OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

Charles W. Thompson, Jr.
County Attorney

OPINION

January 31, 2000

TO: Albert J. Genetti, Jr., Director
Department of Public Works & Transportation

THROUGH: Charles W. Thompson, Jr.
County Attorney

Marc P, Hansen
Chief General Counsel

FROM: Judson P. Garrett, Jr.
Principal Counsel for Opinions and Advice

RE: Community-Facilities-Capital-Grant Right-of-Recovery Requirements

---

This is an opinion of the County Attorney in response to the Department's request for advice regarding the County's ability to comply with the right-of-recovery requirements of the State Community Mental Health, Addiction and Developmental Disabilities law ("the Community-Facilities-Capital-Grant statute").[1]

QUESTION PRESENTED

When a nonprofit provider applies to the State for a "Community-Facilities-Capital Grant" to construct, renovate or equip a community mental health facility, addiction facility, or developmental disabilities facility on property leased from Montgomery County may the County consent to the recording of a notice of the State's statutory right-of-recovery if that consent will expose the County's property to a potential lien in favor of the State and subject the County to joint and several liability to the State for the pro-rata cost of grant-funded improvements to its property should the grantee default by: (a) failing to complete the project or commence operation of the facility; or (b) ceasing, within 30 years after completion of the facility, to operate the facility as a mental health, addiction or developmental disabilities facility?

---

[1]Md. Code, Health-General Article, §§24-601through 24-607.

101 Monroe Street, Rockville, Maryland 20850-2540 •garrej@co.mo.md.us • 240-777-6741
TTD 240-777-2545 • FAX 240-777-6705

ADVICE

Unless required by the lease, the County is not obligated to finance or otherwise assist a nonprofit community mental health facility, addiction facility, or developmental disabilities facility operator with the construction, renovation or expansion of a private community health facility.[2] Nevertheless, the County may, as the lessor of a nonprofit Community-Facilities-Capital-Grant applicant, consent to the recording of a notice of the State's right-of-recovery under the Community-Facilities-Capital-Grant statute, and thereby accept the joint and severable liability for grant-funded improvements to its property that the statute imposes on a lessor in the event of certain defaults by the grantee.

We caution, however, that this is an exceedingly close question of first impression. Given this state of the law, our advice cannot be entirely free from doubt. Furthermore, although a concurring opinion of the Attorney General might be helpful, it could not provide certainty.[3] The only way to proceed with certainty, absent a dispositive court decision, is to obtain clarifying state legislation.[4]

In addition, we recommend the following:

(1) Unless the Community-Facilities-Capital-Grant statute is amended to exempt County lessors from the State's right-of-recovery, the County should require that lessees who seek the County's consent to the recording of a notice of that right:

(a) indemnify the County from its resulting exposure to statutory joint and severable liability and provide satisfactory security for that indemnification, *e.g.*, insurance; or

(b) give the County the option to acquire and provide for the operation of the facility in the event of a default by the grantee; or

(c) if appropriate, both of the above.

---

[2]We understand that no County lease of property for such purposes contains a provision obligating the County to participate in such improvements or consent to such grants. We also understand that there is no outstanding bonded indebtedness on any of the property the County has leased for these purposes.

[3]*State v. Cities Jaycees Foundation, Inc.,* 330 Md. 460, 470 (1993).

[4]In particular, the Community-Facilities-Capital-Grant statute should be clarified either to: (1) expressly exempt counties, as lessors, from the State's right-of-recovery requirements; or (2) clearly authorize counties, as lessors, to consent to those requirements. So, too, should other statutes that provide a substantially similar right-of-recovery, *i.e.*, the Juvenile Justice Facilities Capital Program, the Adult Day Care Centers Capital Program, and the Senior Citizen Activities Center Capital Improvement Grant Program. *See* Md. Code, Art. 89C, §§4-101 *et seq.*; Health-General Article §§ 24-701 *et. seq.*; and Article 70B, §§26 *et seq.*

(2) Unless the Community-Facilities-Capital-Grant statute is amended to provide otherwise,[5] the long-term fiscal implications of a decision to consent to the recording of a notice of the State's right-of-recovery should be subjected to the review and approval procedures for undertaking a financial obligation that is binding beyond the current fiscal year, including submitting the proposal to the County Council for approval by resolution.[6]

Our advice is founded upon the following analysis of applicable law.

APPLICABLE LAW

1. The Community-Facilities-Capital-Grant Statute.

According to the Maryland Department of Legislative Services, the Community Mental Health, Addictions and Developmental Disabilities Facilities Program,

> which began in 1972, assists local governments and private providers with the acquisition, construction, renovation, and equipping of facilities that provide mental health, developmental disabilities, and drug and alcohol abuse treatment and services. The program is essential for the deinstitutionalization of the mentally ill and developmentally disabled and for the prevention of institutionalization for the addicted. In recent years there has been a tremendous growth in the number of organizations offering community services. As a result, there is an increased demand for community bond funds, which are used to develop, expand, and replace facilities that serve these individuals in the community. The State may fund up to 75 percent of the cost of each project. The fiscal 1999 State budget includes $5.7 million for this program.[7]

---

[5] *See, e.g.,* Md. Code, art. 83A, §5-710, which authorizes certain counties to undertake a loan or guarantee under the Loans to Projects in Enterprise Zones Act, "notwithstanding any other provision of law and without regard to any limitations set forth in its charter or other applicable public local or public general law that would otherwise apply, and without complying with any procedures set forth in its charter or other applicable public local or public general law that would otherwise be required."

[6] Ordinarily, the County Executive would act for the County in the case of most County-owned property and the County Council would act in the case of a former school site containing school buildings no longer in public school use. *See* Md. Code, Education Article, §4-115 (c) (1) (i); Mont. Co. Code §11B-45 (as amended by Laws of Mont. Co. (1999), Ch. 20 (Bill No. 12-99) (concerning the procedures for the disposal of surplus school property), and Executive Regulation 67-91AM (Disposition of Real Property).

[7] Maryland Local Government: Revenues and State Aid (Legislative Handbook Series, Vol. II, 1998) (Dept. of Legislative Services, Annapolis, Md.) p. 203.

The Community-Facilities-Capital-Grant statute is a public general law [8] that permits the Board of Public Works, upon the recommendation of the Secretary of Health and Mental Hygiene, to make grants to both governmental and nonprofit applicants for the construction, acquisition, renovation, and equipping of community mental health facilities, addiction facilities, and developmental disabilities facilities (including the plans, specifications, site improvements, surveys, and applicable architects' and engineers' fees).[9] Any county, municipal corporation, or nonprofit organization sponsoring such a project may apply to the Department of Health and Mental Hygiene (DHMH) for a State grant to be applied toward the cost of the project.[10]

For the purposes of this law, "*facility*" means:

> (1) A *public* community mental health facility, addiction facility, or developmental disabilities facility that is *wholly owned* by and operated under the authority of a county or a municipal corporation, or both; or
>
> (2) A *nonprofit* community mental health facility, addiction facility, or developmental disabilities facility that is *wholly owned* by and operated under the authority of a nonprofit organization.[11]

"*Wholly owned*" includes a lease, if:

> (1) (i) The lease is for a minimum term of 30 years following project completion; or
>
> (ii) The lease agreement extends the right of purchase to the lessee; and
>
> (2) *Lessor consents to the recording*, in the land records of the political subdivision in which the facility is located, *of a notice of the State's right of recovery*, as provided as under § 24-606 of this subtitle; or
>
> (3) Lease agreement is with the State for a State-owned building or State-owned property.[12]

---

[8]Laws of Maryland (1990), ch. 214 (House Bill 1390), codified at §§24-601through 24-607 of the Health-General Article of the Maryland Code.

