



OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

Charles W. Thompson, Jr.
County Attorney

MEMORANDUM

December 14, 1998

TO: Deborah S. Goodwin
Special Assistant to the County Executive

FROM: Marc P. Hansen, Chief *Marc Hansen*
Division of General Counsel

RE: Friends of Recreation—Creation; issues analysis

The Department of Recreation has expressed interest in creating a non-profit, tax-exempt organization to be known as “Friends of Recreation” (FOR). FOR—as I understand it—would: (1) raise funds to supplement the Department of Recreation’s budget; (2) permit FOR to purchase items for use by the Department of Recreation without going through the County’s procurement system; and (3) permit the Department of Recreation to contract with FOR, under the grant process, to operate local community recreation centers.

The Department of Recreation points to other examples where non-profit corporations exist to benefit programs of a County department. These examples are the Friends of the Library, the Montgomery County Parks Foundation, Inc., the Montgomery County Police Foundation, Inc., and the Montgomery County Human Services Foundation, Inc. (now inactive). The Department especially focuses on the Friends of the Library with its capacity to approve local chapters as a potential model.

There is an alternative to encouraging the creation of an independent, tax-exempt organization. The Director of Recreation is authorized under state law to organize and appoint “volunteer citizens groups or councils to aid in the implementation of the recreation and parks program.”¹ Under the County’s ethics law, the County Executive may authorize a citizen council to solicit funds for the benefit of the County. Funds collected would be deposited into an expendable trust managed by the Department of Finance. The Department of Recreation could use the funds in the expendable trust to purchase goods and services for the benefit of the recreation programs managed by the Department. If the cost of the goods and services were

¹Maryland Code, Article 25, §225(b).

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below \$3,000, the Department could act, under the Procurement Regulations, as its own contracting officer and directly purchase goods and services. If the amount were over \$3,000, the Department would be required to follow a more formal procurement process.

You have asked me to discuss the implications of creating and using a FOR model versus a County-created citizen council.

I. ABILITY TO RAISE FUNDS

FOR: The Department believes that a private entity, like FOR, will have greater success in raising funds than would a governmental entity. The Department believes that the public's perception of a non-governmental entity is more positive than of a governmental entity, and accordingly FOR would have a greater ability to raise funds than a citizen council. Moreover, the donating public may feel more confident that donated funds will actually go to recreation programs if given to FOR.

CITIZEN COUNCIL: Under §19A-16 of the County ethics law, the County Executive may authorize, by Executive Order, a citizen council to solicit funds for the benefit of the County's recreation program. The donated funds would be placed into an expendable trust account, allowing the County to use those funds *only* for the purpose for which the funds were donated. For example, funds donated to purchase computers for a senior center could be expended only for that purpose and no other.

II. POWER OF THE "PURSE STRINGS"

FOR: Once established, a program financially supported by FOR will be difficult to discontinue even if the program no longer fits the Department's program priorities. Moreover, once a program becomes funded, even in part by FOR, FOR becomes a stakeholder in how the program is administered. This makes it difficult for the Department to change the administration of the program.

CITIZEN COUNCIL: Although policy changes can lead to individual members of a council becoming disenchanted, the council itself, as a part of County government, is likely to remain aligned with the policy directions of the Department.

III. LOBBYING

FOR: As a tax-exempt organization (presumably under IRC §501(c)(3), FOR would be permitted to utilize funds it raised to lobby the County government so long as those lobbying activities do not constitute a "substantial part of its activities." The IRC provides a safe-harbor rule that allows §501(c)(3) organizations to expend up to 20% of their revenue for lobbying purposes.

CITIZEN COUNCIL: A citizen council would not be authorized to lobby. The state law under which a citizen council would be created limits its role to aiding in the implementation of the Department's recreation and parks program. Although this role might, under certain circumstances, permit a council to testify before the County Council, it would certainly not authorize a citizen council to engage in traditional lobbying activities, especially if those activities involve the expenditure of funds.

