



OFFICE OF THE COUNTY ATTORNEY

Marc Elrich
County Executive

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MEMORANDUM

TO: Tom Hucker, Council President

VIA: Marc P. Hansen, County Attorney *Marc Hansen*

FROM: Edward Lattner, Chief, Government Operations
County Attorney's Office *Edward B. Lattner*

Kathryn Lloyd, Associate County Attorney
County Attorney's Office *Kathryn Lloyd*

DATE: October 29, 2021

RE: Authority of the County Executive to repurpose temporarily two recreation centers as homeless shelters without explicit County Council approval

You have asked this Office whether the County Executive has the authority to repurpose temporarily two County recreation centers, the Gwendolyn E. Coffield Community Recreation Center (Coffield) and the Long Branch Community Recreation Center (Long Branch), as emergency homeless shelters without first obtaining explicit approval from the County Council.

SUMMARY

Under the County Charter, the executive power of County government is vested in the County Executive. Designating the facility in which a County program will be conducted is an executive function. Accordingly, the County Executive has the authority to utilize the County recreation centers for whatever government program the Executive deems necessary, **unless there is a law or appropriation prohibiting the Executive from doing so**. Because there is no law, which includes a Council resolution appropriating funds, limiting the use of the Coffield and Long Branch recreation centers or prohibiting the County Executive from using the recreation centers as emergency homeless centers, the County Executive has the authority to temporarily repurpose the two County recreation centers as emergency homeless shelters without first obtaining explicit approval from the County Council. In addition, under the County Code, the County Executive also has the authority, in the event of a public emergency, to use any County facility as the Executive deems necessary to respond to the emergency.

BACKGROUND

Long Branch opened in late 1994 and became fully operational in 1995. Coffield opened in 1984 and was renovated in 1995. As is the normal practice, project description forms (PDFs) were generated as part of the Capital Improvements Program (CIP) for these construction projects at the centers.

Construction/Renovation of the Recreation Centers

The PDFs for both facilities reveal that their design, construction, and any subsequent modification, was for use as recreation centers. The first PDF for Coffield, dated December 5, 1980 (revised Feb. 4, 1981), provided for “the development of expanded indoor recreation facilities” and states “[t]he facility will serve the densely populated Rosemary Hills area with badly needed recreation facilities” and “provide needed indoor recreation space for the many children in the Area.” The last PDF for Coffield, dated September 28, 1982 (revised Feb. 17, 1983), describes an expansion that would “allow for either arts and crafts room, kiln room, health and exercise room, classroom, game room, kitchen, offices, restrooms, mechanical room, lobby and circulation space...”

Similarly, the first PDF for Long Branch, dated September 1, 1984 (revised May 8, 1985), provides for “expansion and modification” because “the present facilities (an undersized gymnasium and a small park shelter building) are inadequate to meet the needs of this community.” The renovated facility “will provide for a community-based center to serve youth, adults, seniors, and special populations. Most importantly, due to the makeup of the area, it will provide ethnic cohesiveness through participation in programs, as well as leisure activities for area youth.” The last PDF for Long Branch, dated December 28, 1993, likewise contains a detailed description of what will be included in the “construction of modern recreational facilities to address current needs in Long Branch Park.”

Temporary Use of the Recreation Centers as Homeless Shelters

At the time Coffield and Long Branch were built they were designed and planned for recreation and leisure use. After 9/11, according to Melanie Sasse, Chief of Aquatics and Recreation Centers in the Department of Recreation, emergency shelter use was included as part of the design and plan of all new recreation facilities.¹ For example, the County increased the

¹ The 2017 Emergency Operations Plan states that one of the responsibilities of the Department of General Services is to “[e]nsure the operability of emergency generators at recreation centers and County buildings that have been surveyed for use as emergency shelters.”
https://www.montgomerycountymd.gov/COUNCIL/Resources/Files/PDF/2017_Emergency_Operations_Plan.pdf at 6-9. The Council adopted this plan by Res. 18-1061 (Mar. 20, 2018).
https://www.montgomerycountymd.gov/COUNCIL/Resources/Files/res/2018/20180320_18-1061.pdf

size of emergency generators and installed additional showers at new recreation facilities. Emergency shelter use was also considered as a backup use for some existing recreation centers. Coffield is currently a recreation center designed as an emergency shelter, and Long Branch is a recreation center designated as an emergency shelter back-up.