[9]§24-602.

[10]§24-603.

[11]§24-601(b). (Emphasis added.)

[12]§24-601(d). (Emphasis added.)

"In the event of failure to complete a project or . . . commence operation of a facility," the State may "recover from the recipient of the funds ... *or the owner of the property* an amount equal to the . . . State funds disbursed for the project, together with all costs and reasonable attorneys' fees incurred . . . in the recovery proceedings."[13] If, within 30 years after completion of a project, a community health facility, addiction facility, or developmental disabilities facility ceases to be a "facility" as defined in this law:

> the State may recover from either the [lessee] or *from the owner,* an amount bearing the same ratio to the then current fair market value of so much of the property as constituted an approved project as the amount the State participation bore to the total eligible cost of the approved project, together with all costs and reasonable attorneys' fees incurred by the State in the recovery proceedings.[14]

The statute requires the State to cause notice of its "right-of-recovery" to be recorded in the land records of the jurisdiction in which the property is located before making any funds available for the approved project,[15] and if the applicant leases the property, the lessor must consent to the recording of the notice.[16] This recording does not create a lien against the property; but it constitutes "notice to any potential transferee, potential creditor, or other interested party of the possibility that the State may obtain a lien . . . ."[17]

If the grantee defaults in one of the manners described above, the State may file a civil action in the Circuit Court and the court must authorize a "temporary lien" if it determines from the State's initial filling that there is probable cause to believe that a default has occurred.[18] If the State ultimately prevails, the court must issue "a final judgment in the amount it finds to be recoverable by the State."[19] All respondents, "*including in every case the owner of the property, shall be held*

---

[13]§24-606(b). (Emphasis added.)

[14]§24-606(c). (Emphasis added.)

[15]§24-606(d)(1).

[16]§24-601(d)(2).

[17]§24-606(d)(2).

[18]§24-606(e)(1) and (2). *See also* §24-606 (e) (3) ("While the temporary lien is in effect, neither the owner nor any person who acquired an interest in the property after the State first made funds available . . . may take any action that would affect the title to the property or institute any proceedings to enforce a security interest or other similar rights in the property, without the prior written consent of the State") and §24-606(4) ("The owner or other interested party" may obtain release of this temporary lien by bonding the State's claim).

[19]§24-606(f)(2).

jointly and severally liable to the State for the amount of the judgment."[20] 30 days following the court's final order, the amount of an unpaid judgment becomes a lien on the property and is superior to any interest perfected after the State first made funds available under this subtitle, if the State timely records a notice of the judgment. The judgment, however, may be "bonded-off"[21] or the Board of Public Works may waive the State's right-of-recovery if it finds "good cause for releasing the transferor, transferee, or owner from this obligation."[22]

2. The Community-Facilities-Capital-Grant Regulations.

The Community-Facilities-Capital-Grant statute authorizes DHMH to adopt regulations implementing its provisions.[23] Those regulations are codified as Title 10, Subtitle 08, Chapter 02 of the Code of Maryland Regulations (COMAR). They define the term "nonprofit facility" to mean "a facility which is, or will be, *wholly owned* by and operated under §501(c)(3) of the Internal Revenue Code as a nonprofit organization."[24] The regulations define "wholly owned" as follows:

> (a) "Wholly owned" includes leased property, if the lease agreement is with the State for a State-owned building or State-owned property.
>
> (b) "Wholly owned" includes *leased property which is not State-owned, if:*
>
> > (i) Lease agreement is for a minimum of 30 years following the project completion or extends the right of purchase to the lessee; and
> >
> > (ii) *Lessor consents* to the recording of a notice of the State's right of recovery, under Health-General Article, §24-606, Annotated Code of Maryland, in the land records of the county or Baltimore City in which the facility is located.[25]

3. Constitutional Limit On County Debt and County Obligations.

The Maryland Constitution commands:

---

[20]*Id.*

[21]§24-606 (5).

[22]§24-606(g)(2).

[23]§24-607.

[24]COMAR 10.08.03 b. (14) (Emphasis added.)

[25]COMAR 10.08.03 B. (20). (Emphasis added.)

No County of this State shall contract any debt, or obligation, in the construction of any Railroad, Canal, or other work of internal improvement, nor give, or loan its credit to, or in aid of any association, or corporation, unless authorized by an Act of the General Assembly.[26]

4. The Express Powers Act.

In pertinent part, the Express Powers Act authorizes a charter county:

> To provide for the protection of the county property; to provide for the acquisition by purchase, lease, or otherwise, and condemnation of property required for public purposes in the county; to dispose of any real or leasehold property belonging to the county, provided the same is no longer needed for public use . . . ; and to provide for the leasing as lessor to the State or any political subdivision or other agency thereof, or to any county agency, or to any person, any property belonging to the county or any agency thereof, in furtherance of the public purposes of such county or agency, upon such terms and compensation as said county may deem proper, and after such disposition, grant or lease shall have been advertised once a week for three successive weeks in one or more newspapers of general circulation published in said county, stating the terms thereof and the compensation to be received therefor, and giving opportunity for objections thereto.[27]

PREVIOUS WRITTEN VIEWS OF THIS OFFICE

On at least two occasions within the last five years, members of this Office have expressed in writing the view that the County may neither consent to the recording of a notice of the State's right-of-recovery under the Community-Facilities-Capital-Grant statute nor accept the conditions required by that statute. The more recent of the two, a June 1,1995, memorandum to the Acting Director of Facilities & Services, stated "that the County property may not be so encumbered since the end result would be the encumbrance of County property to support a private debt." That advice rested on several bases:

> As a general rule the County does not have authority to mortgage or pledge its property. The Courts have held that the pledge of existing public property creates a debt. It has also been found that the pledge of existing revenue producing property is not distinguishable from the creation of debt. The school property is an existing public asset which, if encumbered by the language requested by [the lessee] and the State, could result in the creation of a private debt on the County land.

---

[26]Md. Const., Article III, §54.

[27]Md. Code, art. 25A, §5 (B). (Emphasis added.)

The memorandum also advised that Article III, § 54, of the Maryland Constitution prohibits the County from agreeing to the required notice because:

> If the County were to permit [a nonprofit lessee of County property] to record in the land records the requested language, then it could result in the County being liable to the State for the payment of the debt obligation of [the lessee] or, in essence, the County being a surety for [the lessee]. Under [Article III, Sec. 54 of] the Maryland Constitution, the County may not act as a surety for private obligations and cannot agree to have the requested language be recorded in the land records as it would obligate the County to guarantee a private debt.

The 1995 memorandum did not, however, consider whether the right-of-recovery provisions of the Community-Facilities-Capital-Grant statute themselves constitute an authorization by the General Assembly sufficient to exempt county lessors from the prohibitions of Section 54.

