




OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett
County Executive

Leon Rodriguez
County Attorney

MEMORANDUM

TO: Isiah Leggett
County Executive

VIA: Leon Rodriguez
County Attorney 

FROM: Marc P. Hansen *Marc Hansen*
Deputy County Attorney

DATE: October 1, 2008

RE: Expedited Bill 31-08, Grants – Council Review

You have asked if Expedited Bill 31-08, Grants – Council Review, impermissibly intrudes on the authority granted to the County Executive under the Montgomery County Charter.

Bill 31-08 requires the County Executive to obtain the consent of the Council before applying for a grant if: (1) the grant is for more than \$500,000 for a “new program or activity”; (2) compliance with the grant would require the Council to appropriate more than \$250,000; or (3) the grant-funded activity would require the creation of two or more new positions in the County government.

ANSWER

Because subsections 2-25A (b) and (c) of Bill 31-08 require the County Executive to obtain consent from the Council before exercising a responsibility assigned to the Executive by the Charter, Bill 31-08 is invalid. Subsection 2-25A (a) of Bill 31-08, which requires the Executive to provide the Council with information regarding grant applications, is a valid exercise of the power granted to the Council by the Charter.

DISCUSSION

Separation of Powers

As described by the Court of Appeals, a Charter “is the organic, the fundamental law, establishing basic principles governing relationships between the government and the people, and among the various governmental branches and bodies.” *Cheeks v. Cedlair*, 287 Md. 595, 607 (1980). The Charter serves as the constitution for the County, and may impose certain limits on the County Council’s legislative authority. *Harford County v. Board of Supervisors of Elections*, 272 Md. 33 (1974) (Harford County Charter may authorize a re-districting commission to recommend Council election districts, which recommendation becomes law unless the Council enacts a law establishing different election district boundaries within a certain time).

Section 101 of the County Charter vests the legislative powers of Montgomery County in the County Council. Section 201 of the Charter vests the County’s executive power in the County Executive. Although the Charter requires the County Executive to provide the Council with information concerning the executive branch that the Council “may require for the exercise of its powers,” the Charter prohibits the Council from giving “directions to any individual employee of the executive branch of the County government.” See Charter Sections 209 and 117.

Having assigned legislative and executive functions of County government to separate branches, it becomes necessary to understand the difference between a legislative function and an executive function in order to determine if Bill 31-08 violates the separation of powers established by the Charter. The Court of Appeals has set out the test for determining whether a function is legislative or executive in the following terms:

A recognized test for determining whether a municipal . . . [function] is legislative . . . or whether it is executive or administrative . . . is whether the ordinance is one making a new law – an enactment of general application prescribing a new plan or policy – or is one which merely looks to or facilitates the administration, execution or implementation of a law already in force and effect.

Skull v. Montgomery Citizens League, 249 Md. 271, 282 (1968). A major treatise on municipal law, often relied on by the Court of Appeals, describes the test in these words:

Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them, or appoint the agents charged with the duty of such enforcement. If it can be shown that the particular act could not have been done without a law or ordinance, such act is considered as legislative.

The crucial test for determining what is legislative and what is administrative has been said to be whether the ordinance is one making a new law, or one executing a law already in existence.

McQuillin, Municipal Corporations, Section 10:6; quoted, in part, with approval in *Inlet Associates v. Assateague House Condominium Association*, 313 Md. 413, 429 (1988).

Examples of executive functions may be found in a series of Court of Appeals cases construing charters that contain separation of powers provisions like Montgomery County's Charter. In 1960, the Court of Appeals concluded that the Baltimore County Executive had the authority to secure a lease for office space for County employees. The Court concluded:

“[W]e hold that . . . [the County Charter] gives the County Executive the power to negotiate leases and to bind the County thereto without the necessity of any previous authorization or approval by the Council because the acquisition of office space by means of a lease is an executive and not a legislative function.”

Hormes v. Baltimore County, 225 Md. 371, 377 (1960). Ten years later, the Court of Appeals concluded that the power to initiate condemnation action is an executive function. *Anne Arundel County v. Bowen*, 258 Md. 713 (1970). In the following year, the Court of Appeals concluded that the Montgomery County Executive's authorization for the construction of a road was an executive function, rather than, a legislative function. *Eggert v. Montgomery County Council*, 263 Md. 243 (1971). In 1982, the Court of Appeals strongly intimated that the Carroll County Commissioners were performing an executive function under the Maryland Public Information Act when they met to prepare the County's proposed budget for filing with the Clerk of the County Commissioners. After filing the proposed budget with the Clerk, the Commission performed legislative or quasi-legislative functions when it held the required budget hearings, made revisions to the budget and then approved the final budget. *The Board of County Commissioners of Carroll County v. Landmark Community Newspapers of Maryland, Inc.*, 293 Md. 595 (1982).

