



## OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan  
County Executive

Charles W. Thompson, Jr.  
County Attorney

**MEMORANDUM**

TO: Mike Faden  
Senior Legislative Attorney

FROM: Scott R. Foncannon *SRF*  
Associate County Attorney

VIA: Marc Hansen, Chief *MPH*  
Division of General Counsel

DATE: June 17, 2004

RE: Admissions and Amusement Tax Resolution

**FACTS**

On May 19, 2004, Montgomery County Council approved Expedited Bill 8-04 by a seven to one vote. This bill authorized the Montgomery County Council to set the rate of the Admissions and Amusement Tax by resolution. The bill also required that the County Executive approve or disapprove that resolution within ten days. The bill states that if the County Executive disapproves the resolution within ten days after the resolution is adopted, the Council may re-adopt the resolution by a vote of six Council members and override the County Executive's disapproval.

Immediately after enacting Bill 8-04 the Council approved a resolution increasing the Amusement Tax to 10% effective August 1, 2004. This resolution was presented to the Executive at the same time as Bill 8-04. The County Executive approved Bill 8-04, but disapproved the resolution increasing the Admissions and Amusement Tax, however, the County Executive did not veto the bill itself.

State law requires that the County must give the Comptroller notice of the rate change at

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least 60 days before the effective date of the change. If the County Council re-adopts the resolution and overrides the County Executive's disapproval in June of 2004, there would be less than 60 days notification time to the State of the August 1, 2004 effective date of the rate change. Based on a review of the State statute, there is no sanction or consequence for giving the State less than 60 days notice of the rate change. I have contacted the Attorney General's office and have had a discussion with John Barry, who represents the Comptroller's office, and he was unaware of the procedure of the State for dealing with this situation and has agreed to check into this and contact me with the State's position. As of the date of this memo he has not called me back.

### ISSUES

If the Council re-adopts the resolution by a vote of six Council members and overrides the disapproval of the County Executive:

1. Does the bill need to be amended, indicating a new effective date, then reintroduced, and re-advertised with new public hearings?
2. Can the resolution be amended before or after re-adoption and, if so, does the resolution need to be re-advertised and public hearings conducted prior to the re-adoption of the amended resolution?
3. If the resolution is amended and re-adopted, does the resolution then need to be presented to the County Executive again for his approval or disapproval pursuant to the bill procedure?
4. Will the new rate of tax take effect if the State is not notified 60 days prior to the effective date of the change?

### ANSWER

1. In my opinion, the bill does not need to be amended, re-advertised, and additional public hearings held modifying the effective date.
2. In my opinion, the resolution can be amended after re-adoption and override by the County Council without the necessity of advertising and public hearings on the amended resolution.
3. In my opinion, the amended resolution would need to be re-presented to the County Executive for his approval or disapproval.

4. In my opinion, the State must be notified 60 days prior to the rate change in compliance with State law.

### DISCUSSION

Expedited Bill 8-04 provides that an Admissions and Amusement Tax is imposed at a rate set by resolution adopted by the Council and approved by the County Executive. The bill states that if the County Executive disapproves a resolution within ten days after it is adopted in the Council, and the Council re-adopts the resolution by a vote of six Council members, or if the County Executive does not act within ten days after the Council adopts it, the resolution takes effect. The bill further states that the act takes effect on August 1, 2004. At the same time the bill was approved, the Council approved Resolution 15-619 which increased the rate of the Admissions and Amusement Tax from seven percent (7%) to ten percent (10%), and further states that the rate will take effect on August 1, 2004.

Section 4-102 of the Md. Code Ann., Tax-Gen., specifically provides that the County may impose by resolution a tax and Admissions and Amusement Tax. The previous County law, at 52-16(a) of the Montgomery County Code, did not have a provision for setting the rate by resolution. The purpose of Bill 8-04 was to authorize the County Council to set the Admissions and Amusement Tax by resolution with the approval of the County Executive. Based on my review, there is no State law, County law, regulation, or rule of procedure of the County Council which requires a public hearing for passage of a resolution setting the rate of the tax or the date the new rate takes effect. In this particular case, the resolution was authorized by State law and by County law, as set forth in Bill 5-08, and was adopted on May 19, 2004 the same day that the law was passed.

Md. Code Ann., Tax-Gen. § 4-105(g) states that "If a county, a municipal corporation, or the Stadium Authority changes an Admissions and Amusement Tax rate or changes a class to which a rate applies, the county, municipal corporation, or Stadium Authority shall give the Comptroller notice of the change at least sixty (60) days before the effective date of the change." Due to the date of disapproval of the County Executive and the potential re-adoption by the County Council ( expected to be on June 22, 2004) there will be less than 60 days notice to the Comptroller for the August 1, 2004 effective date of the rate change. Although I am waiting to hear from the Attorney General's office on the State's position, the preliminary indication from the State is that they would not honor the rate change and impose the rate change until at least 60 days after the notice of the change. The state statute does not indicate what the sanction is if the 60 day requirement is not met, however I believe there is a significant possibility that the tax could be challenged and set aside as illegal because there was not sufficient notice to the State. Tax statutes which are unclear or ambiguous are interpreted in favor of the citizen and against the State. *Scoville Service, Inc. v. Comptroller of the Treasury*, 269 Md. 390,(1973) This also

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creates a potential dilemma where the County law is in effect changing the rate on August 1, 2004, yet the State, which administers and collects this tax, will not impose and collect the tax until 60 days has passed from the date of notice of the rate change. The situation could occur where the tax would be collected by vendors, but never paid to the State and then to the County.

The Council may amend the resolution without any new advertising or public hearings. If the Council were to re-adopt the resolution by the vote of six Council members, this would override the County Executive's disapproval then the Council could amend the resolution. The new resolution would provide that the new tax rate would take effect 60 days after the notice to the State or some other date far enough in advance to give sufficient time to notify the State 60 days or more prior to the effective date of the new rate. The amended resolution would have to be presented to the County Executive for his approval as provided in the new County law.

### **RECOMMENDATION**

I recommend that if the Council re-adopts the resolution and overrides the County Executive's disapproval, that the resolution then be amended to provide sufficient time to notify the State of the rate change. The resolution would then have to be resubmitted to the County Executive, and if disapproved again, the Council could re-adopt the resolution and notify the State in a timely manner. Although this delays the rate change, it does comply with County and State law and reduces the risk of a successful challenge to the resolution.

cc: Sonya Healy

PFL/vrp

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