In a more detailed December 6, 1994, internal memorandum, another member of this Office concluded:

> The County is not obligated to finance or assist [a nonprofit organization] with its [community health facility] renovation costs. Moreover, it is doubtful whether the County has the legal authority to encumber [its property] in the manner proposed. In addition to the economic risks involved in connection with the State's potential lien, the County would be vulnerable to taxpayer suits challenging the constitutionality of its actions. Given the County's interest in assisting [the nonprofit organization], however, it has every reason to see that [the organization] receives its grant funds, so long as the County is protected. One possible approach would be to obtain an agreement from the Board of Public Works to waive the State's right of recovery against the County, as "owner" of the property.[28]

In reaching this conclusion, the 1994 memorandum identified several potential legal impediments:

- The Express Powers Act[29] does not grant the County the power to encumber County

---

[28]In construing an identical right-of-recovery provision in the Juvenile Justice Facilities Capital Program, Md. Code, art. 83C, §4-106, the Assistant Attorney General assigned as principal counsel to the Board of Public Works advised the Executive Secretary of the Board that "initial waiver or modification of the [right-of-recovery] provision is not an option available to the Board." The Board may waive only after a default has occurred. *See* January 21, 1994, letter from Assistant Attorney General Margaret Lee Norton to Executive Secretary Sandra K. Reynold.

[29]Md. Code, art. 25A, §5.

property, especially in light of Dillon's Rule;[30]

- "The County's power to lease its property is limited to those circumstances which are in furtherance of the public purposes of the County;"[31] and "[t]he County's power to 'dispose' of its leasehold property is similarly narrow and circumscribed, being limited to those situations where the property is no longer needed for public use;"[32]

- The requirements of the Community-Facilities-Capital-Grant statute might diminish the County's interest in the leased property to a level where it would no longer be considered a property interest "sufficient to ensure continuation of any needed public use," thereby constituting an impermissible "disposition" of property;[33]

- "Without special statutory authority or charter power, as a rule a municipal corporation has no authority to mortgage or pledge municipal property;"[34]

- The pledge of existing valuable, income-producing property of a political subdivision as security for the payment of borrowed money creates debt, contrary to the prohibition of Section 54 of Article III of the Maryland Constitution ; and

- Section 54 also prohibits a county from giving or loaning its credit to, or in aid, of any corporation unless authorized by the General Assembly.[35]

---

[30]Under Dillon's Rule, a municipal corporation may exercise only those powers: (1) expressly granted it; (2) those necessarily or fairly implied in or incident to the powers expressly granted it; and (3) those essential to the accomplishment of the declared objects and purposes of the municipal corporation—not simply convenient, but indispensable. *Montgomery County v. Maryland-Washington Metropolitan District*, 202 Md. 293, 304 (1953). "But with full recognition of this principle, the same author, in III Dillon (5th Ed.) 1581, in regard to a municipal corporation's power of alienation of its property states: 'Municipal corporations possess the incidental or implied right to alienate or dispose of the property, real or personal, of the corporation of a private nature, unless restrained by charter or statute; they cannot, of course, dispose of property of a public nature, in violation of the trusts upon which it is held, and they cannot, except under valid legislative authority, dispose of the public squares, streets, or commons.' " *Id.*

[31]Md. Code, art. 25A, §5(B).

[32]*Id.*

[33]Quoting 67 *Op. Att'y Gen.* 264 (1982) concerning the need, in a sale and leaseback of Harford County property, "to retain a possessory interest in the property which was 'sufficient to ensure continuation of any needed public use of that property.' "

[34]Quoting McQuillin, *The Law of Municipal Corporations*, §28,41 (3d Ed. 1990).

[35]Citing *John Hopkins University v. Williams*, 199 Md. 382, 397 (1951) for the proposition that §54 was adopted to prohibit the counties from all forms of suretyship, the memorandum acknowledged "[i]t is by no means certain that a pledge of the [property in question] would be construed as an unconstitutional loan of credit to a private entity . . . ," but viewed that construction as "at least a possibility."

The 1994 memorandum also did not consider whether the Community-Facilities-Capital-Grant statute itself constitutes an authorization sufficient to insulate counties from Section 54 restraints and satisfy any common-law or statutory requirements concerning the encumbrance or disposal of County property. Neither did this memorandum address the public purpose underlying the Community-Facilities-Capital-Grant Program in general and the funding of grants to nonprofit providers in particular.

ANALYSIS

1. Public Purpose.

The use of County property for a community mental health facility, addiction facility, or developmental disabilities facility clearly serves a public purpose when the County itself operates the facility. It also is clear that the mere leasing of public property for use by a private provider does not lessen the otherwise public purpose of that use.[36] Indeed, because State funds may be used only for a public purpose, the statutory authorization to make State grants to private providers for these purposes conclusively demonstrates the Legislature's view that the operation of the facilities listed in the Community-Facilities-Capital-Grant statute—even by private-nonprofit providers—serves a public purpose.

The leasing and "encumbrance" of the County's property for the purposes of the Community-Facilities-Capital-Grant Program, therefore, satisfies the public-purpose requirements of both the Maryland Constitution and Article 25A, §5(B). Furthermore, if authorized or required by state law, the "encumbrance" of the County's property in accordance with the Community-Facilities-Capital-Grant statute would not diminish the public purpose of the property and would not present the problem addressed by the Attorney General concerning the sale and leaseback of Harford County's property, *i.e.*, the need to retain in the property a possessory interest that is sufficient to ensure continuation of any needed public use of the property.[37]

2. The Express Powers Act.

The General Assembly, as required by the Constitution, has provided a grant of express powers to counties that adopt a charter form of government[38] In addressing the County's authority over county property and franchises, this Express Powers Act permit the County "to dispose of any real

---

[36]*Kelly v. Marylanders for Sports Sanity, Inc.*, 310 Md. 437, 462-463 (1987) (The expenditure of public funds for the construction of a stadium for lease to and the exclusive use of professional baseball constitutes a valid public purpose); *Williams v. Anne Arundel County,* 334 Md.109, 120-121 (1994) ("The decisions of this Court furnish multiple illustrations of . . . public purposes despite the fact that there was also a benefit to privately owned property from which the public at large could rightfully be excluded").

[37]67 *Op. Att'y Gen.* 264 (1982).

[38]Md. Code, art. 25A, §5 (the Express Powers Act).

or leasehold property belonging to the county, *provided the same is no longer needed for public use*."[39] This "disposition provision" is "essentially a codification of the common law rule long applicable to municipal corporations and similar forms of local government: '[a] municipal corporation cannot sell or dispose of property devoted to a public governmental use or purpose ... without special statutory or charter authority....' "[40] However, the very same subsection of the Express Powers Act also authorizes the County:

> to provide for the leasing as lessor . . . to any person, any property belonging to the county or any agency thereof, in furtherance of the public purposes of such county or agency, upon such terms and compensation as said county may deem proper....[41]

Applying the rule that a statute should be read so that all its parts harmonize with each other, [42] it is apparent that the restraints of the Express Powers Act's "property disposition" provision do not apply to the leasing of County property in furtherance of a public purpose of the County because such leases are expressly permitted by the "leasing" provision of the very same subsection of the Act.[43] The leasing of County property for use as a mental health, addiction treatment, or developmental disabilities facilities, therefore, is not proscribed by Express Powers Act. (Indeed, when the leased premises is a former school site that was transferred to the County Council by the Board of Education under the "disposition of real property" provisions of the State Education Law, that law expressly authorizes the Council to lease the property.[44])

As to the encumbrance of County property, it is not necessary that the Express Powers Act give the County that power. That Act is not an exclusive source of County authority. The General Assembly may, and has given charter counties, additional power through the enactment of other

---

[39]Art. 25A, §5(B).