As early as March 2020, the Council was aware that the County Executive was using the Coffield and Long Branch recreation centers as emergency shelters. At the onset of the COVID-19 global pandemic, it became necessary to provide distance between people being housed in the County's homeless shelters to slow the spread of COVID-19, per the Center of Disease Control (CDC) guidance that people be six feet apart.² Prior to COVID-19, the County homeless shelters used bunk beds that were fairly close together and could not accommodate this six-foot separation. On March 25, 2020, Craig Howard, the Deputy Director for the Montgomery County Council, briefed the County Councilmembers with a summary of that day's Daily Operations Call. Included in that briefing was information that Homeless Services coordinated the delivery of cots for additional homeless shelters to be located at both Coffield and Long Branch.³ At that time, all recreation facilities were closed due to COVID-19.

Further, the May 14, 2021, Council staff memo on the FY22 Recreation Department budget provided information that the department would continue to use the Coffield and Long Branch centers as homeless shelters until December 31, 2021.⁴ Page 22 of that memo states "[p]lease note that Gwendolyn Coffield and Long Branch Community Center are being used as County Homeless Shelters, and operate 24 hour per day, 7 days per week. These facilities will continue to function as homeless shelters through December 31, 2021. Both have sustained significant damage to infrastructure and furnishings and will require additional funds to restore to operations."

As explained in the County Executive's letter to the Council President dated September 10, 2021, "spacing requirements during the pandemic drastically reduced our existing capacity to shelter the homeless...[a]s part of the County's emergency mass care plan, we had assessed and identified County buildings for their potential use and capacity as shelters. After reviewing the needs for facilities for testing and shelter, we chose the Coffield and Long Branch centers as the best options for sheltering." The County Executive noted that "[a]ll decisions regarding the

² CDC guidance, under Facility Layout consideration, states: "[i]n general sleeping areas (for those who are not experiencing respiratory symptoms), try to make sure client's faces are at least 6 feet apart: [Interim Guidance for Homeless Service Providers to Plan and Respond to Coronavirus Disease 2019 \(COVID-19\) | CDC](#)

³ Note that much of the communication between the Council and the Executive Branch during that time was via phone calls and email due to COVID-19, so there are no Council staff packets from a Council or Committee session.

⁴ The memo can be found at: https://www.montgomerycountymd.gov/council/Resources/Files/agenda/col/2021/20210514/20210514_4-5.pdf

shelters were made in an effort to save lives.” Ms. Sasse explained that recreation centers are preferable to schools to house persons during an emergency because schools could be in session at the time and the County owns the recreation centers.

APPLICABLE LAWS

The Montgomery County Charter and Code

The County Charter establishes a system of County government where the executive branch and the legislative branch are separate and distinct, with neither having control over the other when operating within its respective sphere of responsibility. Adopted on November 5, 1968, the Charter provides for an elected County Executive and a separation of the County government into legislative and executive branches. Charter § 101 vests in the County Council “[a]ll legislative powers which may be exercised by Montgomery County under the Constitution and laws of Maryland . . .” and § 201 provides that “[t]he executive power vested in Montgomery County by the Constitution and laws of Maryland and by this Charter shall be vested in a County Executive who shall be the chief executive officer of Montgomery County. . . .” Thus, the County Executive directs the general administration of County affairs and carries out the daily business of the County. Under § 211 of the County Charter, the County Executive, through the Chief Administrative Officer, supervises all departments, offices, and agencies of the Executive Branch.

