

Opinions, Advice, and Legislation Quarterly News

Office of the
Maryland Attorney General



January – March 2008

OPINIONS

ALCOHOLIC BEVERAGES

FLAVORED MALT BEVERAGES FALL WITHIN THE CATEGORY OF “DISTILLED SPIRITS” FOR PURPOSES OF TAXATION AND LICENSING

Question: Do certain alcoholic beverages commonly referred to as flavored malt beverages (“FMBs”) constitute “beer” or “distilled spirits” for tax and licensing purposes under Maryland’s alcoholic beverage laws?

Answer: FMBs fall within the definition of distilled spirits set forth in the State laws governing the taxation and licensing of alcoholic beverages.

93 Opinions of the Attorney General 47
March 5, 2008

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BUDGETARY ADMINISTRATION

STATE POLICE – AVIATION – EMERGENCY MEDICAL SERVICES – ALLOCATION OF COSTS OF STATE POLICE AVIATION COMMAND TO MARYLAND EMERGENCY MEDICAL SYSTEM OPERATIONS FUND

Question: What is the proper use of revenues appropriated to the Department of State Police (“Department”) from the Maryland Emergency Medical System Operations Fund (“Fund”) for helicopter medevac services?

Answer: The Department’s allocation of costs relating to its helicopter operations [to the Fund] based on the past proportionate use of the helicopters for emergency medical transports is a reasonable implementation of the statutory restrictions on the Fund’s use. The Department should periodically review the allocation ratio in light of actual experience.

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January 16, 2008

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CONSTITUTIONAL LAW

VEHICLE LAWS – PREEMPTION – FREEDOM OF SPEECH – GAITHERSBURG ORDINANCE PROHIBITING SOLICITATION FOR CERTAIN PURPOSES IN OR NEAR ROADWAY IS PREEMPTED IN PART BY MARYLAND VEHICLE LAW WHILE REMAINDER OF ORDINANCE IS UNCONSTITUTIONAL UNDER FIRST AMENDMENT

Question: Is §15-9 of the Gaithersburg City Code, which is generally referred to as the “anti-solicitation ordinance,” constitutional?

Answer: No. The provisions of the ordinance most closely related to public safety – which concern conduct in the roadway – are preempted by the Maryland Vehicle Law. Moreover, the provisions that are not preempted – which address conduct in vehicles, on the sidewalk, or in parking areas – are not narrowly tailored so as to survive First Amendment scrutiny.

93 Opinion of the Attorney General 31
February 27, 2008

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FEDERAL ENCLAVES

TAXATION – PROPERTY TAX – IMPACT FEES – WHETHER PRIVATE INTERESTS IN REAL PROPERTY IN AN ENCLAVE OF EXCLUSIVE FEDERAL JURISDICTION ARE SUBJECT TO STATE AND LOCAL PROPERTY TAXES AND IMPACT FEES

The federal government’s implementation of the base realignment and closure (“BRAC”) process in Maryland is expected to result in significant developments at certain military bases in the State, including Fort Meade and Aberdeen Proving Ground.

Question: Will real property located within an area of exclusive federal jurisdiction on a military installation, but leased to and developed by a private entity, be subject to Maryland property taxes?

Answer: Property within an enclave of exclusive federal jurisdiction would not normally be subject to the taxing jurisdiction of a state. However, the federal government can waive its immunity from local taxation. Therefore, the answer depends on whether the federal government has waived its immunity from local taxation with respect to the property interests created under the leases, and the extent of any such waiver.

Question: A related question is the same as above, as to real property within an enclave of exclusive federal jurisdiction, but *not* on a military installation?

Answer: The same analysis applies whether the area of exclusive federal jurisdiction is located on a military installation or elsewhere, although some waivers of federal immunity may apply only on military installations. In order to determine whether the federal government has made such a waiver, and the extent of any waiver, one ordinarily looks to the law that authorizes the lease of federal property. If federal immunity has been waived, Maryland law then determines whether the property interest is subject to a tax or is exempt from that tax.

Question: In either context, may impact fees be assessed against the private developer to offset the enhanced costs for schools, transportation, and other public infrastructure?

Answer: With respect to impact fees, it is first necessary to determine whether the particular impact fee is properly categorized as a tax or a regulatory fee. If it is a tax, the question then is whether the federal government has waived immunity for that type of tax. If it is a regulatory fee, the question is whether the regulatory regime involving the fee existed and remained applicable as federal law at the time that the State ceded jurisdiction over the property to the federal government; or, if the State regulatory regime was a later enactment, whether Congress has expressly subjected the enclave to that type of state regulation.

For example, land at Aberdeen Proving Ground was recently leased to a private developer pursuant to 10 U.S.C. §2667, which authorizes Enhanced Use Leases (“EULs”) of land on military bases. That statute specifically waives the federal immunity from local property taxation for the private interests in real property created under an EUL. Accordingly, those

private interests are subject to State and local taxation, unless Maryland law otherwise exempts the property. However, in our view, the federal statute does not waive federal immunity with respect to an impact fee that would be considered a tax. Nor does it appear that local impact fees existed at the time the State ceded jurisdiction of this land to the federal government.