Applying the basic test for determining if a function is legislative or executive in the context of these cases leads to the conclusion that applying for a grant is an executive function. When the Executive applies for a grant to support the mission of a County department or agency, the Executive is engaging in an act to implement an existing law. Applying for a grant is closely parallel to acquiring property to house County employees, which was held by the Court of Appeals in *Hormes v. Baltimore County* to be an executive function. Applying for a grant is certainly not engaging in an act remotely comparable to making a law.

The Appropriation Process

By requiring the Executive to obtain Council approval before applying for a grant that “would require the Council to appropriate more than \$250,000”, Bill 31-08 implicates other provisions of the Charter as well – specifically numerous sections of Article 3. Finance.

Article 3 sets forth the process for authorizing the expenditure of County funds. Section 303 requires the County Executive to recommend an operating budget to the Council by March 15 of each year. Section 305 empowers the Council, after holding a public hearing, to “add to, delete from, increase or decrease any appropriation item” in the operating budget recommended by the County Executive. Section 307 requires that a supplemental appropriation be recommended by the County Executive, and for the Council to hold a hearing on the Executive’s recommendation.

These Charter provisions assign specific roles to the Executive and Council with respect to authorizing the expenditure of County funds. One of the roles assigned to the Executive is to make expenditure recommendations to the Council concerning how County funds should be expended and for the Council to hold a hearing on the Executive’s recommendation. It is inconsistent with the Charter to require the Executive to first obtain the permission of the Council before the Executive can exercise the Charter’s grant of authority to request the Council to appropriate County funds.

But the effect of Bill 31-08 is to do just that. Under the current grant process, the Executive conditions acceptance of a grant on Council approval of an appropriation authorizing the expenditure of the grant funds—unless, of course, appropriation authority already exists.¹ By authorizing the Council to prohibit the Executive from applying for a grant, Bill 31-08 empowers the Council to effectively prevent the Executive from asking the Council to approve an appropriation to expend the anticipated funds to be obtained under the grant, because there is no point to recommending an appropriation in the annual budget or in a supplemental appropriation if the Council has already rejected the grant *ab initio*.

The Grant Process—Executive Limitations

The authority of the Executive to apply for grant funds, however, is not unbridled. The Executive’s authority is circumscribed by two factors: (1) To fall within an executive function, the grant funds must be intended for use in a manner that advances, and is consistent with, the mission of an existing executive branch agency. (2) The Executive cannot accept a grant that commits the County to expend funds unless there are sufficient appropriated funds available to be encumbered to meet the County’s obligation under the grant agreement. *See* Charter Section 311.

Conclusion

Subsections (b) and (c) of Section 2-25A, as proposed by Bill 31-08, are invalid, because they impermissibly intrude on functions assigned to the County Executive by the Charter.

Subsection (a) of Section 2-25A, however, would be consistent with the Charter. Subsection (a) merely requires the Executive to provide the Council with certain information

¹ Charter Section 311 prohibits the expenditure or the authorization for the expenditure of County funds in excess of the “available, unencumbered appropriations therefor.”

regarding grant applications before applying for the grant.² The Council, as the legislative branch of County government, is entitled to obtain information concerning the executive branch that is necessary for the Council in carrying out its legislative powers. Since the expenditure of grant funds requires authorization from the Council through an appropriation, obtaining information about grant applications would assist the Council in exercising the powers assigned to it by the Charter. *See* Charter Section 209.

If you have any concerns or questions regarding this advice, please let me know.

cc: Timothy Firestine, Chief Administrative Officer
Joseph Beach, Director, Office of Management and Budget
Kathleen Boucher, Assistant Chief Administrative Officer
Michael Faden, Senior Legislative Attorney
Karen Federman Henry, Chief, Division of Finance and Procurement

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² We construe the 30 day requirement as being directory and not mandatory. *See Prince George's County v. McBride*, 268 Md. 522, 532-33 (1973) (“[W]here the duty prescribed is of a public nature, and intended for the public benefit, and is directed to be performed within a specified time, courts have adopted as a general rule in the construction of Statutes, that they are, in respect to the time, to be regarded *as directory* merely, unless, from the nature of the act to be performed, or the language employed in the Statute, it plainly appears that the designation of time was intended as a limitation of power of the officer.” (emphasis in original))