

Answer: Yes. A municipality has the authority to regulate landlord-tenant relations and

to require landlords to take certain training as a condition of a license or permit to rent residential property. Article 23A, § 2(a), which provides incorporated municipalities with the power to pass ordinances to preserve the health and welfare of citizens and property, is broad enough to authorize the ordinance. Also, under Article 23A §3(b), a municipality may provide that violations of any municipal ordinance shall be a “municipal infraction” (unless it is declared to be a felony or a misdemeanor by State law), and may impose a fine up to \$1,000.

*Letter to
Senator Richard F. Colburn
October 25, 2006*

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**NATURAL RESOURCES – PUBLIC SERVICE
COMMISSION – NORTHEAST WASTE
DISPOSAL AUTHORITY**

Question: The Northeast Waste Disposal Authority (“Authority”) is subject to regulation by the Public Service Commission (“PSC”). The Authority is in the process of developing several waste-to-energy projects that will be financed with tax-exempt bonds. Does the Authority need to obtain a Certificate of Public Convenience and Necessity (CPCN) from the PSC, a process that takes approximately two years?

Answer: The Authority is not a public service company and the PSC has no jurisdiction over the Authority. Therefore, the Authority need not obtain a CPCN from the PSC to develop and finance its waste-to-energy projects.

*Letter to
Robin B. Davidov, Executive Director
Northeast Waste Disposal Authority
October 17, 2006*

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