[40]67 *Op. Att'y Gen.* at 265-266, quoting 10 McQuillin, *Municipal Corporations*, §28.38 (3rd ed. 1981).

[41]Art. 25A, §5(B).

[42]*Maguire v. State*, 192 Md. 615, 623 (1948).

[43]Whether this analysis also applies to the "mandatory referral" requirements of Md. Code, Art. 28, §7-112 (the Regional District Act) that prohibit every public board, body, or official from *disposing* of public land within the district without the approval of the Maryland-National Capital Park and Planning Commission is a question we need not address in this opinion because the inquiry arises in the context of property that already has been leased to a nonprofit provider for these purposes.

[44]Md. Code, Education Article, §4-115 (c) ("[I]f, with the approval of the State Superintendent, a county board finds that any land, school site, or building no longer is needed for school purposes, it shall be transferred by the county board of education to the county commissioners or county council and may be used, sold, *leased*, or otherwise disposed of, except by gift, by the county commissioners or county council'). (Emphasis added.)

public general laws.[45] The authority to enter into these leases could arise, therefore, from the Community-Facilities-Capital-Grant statute itself. If that statute authorizes counties to consent to the recording of a notice of the State's right-of-recovery and accept liability as provided in that law, the limitations of the Express Powers Act will not restrain that authority. Indeed, even the Charter of Montgomery County would yield to such public general law authorizations.[46]

3. Pledge of Public Property or County's Credit.

To comply with the right-of-recovery requirements of the Community-Facilities-Capital-Grant statute is merely to provide security to the State of Maryland for a State grant (*albeit* to a private entity) to fund improvements to County property for a private, nonprofit facility that serves a public purpose. It does not constitute either *a pledge of public property as security for the payment of borrowed* money or the *loaning of the County's credit* in aid of a corporation. No money is borrowed or loaned, and the grant agreement is not secured by the County's credit. Rather, the County's property is subject to a potential lien and the County, along with its lessee, is jointly liable to the State for the repayment of the statutory share should the property not be improved and used for the purposes of the grant for the prescribed period. Furthermore, even if this transaction did constitute either of those activities, the prohibitions of Article III, §54, would not apply if the Community-Facilities-Capital-Grant statute authorizes counties, as the lessors of private-provider lessees, to comply with these statutory requirements. In the words of the Constitution, these activities would be "authorized by an Act of the General Assembly."

4. Construction of the Community-Facilities-Capital-Grant Statute.

The question presented, therefore, turns on a question of statutory construction: Whether the General Assembly, in enacting the Community-Facilities-Capital-Grant statute, intended that a county, as the owners of property leased to a private-non-profit-facility grantee, be subject to the right-of-recovery provisions of that law. If the Legislature intended to include counties, then the County may consent and thereby expose its property to a lien in favor of the State and accept joint

---

[45]*See, e.g.,* Md. Code, Art. 28, §§ 2-101 *et seq.* (The Regional District Act); Health-General, §§2-301 *et seq.* (The Local Board of Health Act). *See also,* Md. Code, art. 83A, §5-710, which authorizes certain counties to undertake a loan or guarantee under the Loans to Projects in Enterprise Zones Act, "notwithstanding any other provision of law and without regard to any limitations set forth in its charter or other applicable public local or public general law that would otherwise apply, and without complying with any procedures set forth in its charter or other applicable public local or public general law that would otherwise be required."

[46]Md. Const., Art. XI-A, §1 (A county charter is "subject only to the Constitution and Public General Laws of this State . . ."). *See also Montgomery County v. Bd. of Supervisors of Elections for Montgomery County,* 311 Md. 512, 514, 536 A.2d 64 ,642 (1988) ("If a provision of a county charter . . . conflicts with any public general law, the charter provision may not be given effect").

and severable liability as provided in the statute.[47]

a. The Rules of Statutory Construction. A statute is the written will of the Legislature. The cardinal rule for interpreting a statute, therefore, is to ascertain and carry out the intent of the General Assembly,[48] and the beginning point is the language of the law itself.[49] However, "ascertainment of the meaning apparent on the face of a single statute need not end the inquiry."[50] The Court of Appeals has told us also to "look to the context surrounding the enactment of a statute to determine the intention of the [L]egislature."[51] "[W]e do not read particular language in a statute in isolation or out of context; rather, we construe statutory language in light of the Legislature's general purpose and in the context of the statute as a whole."[52] Thus, we may and often must consider other external manifestations or persuasive evidence: a bill's title[53] and function paragraphs;[54] the cause or necessity of the law;[55] its objectives and purposes;[56] its history;[57] applicable reports;[58] amendments that occurred as it passed through the legislature;[59] its relationship to earlier and subsequent legislation;[60] the statute read as a whole;[61] prior and contemporaneous statutes;[62] and other material

---

[47]Consent, of course, must be in accordance with the Charter and laws of Montgomery County, unless the Community-Facilities-Capital-Grant statute or some other public general law provides otherwise.

[48] *Tucker v. Fireman's Fund Ins. Co.*, 308 Md. 69, 73 (1986).

[49] *Morris v. Prince George's County*, 319 Md. 597, 603 (1990).

[50]*Kaczorowski v. Baltimore*, 309 Md. 505, 514 (1987).

[51]*Comptroller v. Jameson*, 332 Md. 723, 733 (1993).

[52]*State v. Crescent Cities Jaycees Foundation, Inc.*, 330 Md. at 468.

[53]*Truitt v. Board of Public Works*, 243 Md. 375, 394 (1966)

[54]*Kaczorowski*, 309 Md. at 514.

[55]*Smith v. Higinbothom*, 187 Md. 115, 125 (1946).

[56]*Clark v. State,* 2 Md. App. 756, 761 (1968).

[57]*Welsh v. Kuntz*, 196 Md. 86, 93 (1950).

[58]*Allers v. Tittsworth*, 269 Md. 677, 683 (1973).

[59]*Kaczorowski*, 309 Md. at 514.

[60]*Welsh*, 196 Md. at 86.

[61]*Barnes v. State*, 186 Md. 287, 291 (1946), *cert. den.* 329 U.S. 754.

[62]*Department of Tidewater Fisheries v. Sollers*, 201 Md. 603, 611 (1953).

that fairly bears on the fundamental issue of legislative purpose or goal.[63] This is the context within which particular statutory language is to be read in a given case.[64]

It also "is a basic and long-standing principle of statutory construction [variously referred to as a "rule of strict construction" or "an exemption or exception principle"] that the State is not deemed to be bound by an enactment of the General Assembly unless the enactment expressly names the State or manifests a clear and indisputable intention that the State is to be bound."[65] This rule or principle "is premised on a policy of preserving for the public the efficient, unimpaired functioning of government,"[66] and on "the rule that the purpose of most legislation is to govern, i.e., to direct the application of the power of government in arranging the affairs of people who are subject to it."[67] Because counties are political subdivisions of the State, this exemption principle extends to Montgomery County.[68] Thus, for example, "[t]he subdivisions of a state, including administrative agencies, counties, cities, and school districts, against the claims of individuals, are recognized as branches of the 'sovereign,' so that they are not bound by the general language of a statute," unless, of course, the statute clearly manifests otherwise.[69]

b. The Language of the Community-Facilities-Capital-Grant Statute. On its face, the Community-Facilities-Capital-Grant statute expressly requires that all grantees, including a county grantee, consent to the recording of a notice of the State's right-of-recovery and, if a grantee, including a county grantee, defaults it is liable to the State and its property is subject to lien and attachment. There is, however, no similar clarity about the County's ability to consent to the recording of a notice and accept liability when its sole connection with the grant is as the owner of County property leased to a nonprofit grantee. On its face, the statute does not address that situation.

