M E M O R A N D U M

January 9, 1992

TO: Betty Ann Krahnke, Councilmember
Nancy Dacek, Councilmember

VIA: Joyce R. Stern
County Attorney

FROM: Marc P. Hansen
Senior Assistant County Attorney

RE: Public Meetings Law

BACKGROUND

You have asked this office for advice on the application of the State open meetings law to a private meeting of the Democratic members of the County Council.[1] According to the newspaper articles attached to your memorandum the following facts are alleged: The seven Democratic members of the Council met on November 24, 1991, in a private meeting with the Democratic Central Committee and other Democrats holding elected office.[2] The participants debated, and by some accounts voted, on the Pasternak councilmanic redistricting plan. The Pasternak plan put the two incumbent Republican councilmembers in the same election district. The November 24th meeting was not open to the public nor was prior notice of the meeting given to the public or the Republican members of the Council.

At the time of the November 24th meeting Bill 56-91 was pending before the Council. Bill 56-91 proposed to establish new Council election districts and placed the two Republican Councilmembers in the same election district.

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[1]The open meetings law is codified at Md State Gov't Code Ann., Sections 10-501 et seq. The open meetings law is commonly known as the Sunshine Act. Effective July 1, 1992, the Sunshine Act will be officially known as the Open Meetings Act. Section 10-512. Unless otherwise indicated, section references are to the Sunshine Act.

[2]Five members of the Council constitute a quorum. Council Rules of Procedure, Rule 1(c)(2).

On December 10, 1991, at a public meeting of the County Council, Bill 56-91 was extensively debated and adopted by the Council. The seven Democratic Councilmembers voted in favor of Bill 56-91; the two Republican Councilmembers voted against Bill 56-91.

ISSUES

You have asked the following questions:[3]

1. Did the November 24th meeting violate the Sunshine Act?

2. If the November 24th meeting violated the Sunshine Act, what effect does the violation have on the subsequent adoption of Bill 56-91?

3. Do Montgomery County laws and Council procedures differ from the provisions of the Sunshine Act?

4. Does the Sunshine Act restrict a Councilmember's attendance at a private meeting, such as with a civic association, if legislation pending before the Council will be discussed?

5. Do the recent amendments to the Sunshine Act, which become effective on July 1, 1992, affect the response to these questions?

SUMMARY OF CONCLUSIONS

Although contrary to the weight of legal authority from other states, we believe that under Maryland law the November 24th meeting did not violate the Sunshine Act. If the November 24th meeting violated the Sunshine Act, we do not believe a Maryland Court would invalidate Bill 56-91. Montgomery County laws and Council procedures do not differ in any material respect from the Sunshine Act. A Councilmember may attend a private meeting and discuss Council business if the meeting has not been convened by the Council. The recent amendments to the Sunshine Act do not significantly alter the conclusions reached in this memorandum.

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[3]We have rearranged the order of your questions, combined some questions, and paraphrased others.

SUMMARY OF SUNSHINE ACT

The purpose of the Sunshine Act is expressly set out in Section 10-502 which states:

> It is essential to the maintenance of a democratic society that, except in special and appropriate circumstances:
>
> (1) public business be performed in an open and public manner; and
>
> (2) citizens be advised and aware of:
>
> (i) the performance of public officials; and
>
> (ii) the deliberations and decisions that the making of public policy involves.

Section 10-505 provides that a "public body" must "meet" in open sessions whenever the public body is carrying out a "legislative function." Section 10-501(g) defines a "public body" as an entity that consists of at least two individuals and is created by the Maryland Constitution, State law, a county charter, or other rule, resolution, or executive order. Section 10-501(e) defines "legislative function" as: "The process or act of: (1) approving, disapproving, enacting, amending, or repealing a law or other measure to set public policy; . . . . " Section 10-501(f) defines "meet" as, "to convene a quorum of a public body for the consideration or transaction of public business." Section 10-503(4) states that the Sunshine Act does not apply to "a chance encounter, social gathering, or other occasion that is not intended to circumvent this subtitle."

Section 10-506 requires a public body to give reasonable notice of the date, time, and place of a meeting the Sunshine Act requires to be open. Section 10-507 provides that the general public is entitled to attend a session of a public body that must be open under the Sunshine Act.