IV. FUNDING EQUITY

FOR: If FOR permits creation of local chapters, there is the possibility that wealthier communities will be able to raise significant sums of money for enhanced services for community recreation centers in their localities. Having "surcharged" themselves for these enhanced activities, the willingness of those communities to support taxes that are used for the benefit of recreation centers in less wealthy communities may be eroded.

CITIZEN COUNCIL: The potential for creating funding inequities is reduced because the County Executive can control the fund-raising agenda of a council.

V. USE OF PUBLIC EMPLOYEES AND COUNTY ATTORNEY LEGAL SERVICES.

FOR: County law prohibits the use of public employees' staff time to perform work for private advantage. Similarly, the County Attorney cannot provide legal services to non-government entities. Finally, it is important to remember that §19A-11 of the County ethics law prohibits a public employee from participating in any manner if the employee knows that a party to the matter is an organization of which the public employee is an officer or director. This prohibition makes it problematic for high-level management in the Department of Recreation to also serve on the board of directors of FOR. The County ethics law would permit a Recreation Department employee to serve as a director of FOR, if FOR authorizes the County Executive or the County Council to appoint the public employee to serve as a director "to represent the public interest."

CITIZEN COUNCIL: County employees and the County Attorney's Office may assist a citizen council because it is part of the County government.

VI. COST OF ADMINISTRATION.

FOR: FOR will incur expense in organizing itself—a lawyer and accountant will need to draft and file articles of incorporation, by-laws, and an application for tax-exempt status. Furthermore, FOR will incur expenses in maintaining its operations—financial accounts will need to be maintained and annual tax returns filed. If FOR has employees, like the Friends of the Library, the cost of administration will increase considerably. Moreover, FOR will need to carry insurance. FOR will need to recover these costs of administration by reducing the amount

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of money used to support County recreation programs or by entering into a contract with the County and passing on the costs of administration to the Department of Recreation's budget.

CITIZEN COUNCIL: A citizen council will certainly use County staff time and may add—at least in theory—some expense to the County's self-insurance fund. But it is likely that these costs would be minimal and certainly less than the costs of organizing and maintaining a tax-exempt organization.

VII. PROCUREMENT

FOR: FOR would be free, as is any other private entity, to acquire goods and services as it believes appropriate. This freedom certainly has some advantages—at least in terms of the time it may take to acquire goods and services.

CITIZEN COUNCIL: Expenditure of funds raised by a citizen council would be subject to the County's procurement system. The Department of Recreation's staff has said that using the County's procurement system creates a significant problem for them in terms of delay and staff time. On the other hand, the use of the County's procurement system offers certain advantages: (1) the County's procurement system requires the use of open competition, which helps ensure reasonable prices; (2) the County's procurement system prohibits self-dealing and favoritism; (3) the County's procurement system offers the opportunity to leverage donated funds through the County's buying power; and (4) many purchases with donated funds are likely to be under \$3,000 leaving the direct-purchase option available to the Department in most circumstances.

VIII. USE OF COUNTY TITLE AND INSIGNIA

FOR: FOR will need to obtain the consent of the Chief Administrative Officer before using County titles or insignia with regard to any FOR activities, including fund-raising efforts.

CITIZEN COUNCIL: A citizen council may use County title and insignia in connection with undertaking to perform its official duties.

Greg Bayor, Director of the Department of Recreation, and Dr. Beatrice Tignor, Director of the Office of Procurement, have reviewed this memorandum. Greg's comments are attached. Bea has indicated to me that she believes the County's procurement system provides the County with significant protections and advantages that ought not to be disregarded. Bea emphasized that the Office of Procurement is prepared to work with Recreation to meet its needs to acquire goods and services with funds raised by Citizen Councils.

I trust you will find this memorandum helpful. If you have any further concerns or questions regarding this matter, please let me know.

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c: Gregory A. Bayor, Director/Dept. of Recreation
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