---

[63]*Kaczorowski,* 309 Md. at 514-15.

[64]*Id.*

[65]*City of Baltimore v. State*, 281 Md. 217, 223-224 (1977), quoting Mr. Justice Story in *State v. Milburn*, 9 Gill 105, 118 (1850), as follows:

> " '[G]eneral acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases, the reasoning applicable to them applies with very different, and often contrary force, to the government itself. It appears to me, therefore, to be a safe rule, founded in the principles of the common law, that the general words of a stature ought not to include the government, or affect its rights, unless the construction be clear and indisputable upon the text of the act.' "

[66]*Sutherland Statutory Construction* (5th Ed.) §62.01.

[67]*Id.*

[68]*Glascock v. Baltimore County*, 321 Md. 118, 122 (1990) ("[A]s a matter of statutory construction, our holding in *City of Baltimore v. State, supra,* extends to Baltimore County").

[69]*Sutherland Statutory Construction, supra.*

The fact that the statute's right-of-recovery provisions apply equally to both kinds of applicants—governmental and nonprofit—*suggests* that the General Assembly intended to apply those requirements to counties across the board—whether acting as applicants or as the lessors of other applicants—public or private. Although it is rather unusual to subject public property to a lien and attachment, nevertheless, if, as is clear here, the Legislature applies a right-of-recovery policy to counties' acting as grantees (the more typical county role in this capital grant program), it would seem to follow, *a priori*, that the Legislature also intended to apply that policy in those relatively few instances when counties participate only as lessors.[70] In other words, if the right-of-recovery policy applies universally to all grantees, including county grantees, it also would seem to be intended to apply universally to all lessors of grantees, including county lessors. That statutory *suggestion* or implication, however, falls far short of a *manifestation* of a "*clear and indisputable*" intention that the County be bound by the lessor provisions. So, too, the fact that the statute expressly exempts property leased from the State from the notice and liablity requirements might *suggest*, but does not clearly and indisputably manifest, an intention to subject counties to those obligations.[71]

c. The Legislative History of the Community-Facilities-Capital-Grant Statute. The Community-Facilities-Capital-Grant program is rooted in the 1960s. Originally, State general obligation bonds for this program were authorized in the General Construction Loan Act, which did not contain "programmatic" provisions such as the terms and conditions of the grants.[72] Beginning in 1973 and continuing until the 1990 Regular Session, this capital program was the subject of a separate bond bill—originally called the Community Mental Health Center Components or Mental Retardation Facilities Act, later the Community Mental Health Facilities, Addiction Facilities, and Developmental Disabilities Facilities Loan Act—that contained both the bond authorization and the programmatic provisions."[73] The 1973 Act, for example, was a separate bond bill that made grants available to components and facilities "wholly owned by and operated" by a county, municipality, or nonprofit organization, and generally authorized the State to exercise an unspecified "right of recovery of a portion of the original grant" if the "sponsor" defaulted within 15 years after

---

[70]I am advised by the Acting Executive Secretary to the Board of Public Works that Montgomery County is the only jurisdiction in which this question has arisen—perhaps because Montgomery County is the only subdivision that leases its property for these purposes.

[71]§24-601(d)(3). (It is more likely that this exemption springs solely from the absurdity that would arise if the statute required the State, as a lessor, to consent to a notice of the State' right-of-recovery and accept liability to itself for its lessee's default.)

[72]*See, e.g.,* Laws of Md. (1969), Ch. 409; Laws of Md. (1972), Ch.179.

[73]*See* Laws of Md. (1989), Ch. 126; Laws of Md. (1988), Ch. 666; Laws of Md. (1997) Ch. 461; Laws of Md. (1986) Ch. 315; Laws of Md. (1985) Ch. 542; Laws of Md. (1984) Ch. 330; Laws of Md. (1983) Ch. 570; Laws of Md. (1982) Ch. 534; Laws of Md. (1981) Ch. 630; Laws of Md. (1980) Ch. 770; Laws of Md. (1979) Ch. 573; Laws of Md. (1978) Ch. 899; Laws of Md. (1977) Ch. 702; (1975) Laws of Md. Ch. 417; Laws of Md. (1974) Ch. 648; Laws of Md. (1973) Ch. 286.

completion of construction. Grants were not available for leased facilities.[74] The General Assembly substantially rewrote these programmatic provisions in 1974. Although grants continued to be available only to facilities "wholly owned" by a county, municipality, or nonprofit organization and operated under its authority, the 1974 bond bill expressly provided, for the first time, that if, within fifteen years after completion of construction of the facility, an institution was sold or transferred to any entity not eligible to be a grantee or ceased to be a public or nonprofit facility, the State was "entitled . . . to recover from" the transferor or transferor in the first instance or the grantee or "*owner thereof*" in the latter instance.[75] Moreover, whereas the 1973 Act had authorized the waiver of the State's right-of-recovery if the Secretary of Health and Mental Hygiene determined there was good cause for releasing "*the sponsor*" from its obligations, the 1974 Act authorized such a waiver if the Secretary found good cause "for releasing *the applicant or other owner*" from those obligations.

In 1978, the General Assembly amended the boilerplate "programmatic" language to require, among other things, that a notice of the amount the State is entitled to recover be recorded among the land records and "constitute a lien upon the real property of the institution" from the date the Secretary determined that a facility had been sold or transferred impermissibly or ceased to be a public or private facility.[76] The boilerplate was expanded in the following Session to include a requirement that the State's right-of-recovery be recorded in the land records *before* the release of any grant funds to the facility.[77] The right-of-recovery period was extended from 15 to 30 years in 1988.[78] The 1989 bond bill defined the term "wholly owned," for the first time in the history of the program, to included leases. The lease, however, had to be "for a minimum of 30 years following

[74]Laws of Md. (1973), ch 286, sec. 5.

[75] If, at any time within fifteen (15) years after completion of construction, a facility . . . :

> (i) is sold or transferred to any person, agency, or organization which would not itself qualify as an applicant under the terms of this Act, or which is not approved by the Secretary of Health and Mental Hygiene, or
>
> (ii) ceases to be a public or nonprofit facility . . . then the State shall be entitled to recover . . . the owner thereof an amount bearing the same ratio to the then value (as determined by agreement . . . or [court] action . . .) of so much of the institution as constituted an approved project, as the amount of the State participation bore to the cost of the construction under that project. This right of recovery may not constitute a lien upon the property of the institution prior to this determination. The Secretary ... may waive the State's right of recovery if he determines that there is good cause for releasing the applicant or other owner from this obligation.

Laws of Maryland (1974), Ch. 648, sec. 5.

[76]Laws of Maryland (1978), Ch. 899, sec. 1.

[77]Laws of Maryland (1979), Ch. 573, sec. 1.

[78]Laws of Maryland (1988), Ch. 666, sec. 1. (This bill also substituted the term "facilities" for "components.")

project completion," and the lessor had to consent "to the recording of a notice of the State's right of recovery in the land records of the county or Baltimore City in which the facility is located.[79]

By 1990, the Community-Mental-Health-Capital-Facilities Program was one of only a handful of the State's many capital programs that were authorized in separate bond bills containing "programmatic aspects" or requirements. The requirements of the other programs had been codified, and were referenced in bond authorizations. In 1990, because of changes made in the State's capital budget presentation, all of the State's capital programs were placed in the General Consolidated Loan Act (the State's so-called "Capital Budget"), and legislation was introduced to codify the programmatic aspects of those that previously had such provisions in their bond bills.