Section 10-509 requires the public body to include in its public minutes a statement of the time, place, and purpose of any meeting that is permitted to be closed under the Sunshine Act.[4]

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[4]Section 10-508 allows a public body to meet in a closed session to discuss certain matters which are not relevant to your inquiry.

Section 10-510 provides that any person adversely affected by a violation of the Sunshine Act is authorized to file a petition with the Circuit Court seeking relief. The Court may require the public body to comply with the Sunshine Act; in addition, the Court may void the action of the public body if it finds the public body "willfully failed to comply with . . . [the Sunshine Act] and that no other remedy is adequate. . . ."[5]

SURVEY OF LEGAL AUTHORITIES

A. **Maryland**.

The Maryland Appellate Courts have interpreted the Sunshine Act on various occasions, but have not directly addressed the issues raised in your inquiry. Nevertheless, certain of these decisions should be noted because they provide some guidance regarding the questions you have asked.

In City of New Carrollton v. Rogers, 287 Md. 56, 410 A.2d 1070 (1980), the Court of Appeals faced a situation in which certain property owners sought to stop an annexation being pursued by New Carrollton; the property owners claimed that the Town Council had met in violation of the Sunshine Act prior to the public approval of the annexation. Of particular interest in this case was a meeting attended by the Mayor and members of the Council at the invitation of the West Lanham Hills Citizens Association. The purpose of the meeting was for officials to answer questions concerning the proposed annexation. No notice of the meeting was given. The Court of Appeals concluded that this meeting did not violate the Sunshine Act stating:

> Nor was there anything sinister or illegal about the invited attendance of the Mayor and members of the Council at the August 7, 1978, meeting in West Lanham Hills for the purpose of answering questions that the residents might have about New Carrollton. Public notice of this event was not required by the Act to be given to the citizens of New Carrollton since, as we view it, it was not a 'meeting' of a public body but rather, within the contemplation of . . . [the Sunshine Act], was an '[occasion] . . . not

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[5]This summary has addressed only those portions of the Sunshine Act which appear to be relevant to your inquiry. This summary should not be considered as a complete survey of the provisions of the Sunshine Act.

> designed or intended for the purpose of circumventing the provisions of this subtitle.' Id. at 1078.

In Avara v. Baltimore News American, 292 Md. 543, 440 A.2d 368 (1982), the Baltimore News sought a declaration that a conference committee of the Maryland General Assembly may not be closed to the public. The conference committee was held to resolve differences between the two Houses over the State Budget Bill. The Court of Appeals held that the conference committee was a public body because its creation was authorized by House and Senate rules.

In Abell Publishing Co. v. Bd of Regents, 68 Md. App. 500, 514 A.2d 25 (1986), the Court of Special Appeals addressed a request from the media to require the subcommittee of a task force to open its meetings to the public. The task force in question was created by the Chancellor of the University of Maryland in response to the cocaine related death of a University basketball player. The task force had divided into subcommittees. The subcommittee refused to open its meetings to the Baltimore Sun. As a result, the Baltimore Sun filed an action under the Sunshine Act to force the subcommittee to open its meetings. The Court of Special Appeals concluded that the task force and its subcommittees were not a public body subject to the Sunshine Act because neither was created by rule, resolution, or by-law of the University Board of Regents.

In Malamis v. Stein, 69 Md. App. 221, 516 A.2d 1039 (1986), certain parents sought a declaration that a closed meeting of the Allegany Board of Education violated the Sunshine Act. The meeting of the Board of Education was held to finalize a student reassignment plan. The Circuit Court found that the Board of Education violated the Sunshine Act and ordered the Board to hold a public meeting to adopt a new reassignment plan. The Circuit Court left the old plan in effect until a new plan was adopted pursuant to the Court's order. The Circuit Court finally denied the parents' request for attorney's fees. While the appellate decision deals with the issue of whether the parents were entitled to an award of attorney's fees, the actions taken by the Circuit Court provides some guidance as to how a Maryland court might craft a remedy for a violation of the Sunshine Act.