The Montgomery County code further delineates executive branch responsibilities. Chapter 2 sets out the Administration of the County government, with Article III outlining the Executive Branch. Under this article, Division 7A establishes the Department of Health and Human Services and Division 11 establishes the Department of Recreation.

The County Executive is also empowered with certain powers during an emergency. Under § 2-13 of the County Code, “[t]he county executive is hereby authorized and empowered to use or to direct the use of any and all facilities, equipment, buildings and land belonging to the county, including trucks, school buses, motors, tools, buildings and any other equipment and property of the county for such purposes and in such manner that shall be necessary for the welfare and benefit of the citizens of the county for the duration of the war **or other public emergency.**” (Emphasis added.)

Case Law

The County Council can, through the capital budget resolution, limit the County Executive’s authority to spend money in the construction of capital projects. In *James v. Anderson*, 281 Md. 137 (1977), the court determined that the Harford County Council’s annual budget and appropriations ordinance, through which the county adopted its annual capital budget

and incorporated descriptive “project estimate” sheets, controlled the purposes for which the county executive could expend public monies. Therefore, the county executive did not have authority to use bond proceeds, which the council budgeted and appropriated for the renovation of the **existing** county courthouse, for the construction of **another** courthouse on a different site.⁵

The PDFs in the CIP are analogous to the “project estimate” sheets discussed in the *James* case. Both these documents detail the justification for a proposed capital project. As in Harford County, Montgomery County’s annual capital budget funds capital projects and, more recently, incorporates by reference the specific PDFs from the CIP that describe those projects. Through the capital budget (and incorporated PDFs) the Council limits the Executive’s expenditure of money for capital projects, such as the construction or renovation of a recreation center.⁶ “Budget making is a quintessential legislative function, reflecting the legislators’ ordering of policy priorities in the face of limited financial resources.” *Kensington Volunteer Fire Dep’t, Inc. v. Montgomery Cnty.*, 684 F.3d 462, 471 (4th Cir. 2012) (internal quotation and citation omitted). *See also Haub v. Montgomery Cnty.*, 353 Md. 448 (1999) (Montgomery County budget treated as enacted legislation).

But once the legislative body has approved a capital project, the accomplishment of that goal is an executive function. “The implementation of roads, bridges, libraries, police stations or other capital projects is pursuant to existing law [and therefore] executive in character.” *Eggert v. Montgomery County Council*, 263 Md. 243, 259 (1971) (concluding that authorization of the construction of a capital project is an executive, not a legislative, function). *Boswell v. Prince George’s Cnty.*, 273 Md. 522, 533 (1975) (after a highway project received proper legislative authorization in the budget, the decision to proceed with condemnation to acquire the necessary property was an executive function).

The operation of County facilities is an executive function. And while the capital budget limits the Executive’s expenditure of money for capital projects, it does not govern the Executive’s subsequent use of those facilities for legitimate governmental purposes. Maryland cases have analyzed the authority of a County Executive and the separation of powers between

⁵ The court concluded that bond authorization bill, which more broadly authorized the issuance and sale of bonds for renovation of the existing courthouse **or new facilities**, did not control because the Harford County Charter stated that neither the Council nor the County Executive could authorize any obligation for any capital project not included in the county budget. Rather, if renovation of the existing courthouse became impractical, this language would have permitted the Executive to ask the Council to amend the capital budget to include the construction of a new courthouse. If the Council approved, the bond proceeds would have then become authorized for this new purpose. *Id.* at 149-50.