The codification of the Community-Mental-Health-Capital-Facilities Program was proposed by House Bill 1390, a DHMH departmental bill.[80] "Compendia" or position papers submitted to the House Ways and Means Committee and the Senate Budget and Taxation Committee by the then Maryland Department of Budget and Fiscal Planning (DBFP) confirmed that H.B. 1390 codified the "administrative aspects" of the Community-Capital-Facilities Program because of changes made in the State's capital budget presentation:

> The state operates forty-seven different capital programs. The programmatic aspects of all but six of these programs are in statute. The remaining six, including the Community Mental Health Capital Program, have been authorized each year in a bond bill. That authorizing legislation typically included the amount of debt to be authorized and certain programmatic aspects such as program eligibility, loan conditions, limits on state contributions and priority rankings.
>
> In discussions with the Attorney General's Office and bond counsel on the consolidated capital budget bill, it was determined this programmatic language should not be included in the consolidated capital budget bill. However, it is necessary to reference the programmatic aspects of each program in the bond authorization. The options available to accomplish this include referring to prior year's Chapter Law (uncodified) or codifying the programmatic features of the program consistent with the majority of the state's capital programs. We believe the codification of this program is the most appropriate solution and requires favorable consideration of House Bill 1390.[81]

---

[79]Laws of Maryland (1989), Ch. 126, sec. 2 (4) (e).

[80]*See also* House Bill 626 (Partnership Rental Housing Program); House Bill 1212 (Senior Citizen Activities Capital Improvement Grants Program); House Bill 1387 (Adult Day Care Centers Capital Program); House Bill 1388 (Juvenile Facilities Capital Program); and House Bill 1389 (Community Colleges Capital Program).

[81]March 7, 1990, and April 2, 1990 POSITION ON HOUSE BILL 1390, H.B. 1390 bill file, Dept. of Legislative Services, Annapolis, MD.

The Fiscal Note on House Bill 1390, as introduced, pointed out that the State had a right to recover a specified portion of the value of the property if, within 30 years after a project is completed, the property is either sold to an entity other than a county, municipality, or nonprofit organization or is not being used as an Adult Day Care Center. The Note, advised, nevertheless, that the bill would have no state or local fiscal impact.[82] So, too, Montgomery County supported the legislation without any comment on the State's right-of-recovery.[83]

The bill was reported to the floor of the House with a favorable report on March 19th. A document that appears to be the Floor Report of the House Ways and Means Committee confirmed the background given by DBFP, stated that the fiscal effect of the bill was "none," and reported that there was no testimony in opposition in committee. On March 20th, the bill passed second and third reading in the House without amendment and was sent to the Senate, where it was referred to its Budget and Taxation Committee. The Senate Committee heard the bill, amended it, and reported it "favorable with amendments" to the floor of the Senate on April 4th. The Committee's Floor Report advised the full Senate:

> House Bill 1390 is a departmental bill which codifies the financial program administered by the Department of Health and Mental Hygiene, under which local governments and nonprofit organizations are provided with state grants to acquire, renovate, and equip community mental health, addiction, and developmental disabilities facilities in residential settings. *This bill merely codifies this existing program*, which was previously funded through an annual bond bill, but is now part of the consolidated budget bill.

* * *

---

[82]Maryland General Assembly, Department of Fiscal Services, Division of Fiscal Research, HB 1390. (This advice may have been founded on the view that the bill was merely codifying existing bond bill requirements and, therefore, created no new fiscal impact.)

[83]In a letter to the House Ways and Means Committee, a Special Assistant to the County Executive wrote:

> The Montgomery County Coordinating Council on Substance Abuse supports House Bill 1390. State participation in the funding of capital projects covered by this bill is vital to the counties who must provide these services. With the vast increases that we are seeing statewide in the number of persons needing or wanting treatment in these areas, it is vitally necessary that the State enter into a partnership with the counties to provide the funding for the facilities needed to provide this treatment.
>
> As the number of drug arrests continue to rise, so will the need for treatment facilities. We must look forward towards this eventuality and plan now for the facilities necessary to accomplish this. This bill will allow this to occur and we urge you to support it.

March 15, 1990, letter from Maxine H. Counihan, Ed.D.

This amendment provides that leased facilities may be granted funds if they meet certain criteria:

- The lease is for a term of 30 years; or
- The grantee has a right to purchase; and
- The State's right of recovery is recorded in the land records of the political subdivision in which the facility is located; or
- The lease agreement is with the state for a state-owned building.[84]

The bill, as amended, passed second and third reading in the Senate, and was returned to the House for concurrence in the amendments. In a document, entitled "CONCURRENCE", the House Ways and Means Committee moved the House to concur in the Senate amendments, stating, "The Senate Amendments are technical, making the lease provisions consistent with other capital facilities statutes." The bill as amended passed on April 6th, and subsequently was approved by the Governor as Chapter 214 of the Laws of Maryland (1990).[85]

---

[84]In fact, the first and third of these lease requirements were in the bill as introduced, and were merely a continuation of the lease requirements first adopted in the 1989 bond bill. The actual amendment was as follows:

(D) 'WHOLLY OWNED' INCLUDES LEASED [property], IF THE:

(1) *(I)* LEASE IS FOR A MINIMUM TERM OF 30 YEARS FOLLOWING PROJECT COMPLETION; OR

(II) THE LEASE AGREEMENT EXTENDS THE RIGHT OF PURCHASE TO THE LESSEE; AND

(2) LESSOR CONSENTS TO THE RECORDING, IN THE LAND RECORDS OF THE POLITICAL SUBDIVISION IN WHICH THE FACILITY IS LOCATED, OF A NOTICE OF THE STATE'S RIGHT OF RECOVERY ~~IN THE LAND RECORDS OF THE COUNTY OR BALTIMORE CITY IN WHICH THE FACILITY IS LOCATED AND~~, AS PROVIDED UNDER § 24-606 OF THIS SUBTITLE; OR

~~(3) LEASE AGREEMENT EXTENDS THE RIGHT OF PURCHASE TO THE LESSEE; OR~~

~~(4) LEASE AGREEMENT IS FOR A MINIMUM OF 30 YEARS~~

(3) LEASE AGREEMENT IS WITH THE STATE FOR A STATE-OWNED BUILDING.

Laws of Md. (1990), Ch. 214, p. 750. (H.B.1388, concerning the Juvenile Facilities, and H.B. 1387, concerning Adult Day Care Centers, also were amended to add the "right to purchase" provision, but not the "state lease" provision. H. B. 1212, concerning Senior Citizen Centers, which, as introduced, had not defined the term "wholly owned" was amended to add an identical definition of the term.)

[85]Bills containing substantially similar lessor and right-of-recovery provisions were passed for the Juvenile Justice Facilities Capital Program, the Adult Day Care Centers Capital Program, and the Senior Citizen Activities Center Capital Improvement Grant Program. *See* Laws of Maryland (1990) Ch. 389 (House Bill 1388-Juvenile Justice, codified at Md. Code, Art. 89C,§§4-101 *et seq*); Ch. 388 (House Bill 1387-Adult Day Care, codified at Health-General §§ 24-701 *et. seq.*); and Ch. 206 (H.B. 1212-Senior Citizens, codified at Article 70B, §§26 *et seq.*).