The Attorney General has not issued any formal opinions on the matters raised in your memorandum. However, on January 5, 1990, Attorney General J. Joseph Curran, Jr. wrote to Delegate Dembrow providing a brief analysis of the Sunshine Act. In that letter, Attorney General Curran notes that since 1977 his office had responded to numerous inquiries concerning the Sunshine Act. The Attorney General states:

> The Attorney General's office has previously advised that certain gatherings of legislators and staff do not meet the law's rigid definition of 'public body' or 'meet[ing]'.

> (Footnote omitted) Because they are not created by statute, resolution or rule, such informal bodies as the Democratic Caucus, the House leadership and the Senate leadership do not have to hold their meetings in public. See, letter of advice to the Honorable Benjamin L. Cardin, dated Dec. 10, 1982; advice to Janet Davidson, dated Dec. 18, 1986. In addition, meetings between a committee chairman and individual members constituting less than a quorum of the committee are not subject to the law. . . . The law also excludes 'a chance encounter, social gathering, or other occasion that is not intended to circumvent the law.' Thus, we have said that a legislative retreat, where no formal public business was concluded and which was not intended as a subterfuge to evade the law, would not be covered by the statute. See, letter to Frank Gillio, dated Mar. 26, 1985. (Emphasis added)

B. **Other Legal Authorities**.

All 50 states have an open meetings statute. Bd of County Commissioners of Carroll County v. Landmark Community Newspapers, 293 Md. 595, 446 A.2d 63 (1982). The issues raised in your memorandum, while not directly addressed by Maryland Appellate Courts, have been the subject of decisions in other State Appellate Courts.

Illinois. The Illinois Supreme Court was faced with the following facts in People ex. rel. Difanis v. Barr, 414 N.E.2d 731 (Ill. 1980):

> . . . an Urbana City Council meeting was scheduled for Monday, October 23, 1978 at 7:30 p.m. On Friday, October 20, 1978, two members of the City Council . . . decided to hold a party caucus prior to the City Council meeting. The caucus meeting was scheduled for October 23, 1978, at 6 p.m. in the home of a member of the City Council. Attendance at the meeting was voluntary. The nine defendants attended the 6 p.m. meeting. Eight of the defendants are members of the Champagne County Democratic party, and one defendant has no political affiliation. There are fifteen members of the Urbana City Council, nine of whom are Democrats. Eight persons constitute a quorum of the Council.
>
> The meeting was called to discuss matters the City Council would consider at its meeting later that night, as well as party matters and an election to be held in November 1978. No agenda was prepared for the 6 p.m. meeting, and no votes were taken. Id. at 733.

Subsequently at the City Council meeting, the 9 councilmembers who attended the party caucus voted as a block to approve a ward map amendment by a vote of 9 to 4. The defendants acknowledged that they had caucuses of this nature in the past and would continue to have caucuses in the future.

The defendants argued that the meeting was called primarily as a political caucus and not a formal "meeting" of the City Council. The Illinois Supreme Court rejected the defendants' argument, noting that the Illinois Sunshine Act clearly stated a public policy that would be poorly served if the Court accepted defendants' argument. The Illinois Supreme Court quoted with approval the California case of Sacramento Newspaper Guild, Local 92 v. Sacramento County Board of Supervisors, 263 Cal. App. 2d 41, 50-51, 69 Cal. Rptr. 480, 487 (1968):

> An informal conference or caucus permits crystallization of secret decisions to a point just short of ceremonial acceptance. There is rarely any purpose to a non-public pre-meeting conference except to conduct some part of the decisional process behind closed doors. Only by embracing the collective inquiry and discussion stages, as well as the ultimate step of official action, can an open meeting regulation frustrate these evasive devices. Id. at 734.

The defendants next argued that as a group they did not constitute a "legislative body" subject to the Illinois Sunshine Act. The Illinois Supreme Court rejected that argument as well, concluding that the term "body" under the Illinois Sunshine Act "must necessarily be interpreted to mean an informal gathering of nine members of a legally constituted public body." Id. at 735. Interestingly, however, the Illinois Supreme Court noted that the Illinois Sunshine Act was not intended to prohibit bona fide social gatherings or "truly political meetings at which party business is discussed." Id. at 735. The Court, however, concluded that the items discussed at the caucus meeting by the 9 members of the Urbana City Council regarding a new ward map were public business which could not be discussed in a closed meeting.

