



## OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan  
County Executive

Charles W. Thompson, Jr.  
County Attorney

## MEMORANDUM

TO: Carolyn Biggins  
Chief, Transit Services Division  
Department of Public Works and Transportation

VIA: Marc P. Hansen *MPH*  
Chief, General Counsel Division  
County Attorney's Office

FROM: Edward B. Lattner *EBL*  
Associate County Attorney

DATE: June 8, 2004

RE: **Council Expedited Bill 16-04: Transportation - Fees - Council Resolution**

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**Question**

The Chief Administrative Officer has asked us to provide you with our analysis of Council Expedited Bill 16-04, which would allow the Council to unilaterally set certain transportation-related fees by resolution; the County Executive currently sets these fees by executive regulation.

**Short Answer**

Bill 16-04 violates the separation of powers doctrine embedded in the County Charter because it purports to authorize the Council to engage in a legislative act, setting fees, via the resolution process, without presenting that legislation to the County Executive for approval as required by Charter § 208. The Council retains the power to set these fees by law, following the process for enactment of legislation set out under Article XI-A of the Maryland Constitution and the County Charter.

**Explanation**

The County's authority to set these transportation-related fees is found in § 5(S) of the

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Express Powers Act, Md. Ann. Code art. 25A.<sup>1</sup> These include bus fares, vehicle impoundment costs, parking fees, residential parking permit area application fees, fines for violations of Chapter 31 (motor vehicles and traffic), and parking ticket late fees.

Under the current law, the Council has validly delegated its authority to set these fees to the Executive, who sets them by regulation under method (3). Charter § 201 provides that the Executive “shall have no legislative power except the power to make rules and regulations expressly delegated by a law enacted by the Council or this Charter.” Maryland courts have long upheld this type of delegation of legislative authority to administrative officials and “the modern tendency of the courts is toward greater liberality in permitting grants of discretion to administrative officials in order to facilitate the administration of the laws as the complexity of governmental and economic conditions increases.” *Falik v. Prince George’s Hospital and Medical Center*, 322 Md. 409, 417-418, 588 A.2d 324, 328 (1991).

The Maryland Court of Appeals has repeatedly sustained the General Assembly’s delegation of legislative authority to a variety of administrative officials to set fines, fees, and fares. In *Lussier v. Maryland Racing Comm’n*, 343 Md. 681, 684 A.2d 804 (1996), the Maryland Court of Appeals held the General Assembly’s broad delegation of legislative authority to the Maryland Racing Commission authorized the Commission to issue a regulation empowering it to impose a monetary penalty for violation of those regulations. In *Falik*, the Maryland Court of Appeals held that the General Assembly’s delegation of legislative power to the Workers’ Compensation Commission authorized the Commission to issue a regulation establishing a schedule for the payment of medical and surgical fees, *Falik*. In *G. I. Veterans’ Taxicab Ass’n v. Yellow Cab Co.*, 192 Md. 551, 555, 65 A.2d 173, 174 (1949), the Court of Appeals upheld the validity of a state law delegating to the Baltimore City Board of Police Commissioners the legislative authority to fix rates of fare for hackney carriages as a proper delegation of the police power.

Although Bill 16-04 rescinds that delegation of legislative authority to the Executive (which the Council could do), it does not envision the Council setting those fees by legislation (which the Council could do as well). Rather, the bill purports to authorize the Council to act unilaterally, by resolution. This, it cannot do.

Bill 16-04’s proposal that the Council may act unilaterally violates the separation of powers doctrine embedded in §§ 101, 201, and 208 of the County Charter.<sup>2</sup> The notion of checks

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<sup>1</sup> The broadest authority for local legislation exists in § 5(S) of the Express Powers Act, which is often referred to as the “general welfare clause” because it grants charter counties the power to legislate on matters not specifically enumerated elsewhere. *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151, 161, 252 A.2d 242, 247 (1969). The County’s authority to set fines is found in §5(A) of the Express Powers Act.

<sup>2</sup> *Montgomery County v. Anchor Inn Seafood Restaurant*, 374 Md. 327, 332, 822 A.2d 429, 431-32 (2003). Section 101 of the Charter vests all legislative powers in the County Council. Section 201 vests all executive power

and balances that lies at the heart of the separation of powers doctrine is best evidenced by the Charter's requirement that the Council deliver all legislation to the Executive for approval. The so-called "presentment clause" in Charter § 208 provides that "upon the enactment of any legislation by the Council, it shall be delivered within three days to the county Executive who within ten days thereafter shall approve or disapprove it."

The Council must follow the procedures for passing legislation when it exercises a legislative function. In *Scull v. Montgomery Citizens League*, 249 Md. 271, 239 A.2d 92 (1968), the court struck down the County's fair housing law because the Council enacted the law in executive session,<sup>3</sup> without following the procedures required for the passage of legislation. See also *Inlet Associates v. Assateague Home Condominium Assoc.*, 313 Md. 413, 545 A.2d 1296 (1988) (city council had to act by ordinance, and not resolution, when conveying property interests).

There are instances where the Council may properly set charges via the resolution process, without the involvement of the Executive. But, in each of these instances, the Council did not violate the separation of powers doctrine contained in the County Charter because it acted pursuant to a state law or the Charter itself, which directly authorized the Council to take the action, alone. For example, State law (codified at § 52-17 of the County Code) grants the County Council broad authority to set excise (non-property) tax rates. This authority exists outside of the Express Powers Act and the County Charter. *Waters Landing Ltd. Partnership v. Montgomery County*, 337 Md. 15, 19-20, 650 A.2d 712, 713-14 (1994). In setting transportation-related fees under Bill 16-04, the Council is exercising its general police powers under § 5(S) of the Express Powers Act. There is no State law or Charter provision authorizing the Council to set these fees without the Executive's Charter-mandated involvement.

Bill 16-04 is fatally flawed because it violates the County Charter. The County Executive cannot simply "waive" the presentment requirement in § 208 of the Charter by signing the bill (assuming the Council passes the bill). For example, in *EEOC v. Chrysler Corp.*, 595 F. Supp. 344 (E.D. Mich. 1984), the court struck down a section of the Reorganization Act of 1977 that purported to authorize either House of Congress, by resolution, to take certain legislative actions. The court, relying upon the Supreme Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), ruled that this so-called "legislative veto" violated the federal constitutional requirement that Congress present legislative enactments to the President for approval. The legislative veto provision in the Reorganization Act of 1977 was not saved by fact that President Carter had

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in the County Executive.

<sup>3</sup> The County Charter at that time did not provide for a County Executive form of government; the Council exercised both legislative and executive functions in legislative and executive sessions, respectively.

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signed the act into law.<sup>4</sup> Even if approved by the County Executive, Bill 16-04 would also be invalid as an attempt to amend the Charter without approval of the voters as required by Article XI-A of the Maryland Constitution.

In conclusion, Bill 16-04 is invalid.

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cc: Rebecca Domaruk, Senior Executive Administrative Aide  
Michael E. Faden, Senior Legislative Attorney  
Eileen Basaman, Associate County Attorney  
Michael Hoyt, Acting Director, DPWT

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<sup>4</sup> In fact, the Reorganization Act which was finally enacted was a compromise between a bill sponsored by the Administration and a bill which was initially introduced in the House. The Administration bill provided for a legislative veto by either House of Congress of any plan proposed by the President.