In 1993, House Bill 194, a DHMH departmental bill, was introduced "for the purpose of extending and clarifying the State's right of recovery to certain funds disbursed under the Community Mental Health, Addiction, and Developmental Disabilities Facilities Capital Program. . . ."[86] In pertinent part, that legislation amended §24-606 of the Health-General Article to add the following:

> (A) IN ACCORDANCE WITH THIS SECTION, THE STATE SHALL HAVE THE RIGHT TO RECOVER FUNDS DISBURSED UNDER THIS SUBTITLE.
>
> (B) IN THE EVENT OF FAILURE TO COMPLETE A PROJECT OR FAILURE TO COMMENCE OPERATION OF A FACILITY, THE STATE MAY RECOVER FROM THE RECIPIENT OF THE FUNDS DISBURSED FOR THE PROJECT OR FACILITY OR THE OWNER OF THE PROPERTY AN AMOUNT EQUAL TO THE AMOUNT OF STATE FUNDS DISBURSED FOR THE PROJECT, TOGETHER WITH ALL COSTS AND REASONABLE ATTORNEYS FEES INCURRED BY THE STATE IN THE RECOVERY PROCEEDINGS.[87]

According to the DHMH position paper contained in the bill file, "the proposed change in the law would enable the State to exercise it's 'right of recovery' on State funds expended through this program (i.e., General Obligation Bonds) for a facility that has not yet completed construction or fails to commence operation of the facility."[88] The Fiscal Note stated the same purpose and advised:

> Preliminary evaluation of this legislation indicates that enactment would not create a fiscal impact on state and/or local governments. If further evaluation indicates a fiscal impact, a revised fiscal note will be issued.[89]

The fiscal note also reported:

> In the twenty years of the Community Mental Health, Addiction, and Developmental Disabilities Facilities Capital Program, there have been no defaults and none are expected.

A bill summary, apparently prepared by the House Environmental Matters Committee's staff, advised that the bill gave the State the right to recover funds disbursed under the Program in the

---

[86]Laws of Maryland (1993), Ch. 31 (House Bill 194).

[87]*Id.*

[88]DHMH (position paper), Bill No. 194, Committee FIN[ance].

[89]Md. Gen. Assembly, Dept. of Fiscal Services, Fiscal Note, HB 194, Environmental Matters, Referred to Finance.

event of failure to complete a project or to commence operation of a facility and stated, among other things, that the State could recover from the recipient of the funds or the owner of the property.[90] The bill passed both houses without amendment and was signed into law.[91]

The legislative history of the Community-Facilities-Capital-Grant statute—as originally enacted, as amended, and as reflected in the programmatic provisions of its predecessor bond bills—reveals, therefore, that the General Assembly never addressed the question of whether the State's right-of-recovery was intended to apply to a county lessor and impliedly authorize counties to consent to the recordation of that right and accept the resulting liability. So, too, are the legislative histories of the statutes regarding the State's substantially identical right-of-recovery in the Juvenile Services Facilities Capital Program, the Adult Day Care Centers Capital Program, and the Senior Citizen Activities Centers Capital Improvement Grant Program. There simply is no evidence that the Legislature ever considered the effect of this legislation or its predecessor bond bills on county lessors. The strict-construction rule or County-exemption principle, therefore, would teach that the right-of-recovery provisions of the Community-Facilities-Capital Grant statute do not apply to County leases.[92]

Like all rules of statutory construction, however, this rule is subject to "limitations and exceptions:"[93]

> Since the rule is founded on the policy of preserving the interests of government and the public from the *injurious* consequences of a statute, the validity of the rule is destroyed where a statute is advantageous to those interests. So a general statute that is advantageous to the sovereign will be liberally interpreted to secure for it the same rights, privileges and protection granted to individuals. * * *
>
> The stringency of the rule should be relaxed where the demands of a contrary policy include the government within the purpose and intent of a statute. Such a policy may be reflected from one or both of two sources: *First*, where the objective of a statute could not be accomplished without including the government. * * * *Second*, a contrary policy is indicated where the inclusion of a particular activity within the meaning of the statute would not vitally interfere with the processes of government.

---

[90]Unattributed document (entitled "COMMUNITY MENTAL HEALTH, ADDICTION, AND DEVELOPMENTAL DISABILITIES FACILITIES PROGRAM; HEARING: 1/20/93; VOTE: 24:0:0:2) in the bill file of the Department of Legislative Services.

[91]Laws of Maryland (1993), Ch. 31.

[92]This, in turn, would raise the question of whether a nonprofit applicant is ineligible for a State grant because it cannot satisfy the lessor-consent-and-liability requirements or is eligible because those requirements are not applicable to a County lessor or its lessee.

[93]*Sutherland Statutory Construction* (5th Ed.) §62.02.

> This is illustrated in the distinction that is commonly made between cases where the government is pursuing a "proprietary" function, and those where it is operating in its "governmental" capacity. The former is held subject to general legislative regulations.[94]

The rule, therefore, is founded on public policy and immunity grounds, and there is "no hard and fast rule. "The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent . . . to bring state or nation within the scope of the law."[95] Indeed, because the rule is founded "in no small part in the doctrine of governmental immunity,"[96] "[it] has no application where no impairment of sovereign powers will result, where immunity has been waived, or where the government is given, rather than deprived of, powers."[97] It has been said, therefore, that the rule "has less force where nongovernmental functions are being exercised by the governmental agency whose authority may be subject to a statutory provision."[98]

Although there are no reported Maryland decisions addressing the specific question presented by your request for advice, there is pertinent Maryland caselaw. In *Board of Education v. Town of Riverdale*,[99] the Court of Appeals concluded that holding a local government liable to suit in tort by the State or a State agency is not inconsistent with the public policy principles underlying governmental immunity from tort suit.

> [G]overnmental immunity protects the State from the coercive control of its own agencies (the courts), prevents any burdensome interference with the State's governmental functions, and preserves the State's control over its agencies and funds. Allowing [a local government] to assert immunity in this case would interfere with each of these principles and would be inconsistent with the State's sovereignty.[100]

In *City of Baltimore v. Comptroller*,[101] the Court reviewed its decisions on the attachment of

---

[94] *Id.* (Emphasis in original.) (Citations omitted.)

[95] *United States v. Cooper Corp.*, 312 U.S. 600, 604-605 (1941).

[96] *United States v. Coumantaros*, 165 F. Supp. 695, 700 (D. Md. 1958), citing *Ohio v. Helvering*, 292 U.S. 360, 368-369 (1934)

[97] *Id.*

[98] *Sutherland Statutory Construction* (5th Ed.) §62.02.

[99] 320 Md. 384 (1990).

[100] *Id.* at 391.