The defendants also contended that the Illinois Sunshine Act, as applied to them in the context of a political caucus, violated their rights of freedom of speech and assembly under the U.S. Constitution. The Illinois Supreme Court concluded that the Illinois Sunshine Act did not prohibit political discussions between or among members of a public body, but simply adopted reasonable regulations as to when those discussions could take place. The Court concluded that when balanced against the extremely important governmental interest of protecting the public's right to know, the Illinois Sunshine Act was eminently reasonable. The Supreme Court concluded that

the Sunshine Act places "a limited and reasonable regulation upon officials by requiring them to speak of public business with their fellow officials only when they are in a public forum, and sufficient notice under the Act has been given." Id. at 739.

Colorado. In Cole v. State, 673 P.2d 345 (Colo. 1983), a member of the Colorado Senate sought a declaratory judgment that caucus meetings of the Colorado legislature were subject to the Colorado Sunshine Act. The Colorado Supreme Court noted that Colorado, unlike Arizona and Connecticut, did not expressly exempt legislative caucuses from the requirements of the Sunshine Act. The Court concluded:

> While a legislative caucus is not an official policy making body of the General Assembly, it is, nonetheless, a 'de facto' policy making body which formulates legislative policy that is of governing importance to the citizens of this state. Id. at 348.

The Colorado Supreme Court accordingly concluded that legislative caucus meetings were subject to the Colorado Sunshine Act. Like the Illinois Supreme Court, the Colorado Supreme Court also rejected the argument that the Colorado Sunshine Act interfered with the free speech and association rights of the members of the Colorado General Assembly. The Court noted that the Colorado Sunshine Act:

> . . . does not forbid political discussion among legislators, and does not regulate the content of their discussions. The Colorado Open Meetings Law merely requires that business meetings of policy-making bodies of the General Assembly be open to the public. The Open Meetings Law, as we view it, is a reasonable legislative enactment which seeks to balance the public's right of access to public information with the right of legislators to speak candidly and to associate with whomever they choose. Id. at 350.

Alaska. In Brookwood Area Homeowners Ass'n v. Anchorage, 702 P.2d 1317 (Alaska 1985), a quorum of the Anchorage Municipal Assembly met in a closed meeting with a developer to discuss in detail the developer's application for rezoning. The meeting was held one week before a public hearing on the rezoning application. Subsequently, the Assembly passed a rezoning ordinance allowing the development to proceed in a modified form. The Supreme Court of Alaska determined that the private meeting with the developer violated the Alaskan Sunshine Act. Accordingly, the Supreme Court invalidated the rezoning ordinance and awarded attorney fees to the association that brought the case. Of particular interest in this case is the argument that the subsequent public hearing and adoption of the zoning

ordinance in open session cured the original violation of the Sunshine Act. The Supreme Court of Alaska determined that a subsequent public meeting "would serve as a proper remedial effort only if it 'functioned as a true de novo consideration of the defective action.'" Id. at 1325. The citizens association argued that it would have presented different testimony at the public hearing if it had known the content of the presentation made by the developer at the private meeting with members of the Anchorage Assembly. The Court concluded that ". . . if a violation is shown, the burden shifts to the defendant to show that a 'substantial reconsideration' of the issue was made at a subsequent public meeting . . ." Id. at 1325. The Court concluded that it was necessary to invalidate the adopted zoning ordinance in order to clear the way for a true reconsideration of the issue by the government.

Wisconsin. In State ex. rel. Newspapers, Inc. v. Showers, 398 N.W.2d 154 (Wis.1987), the Wisconsin Supreme Court lay down the following rule as to when the Wisconsin Sunshine Act applied:

> First, there must be a purpose to engage in governmental business, be it discussion, decision or information gathering. Second, the number of members present must be sufficient to determine the parent body's course of action regarding the proposal discussed. Id. at 165.

Of particular interest was the Court's discussion of the problem of "walking quorums" which the Court described as a "series of meetings of groups less than a quorum." The Court, quoting from a previous decision, noted:

> It is certainly possible that the appearance of a quorum could be avoided by separate meetings of two or more groups, each less than quorum size, who agree through mutual representatives to act and vote uniformly, or by a decision by a group of less than quorum size which has the tacit agreement and acquiescence of other members sufficient to reach a quorum. Such elaborate arrangements, if factually discovered, are an available target for the prosecutor under the simple quorum rule. Id. at 161.