⁶ The Council’s practice of incorporating the CIP’s PDFs into the capital budget is of recent vintage; it is not clear whether the capital budgets at issue here, dating from the 1980’s and 1990’s incorporated the recreation center PDFs. For present purposes, this opinion assumes that those capital budgets did, in fact, incorporate the recreation center PDFs.

the legislative and executive branches operating under a charter form of County government. In *Hormes v. Baltimore County*, 374 (1961), the County Executive for Baltimore County leased a floor of a building for 10 years to house the County’s health department without the express or implied authority of the County Council. A citizen-taxpayer sued arguing that the County Executive did not have the authority to negotiate and execute this lease unless authorized by an enabling act of the County Council. *Id.* at 377. The Court of Appeals, citing to 2 McQuillin, *Municipal Corporations*, stated “[t]he 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 in existence.” *Id.* at 377-78. Although the Baltimore County Code generally authorized “the county” to acquire property for any public purpose “it could scarcely be reasonably contended that the acquisition of property for public use is a legislative function.” *Id.* at 377. The Court concluded that “the decision as to whether property is needed for a public purpose is one to be made by the Executive and that this also is an executive rather than a legislative function.” *Id.* at 377-78.

Our County Code, like the Baltimore County Code examined in *Hormes*, generally authorizes “the County” to acquire property for any governmental function. § 2-11(a)(5). As noted above, this is an executive function. Thus, the Executive is authorized to make temporary use of recreation facilities as homeless shelters when necessary to further legitimate governmental purposes.

ANALYSIS

Although the PDFs for the Coffield and Long Branch recreation centers reveal that they were initially constructed for use as recreation centers, those PDFs were not tied to the operating budgets for either the Department of Recreation or the Department of Health and Human Services. Nothing in the FY 2022 Operating Budget Resolution prohibits the County Executive from temporarily spending money to (continue to) use these recreation centers as homeless shelters.⁷ The appropriations for these departments, like all other County departments, is apportioned by personnel costs and operating expense, not by a specific program within the department.⁸

The County Executive has the authority to direct, supervise, and control the actions of all executive branch agencies, which includes the Departments of Recreation and Health and

⁷ The FY22 Operating Budget Resolution can be found at:
https://apps.montgomerycountymd.gov/ccllms/DownloadFilePage?FileName=10082_1_15513_Resolution_19-872_Adopted_20210527.pdf

⁸ The appropriation for the Department of Recreation is on page 30 of the FY22 Operating Budget. The HHS appropriation is on page 34.

Human Services.⁹ The administration of County recreation centers is an executive branch function and all executive power under the Charter is vested in the County Executive.¹⁰ The County Executive has the authority to carry out the day-to-day business of the County and to make decisions concerning the services to be offered by public facilities. Pursuant to *Hormes*, deciding where to house a government program is an executive function. Hence, the County Executive can house a homeless program in any government facility unless a law or appropriation resolution prohibits it. As noted above, we have found no such law or appropriation.

Further, § 2-13 of the County Code provides direct authority to the County Executive to use or direct the use of any County facility, including recreation centers, to mitigate a public emergency. That is what the County Executive has done by repurposing the Coffield and Long Branch recreation centers as homeless shelters during the COVID-19 global pandemic, during which there is a CDC-mandated need for persons to maintain six feet of separation. The County requires the use of these recreation centers to house the homeless to meet needs under the public emergency. The County Executive has the authority to direct this use under § 2-13.¹¹

Finally, the Council has tacitly condoned the use of Coffield and Long Branch as homeless shelters. The Council has been aware of this use since March of 2020. However, the Council took no action in the FY22 budget to prohibit the expenditure of funds to operate a homeless shelter in either Coffield or Long Branch. By not prohibiting the use of appropriated funds to locate homeless shelters in these recreation centers in the FY22 Operating Budget, the Council has taken no action to prohibit a use that it was aware of and had the ability to prevent.

CONCLUSION

For the foregoing reasons, the County Executive has the authority to temporarily repurpose the Coffield and Long Branch recreation centers as emergency homeless shelters without obtaining explicit approval from the County Council.

cc: Marc Elrich, County Executive
Richard Madaleno, CAO
Jennifer Bryant, Director, Office of Management and Budget
Raymond Crowel, Director, Department of Health and Human Services
Robin Riley, Director, Department of Recreation

⁹ § 211 of the County Charter.

¹⁰ *Id.*

¹¹ Exercising authority under § 2-13, does not require the Executive to declare an emergency under § 2-17.

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