[101] 292 Md. 293 (1982).

funds in the hands of public official and found that its cases consistently had adhered to the rule, announced in 1855,[102] that attachments do not lie against counties and cities.[103] The particular history of that area of the law and the continuing absence of any clear statutory authorization ultimately caused the Court to decide not to apply a statute generally authorizing the attachment of wages of an employee.[104] The Court, however, carefully noted the competing interests that had led to different results. In *Phillips v. Baltimore City*, for example, the Court construed the general venue statute as not embracing municipal corporations because "[t]o permit . . . public duties to be hindered or delayed in their performance, in order that *individuals or private corporations* might more conveniently collect their private debts, would be to pervert the great object of the creation of municipal corporations."[105] In *Rockville v. Randolph,* however, the Court sustained a paternity-proceeding order directing the City of Rockville to make weekly child support payment deductions from an employee's paycheck because:

> we have not a creditor in pursuit of the collection of a *private* debt, *but a superior apparatus of government* soliciting an order of court *directing an inferior apparatus* to hand over the part of money due an employee which is not a debt but an obligation to his dependent, absent the payment of which the superior apparatus must pay out of public funds a like amount to the employee's dependent.[106]

The cases suggest, therefore, that, both as an aspect of governmental immunity and a matter of public policy, the County-exemption principle should not be applied to the State's right-of-recovery provisions under the Community-Facilities-Capital-Grant statute. Governmental immunity is not

---

[102]*See Baltimore v. Root*, 8 Md. 95 (1855).

[103]292 Md. at 301, citing, *inter alia*, "*Wilson v. Ridgely*, 46 Md. 235, 248 (1877) ('Though the provisions of the attachment laws of this State are very broad, we cannot believe that they were ever intended to authorize attachments to be laid upon funds in the hands of State or municipal officers as such, and thereby impose upon them and the public service such annoyances, inconveniences and interruptions as are described [in *Bulkley v. Eckert*].'); *Keyser v. Rice*, 47 Md. 203, 213 (1877) ('From considerations of public convenience, the Courts have long since decided, that attachments would not lie against the salaries of public or municipal officers . . . .'); *Dale v. Brumbly*, 98 Md. 468, 56 A. 807 (1904) (Root -like analysis applied to attachment laid in hands of clerk of circuit court); *Lawrence v. Commercial Banking Corp.*, 165 Md. 559, 561-62, 169 A. 69, 70 (1933) ('It is well settled in this state that wages or salaries of public officers or agents are not attachable. This results from the immunity of the government from suit as well as from principles of public policy.'). . . ."

[104]"Our cases have said that the general provisions of attachment statutes were not intended to include public officials as garnishees, and we have long held that such attachments do not lie. It has been seen that special statutes have been enacted which expressly authorized the State, as creditor, to reach credits of its debtor in the hands of public officials. There is no such special authorization under the wage garnishment statute or under the Retail Sales Tax Act. The historic pattern has been one of exclusion by construction in the absence of clear statutory authority." 292 Md. at 311.

[105]110 Md. 431, 440 (1909), quoted at 292 Md. 303.

[106]267 Md. 56, 62 (1972), quoted at 292 Md. 303. (Emphasis added.)

designed to insulate counties from claims by the State, and the public policy balancing test weighs heavily in favor of the State recovering and replenishing public funds spent for improving the property of its offspring. Just as a local government is not immune from a tort action brought by the State because suit by the State is not inconsistent with the public policy principles underlying governmental immunity,[107] so, too, allowing the State to exercise a statutory right-of-recovery against a County lessor to recover grant funds and replenish the Annuity Bond Fund does not offend those principles. There is, therefore, strong support for the proposition that the County-exemption principle does not apply to the construction of a statute involving the liability of lessors to the State.

Absent the applicability of the County-exemption principle, the overall history and context of the Community-Facilities-Capital-Grant statute supports the construction that its right-of-recovery provisions apply to County lessors. Those provisions are designed to ensure that a facility funded by a grant is constructed or renovated as represented in the application and that it is used for at least 30 years thereafter for the purposes specified. They provide, in the event of certain defaults under the grant, for the State to obtain a judgment against the grantee and the owner of the property, for the judgment to become a lien on the property, and, if necessary, for the lien to be satisfied out of the proceeds of a sale of the property. There is no question about the applicability of these provisions to a county that receives a grant for a facility its operates on county property. The statute clearly applies. In the event of a default, the county grantee is liable and its property is subject to a lien and sale to reimburse the State for the funds granted for improvements to the property. It also is clear that these right-of-recovery provisions apply to all grantees—including counties—that lease the property on which they operate a facility. It is only when a county's participation is solely as the lessor of a grantee that the statute is less than clear about respect to the State's right of recovery.

In the face of this general statutory scheme, however, the absence of any expression of intent to exempt County lessors from the right-of-recovery provisions should be construed to reflect an intention to apply those provisions to all lessors, including County lessors. In short, the general purpose and context of the statute as a whole suggests that the State's right-of-recovery is intended to apply to all grant property, whether owned by a private or governmental grantee or leased from a private or governmental lessor. *A priori*, the statute authorizes counties to participate in the program subject to the State's right-of-recovery.

CONCLUSION

The general purpose and context of the Community-Facilities-Capital-Grant statute as a whole demonstrates a legislative intent that the right-of-recovery provisions apply to all lessors, including

[107] *Board of Education v. Town of Riverdale*, 320 Md. 384, 391 (1990) ("[H]olding that local government tort immunity has no application in a suit by the State or a State agency is consistent with the public policy principles underlying governmental immunity from tort suit. [G]overnmental immunity protects the State from the coercive control of its own agencies (the courts), prevents any burdensome interference with the State's governmental functions, and preserves the State's control over its agencies and funds. Allowing [a local government] to assert immunity in this case would interfere with each of these principles and would be inconsistent with the State's sovereignty").

counties. The implementing regulations support that construction. Therefore, although the County is not obligated to finance or assist a nonprofit organization with the construction, renovation or expansion of a private community health facility, it may, as the lessor of property to a nonprofit lessee applying for a Community-Facilities-Capital-Grant, consent to the recording of a notice of the State's right-of-recovery under the Community-Facilities-Capital-Grant statute, and thereby accept statutory joint and severable liability, in the event of certain defaults, for the pro-rata costs of grant-funded improvements to its property.[108]

We caution, however, that the question presented is, at best, a close question of first impression. Given this state of the law, our advice cannot be entirely free from doubt. Furthermore, although a concurring opinion of the Attorney General could be helpful, it could not provide certainty because it would not be binding on the courts. The only way to proceed with certainty, absent a dispositive court decision, is to obtain clarifying state legislation.

We also recommend:

(1) Unless the Community-Facilities-Capital-Grant statute is amended to exempt County lessors from the State's right-of-recovery, the County should require that lessees who seek the County's consent to the recording of a notice of that right:

(a) indemnify the County from its resulting exposure to statutory joint and severable liability and provide satisfactory security for that indemnification, *e.g.*, insurance, or

(b) give the County the option to acquire and provide for the operation of the facility in the event of a default by the grantee; or

(c) when appropriate, both of the above.

(2) Unless the Community-Facilities-Capital-Grant statute is amended to provide otherwise, the long-term fiscal implications of a decision to consent to the recording of a notice of the State's right-of-recovery should be subjected to the review and approval procedures for undertaking a financial obligation that is binding beyond the current fiscal year, including submitting the proposal to the County Council for approval by resolution.

Finally, we note the need for corresponding action with respect to the substantially similar right-of-recovery provisions in the Juvenile Justice Facilities Capital Program, the Adult Day Care Centers Capital Program, and the Senior Citizen Activities Center Capital Improvement Grant Program.

---

[108]Because it is silent as to the process by which a county consents, the Community-Facilities-Capital-Grant statute does not supercede or permit the bypassing of any charter, local law, or administrative requirement otherwise applicable.

We trust that this advice is fully responsive and of assistance.

I:\GJ\GARREJ\OPINIONS\Community-Facilities-Capital-Grant draft29.wpd