Delaware. In News-Journal Co. v. McLaughlin, 377 A.2d 358 (1977), a Delaware Court of Chancery, a Court of original jurisdiction, related the following facts:

> The Wilmington City Council is composed of thirteen members, of which at present eleven are members of the Democratic Party and two are members of the Republican Party. The eleven Council members named as defendants

> here are the eleven Democrats. At approximately 6:30 p.m. on February 3, 1977, these eleven councilmen met at the office of Mayor McLaughlin who, (as is the defendant City Clerk who attended the meeting) is also a Democrat by political affiliation. Certain members of the Mayor's staff were also in attendance. Id. at 360.

The purpose of the meeting was to encourage participants to lobby the General Assembly not to repeal certain statutes. The Court noted, ". . . it seems obvious that the criterion for attendance had a political basis." Id. at 360.

The defendants argued that they did not convene for the purpose of addressing "public business" as that term was defined under the Delaware Sunshine Act. The defendants argued that to require a strategy session such as they engaged in to be open to the public would constitute "an unfair limitation on their ability as a majority political party to function as a unified group." Id. at 362. The Court noted that the Delaware Sunshine Act did impose such a burden and concluded that the Delaware Sunshine Act was intended to prevent "at non-public meetings the crystallization of secret decisions to a point just short of ceremonial acceptance". Id. at 362. The Court concluded that the meeting in question violated the Delaware Sunshine Act.

New York. In Sciolino v. Ryan, 440 N.Y.S.2d 795 (1981), the Appellate Division of the New York Supreme Court, an intermediate appellate court, concluded that closed sessions of the Rochester City Council must be opened under the New York Sunshine Act. The Court related the following facts:

> On most Thursday afternoons respondents, the eight Democratic members of the nine member Council, met in the office of the Mayor of Rochester at his invitation. Members of the City's administrative staff, including the City Manager and City Clerk, are frequently invited and attend these sessions, with occasional invitations extended to members of advisory boards and commissions, and consultants under contract with the City of Rochester. The sole Republican member of the Council, representatives of the news media and the general public are excluded from these meetings. Id. at 796.

The defendants argued that the closed sessions were political caucuses that were exempt from the requirements of the New York Sunshine Act. The Court concluded that the closed sessions of the Council's Democratic majority were meetings within the scope of the New York Sunshine Act. The Court

noted that the Democratic majority constituted a quorum of the City Council. The Court stated:

> The decisions of these sessions, the legislative future of items before the Council, although not binding, affect the public and directly relate to the possibility of a municipal matter becoming an official enactment. Id. at 798.

The New York Sunshine Act contained a provision that excluded from the requirements of the Sunshine law deliberations of political caucuses. The Court concluded that the discussions held by the Democratic majority of the Rochester City Council were not political caucuses within the meaning of the exemption. The Court noted that the matters discussed at the sessions were not private matters of a political party but were public business.

CONCLUSIONS

1. **Did the November 24th meeting of the Democratic members of the Council violate the Sunshine Act?**

Even though not consistent with the weight of authority from other states, we believe that Attorney General Curran's 1990 letter to Delegate Dembrow must be given controlling weight. The letter summarizes long standing and consistent advice from the Attorney General's Office to the General Assembly approving the continuing practice of members of the General Assembly meeting in political caucuses, even if those meetings constituted a quorum of a legislative committee or even the entire General Assembly.

In 1991, the General Assembly adopted Senate Bill 170 which culminated at least a year's effort in preparing a general revision to the Maryland Sunshine Act. Significantly, the General Assembly did not include in Senate Bill 170 any provisions that would alter the views expressed by Attorney General Curran in his 1990 letter. The Court of Appeals has held that the General Assembly's failure to change a law after an Attorney General opinion interpreting the law gives additional credence to the Attorney General's interpretation. Crest Inv. Trust, Inc. v. Cohen, 145 Md. 639, 227 A.2d 8 (1967); Demory Bros., Inc. v. Bd of Public Works, 20 Md. App. 467, 316 A.2d 529, aff'd, 273 Md. 320, 329 A.2d 674 (1974).