93 Opinions of the Attorney General 12
January 29, 2008

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ADVICE LETTERS

FINANCIAL REGULATION MORTGAGE PREPAYMENT PENALTIES - RETROACTIVITY

Question: In *Bednar v. Provident Bank of Maryland*, 402 Md. 532 (2007), the Court of Appeals determined that an agreement under which a lender paid the closing costs of a loan subject to a provision that the costs would be charged to the borrower if the loan was repaid within three years was a violation of Commercial Law Article §12-1009(e) prohibiting a credit grantor from imposing prepayment charges. SB 347 / HB 852, proposed as an Emergency Bill, and enacted as Chapter 34 and Chapter 35 Laws of Md 2008, provides relief from those penalties in cases where the action was taken in conformity with advice, regulations or forms of the Commissioner of Financial Regulation or advice from the Attorney General. Can this legislation be given retroactive effect?

Answer: Yes. The legislation authorizes the practice found illegal in *Bednar*, thus permitting the practice in the future. The legislation also provides that the penalty provisions do not apply to credit grantors who entered into agreements approved by the Commissioner but later found invalid in the *Bednar* case.

Letters to
Sen. Allan H. Kittleman
March 3, 2008
Delegate Dereck E. Davis
February 21, 2008
Senator Thomas M. Middleton
February 18, 2008
Senator Rob Garagiola
February 7, 2008

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GAMING DEVICES/SLOT MACHINES

Question: Is the use of “instant bingo machines” (sometimes called pull-tab machines) in St. Mary’s County slot machine gaming prohibited under Criminal Law Article §12-302?

Answer: An instant bingo machine is legal for use by qualified organizations only if it dispenses a preprinted ticket or pull-tab in a predetermined order and not if the order is determined by the machine. A qualified organization may operate an instant bingo machine in a restaurant or bar. However, the qualified organization may not pay a percentage of the proceeds to the restaurant or bar, and may not participate in an arrangement under which the machines are managed by the restaurant or bar rather than the members of the qualified organization.

*Letter to
Senator Thomas V. Mike Miller
March 10, 2008*

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**HIV TESTING
MINORS — CONSENT**

Question: Health - General Article §20-102(c)(3) permits a minor to consent to treatment for or advice about venereal disease. Does the law permit a minor to consent to a test for Human Immunodeficiency Virus (“HIV”)?

Answer: Yes. HIV is a sexually transmitted disease and the term is used interchangeably with “venereal disease.” Moreover, because the intent of the statute was to encourage minors to seek treatment for HIV, the statute must be read broadly to permit a minor to consent to testing for HIV.

*Letter to
Delegate. Samuel I. Rosenberg
January 30, 2008*

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**PUBLIC OFFICERS AND EMPLOYEES
— OFFICE OF PROFIT**

Question: May a member of the Board of County Commissioners of Washington County accept a position as town administrator for the Town of Myersville without forfeiting his position on the Board?

Answer: If the Town structures the position to ensure that it is a position of employment rather than an office, the administrator position would not be an “office for profit” under Article 35 of the Maryland Declaration of Rights and there is no reason why an individual could not simultaneously serve in both positions.

*Letter to
John F. Barr, President
Washington County Commissioners
March 13, 2008*

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SMOKING – PRIVATE CLUBS

Question: Does the Clean Indoor Act of 2007 apply to private clubs?

Answer: Yes. As of February 1, 2008, a person may not smoke in an indoor area open to the public. Private clubs are not excluded from the law. The Act’s implementing regulations direct owners of bars, restaurants, clubs and other entities to prohibit smoking in an indoor area open to the public.

*Letter to
Delegate Peter A. Hammen
February 21, 2008*

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**TRUTH IN MUSIC ADVERTISING ACT
— FREE SPEECH**

Question: SB 711 (Chapter 617, Laws of Maryland 2008), the Truth in Music Advertising Act, would prohibit a person from advertising or conducting “a live musical performance or production in the State through the use of false, deceptive, or misleading affiliation, connection, or association between a performing group and recording group.” Does the Act violate the First Amendment?

Answer: No. The First Amendment does not protect fraud or deceptive speech. The intent of the legislation is to lessen the likelihood that the public will be misled into believing that they are seeing one performing and recording group when, in fact they are seeing another. The bill also limits commercial speech, not the act of performing.

*Letter to
Senator Mike Lenett
March 4, 2008*

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**WASHINGTON SUBURBAN SANITARY
COMMISSION – UTILITIES – PUBLIC
SERVICE COMMISSION – PROPERTY TAX**

Question: May the Washington Suburban Sanitary Commission (WSSC) impose a charge to pay for the replacement of water and sewer pipelines?

Answer: Yes. WSSC’s enabling statute entitles it to recover a proper depreciation allowance as part of a service charge that encompasses both the “ready to serve” charge and water rates. These revenues may be devoted to infrastructure replacement. However, the statute does not authorize WSSC to finance the replacement directly through an *ad valorem* tax.

*Letter to
Adrienne A. Mandel, Chair, WSSC
February 25, 2008*

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ZONING AND PLANNING

Historic Preservation – Natural Resources

Question: Would the National Sailing Hall of Fame (“NSHOF”) be subject to the laws of the City of Annapolis if it were to enter into an agreement with the Department of Natural Resources to lease State property in the City as a site for a museum devoted to sailing?

Answer: A court would likely find that the property would not be subject to local zoning and historic preservation laws if it were leased to NSHOF for use as a sailing museum.

*Letter to
Senator John C. Astle
March 28, 2008*

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