The Attorney General's conclusion that political caucuses of legislative bodies are not subject to the Sunshine Act appears to be consistent with City of New Carrollton v. Rogers, supra, in which the Court of Appeals approved a private meeting between members of the New Carrollton Council and a civic association to discuss pending business before the Council.

Section 10-501(f) defines "meet" as "to convene a quorum of a public body for the consideration or transaction of public business." Webster's New International Dictionary (Second Edition) defines "convene" as: "to assemble; to convoke". Section 10-501(f) does not identify who must convene a quorum before the gathering is considered a meeting under the Sunshine Act. Based on the factors discussed above, we must conclude that the General Assembly intends to limit the application of the Sunshine Act to meetings of a public body that are called by the public body. Since the November 24th meeting was not called by the Council, the Sunshine Act does not apply. On the other hand, if the meeting were convened by the Council, whether directly or indirectly, the Sunshine Act would apply.

2. **If the November 24th meeting violated the Sunshine Act, what effect does the violation have on the subsequent adoption of Bill 56-91?**

We do not believe that a Maryland court would declare Bill 56-91 invalid if it were determined that the November 24th meeting violated the Sunshine Act. Section 10-510 authorizes a court to invalidate a public act if the court finds that the public body willfully failed to comply with the act. In light of the Attorney General's advice and the practices of the General Assembly, we do not believe that a court would find a willful violation of the Sunshine Act in this case.

Furthermore, Bill 56-91 was adopted in open session after considerable debate. We believe it likely that a Maryland court would, in the alternative, consider this subsequent public action sufficiently remedial to make the closed meeting a harmless violation of the Sunshine Act. See, Malamus v. Stein, supra.

Finally, we believe that a court would be especially reluctant to invalidate Bill 56-91 because, under Charter Section 104, the effect of invalidation would be to make the Redistricting Commission's report the law establishing Council election districts. Since Charter Section 104 provides only a 90 day window in which legislation can be adopted to change the Commission's plan, the court would, in effect, find itself functioning in the role of a legislature. Accordingly, we believe a Maryland court would be extremely reluctant to strike down Bill 56-91.

3. **Do Montgomery County laws and Council procedures differ from the provisions of the Sunshine Act?**

The only County law or Council procedure which supplements the Sunshine Act is Council Rule 1(d). That rule authorizes the Council to close a meeting for the reasons listed in the Sunshine Act. Rule 1(d), however, limits the authority of the Council to utilize exemption (14) of the Sunshine Act which allows a public body to close a meeting to satisfy an exceptional reason if two-thirds of the members of the public body find the reason to be

so compelling that it overrides the general public policy in favor of open meetings. Council Rule 1(d) restricts the use of exemption (14) to preparing "strategy for a meeting with another government officer or body" or to "select, or negotiate with, a party to a contract with the Council or another County agency".

4. **Does the Sunshine Act restrict a Councilmember's attendance at a private meeting with an organization such as a civic organization?**

As discussed in response to the question regarding the November 24th meeting, we believe that the Sunshine Act does not restrict Councilmembers attending meetings called by another body including a civic organization. At these meetings, we believe a Councilmember may discuss pending legislation before the Council, including expressing his or her opinion regarding the legislation by an informal vote or otherwise. As indicated, we believe the Sunshine Act only applies to meetings called by the Council.

5. **Do the amendments to the Sunshine Act, which become effective on July 1, 1992, affect the response to these questions?**

As already discussed, Senate Bill 170 does not amend any of the provisions which would impact on the questions you have asked, with one exception. Senate Bill 170 does provide that a member of a public body who willfully participates in a meeting with knowledge that the meeting is being held in violation of the Sunshine Act is subject to a civil penalty not to exceed $100. Accordingly, in response to question 2, a court could impose a civil fine on each member of the Council who attended the November 24th meeting, if that meeting were to be determined to have been held in violation of the Sunshine Act.

We trust you will find this memorandum responsive to your inquiries. We believe that the questions you have asked present difficult issues. While we believe that the conclusions we have reached are consistent with the statutory language of the Sunshine Act, and the intention and practices of the General Assembly, we recognize that the appellate courts of the states that have addressed these issues would conclude otherwise. If you have further questions, please do not hesitate to contact us.

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cc: Bruce Adams, President, County Council
Neal Potter, County Executive