



OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett
County Executive

Marc P. Hansen
County Attorney

MEMORANDUM

March 16, 2012

TO: Kathleen Boucher
Assistant Chief Administrative Officer

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

Clifford L. Royalty *Clf*
Chief, Division of Zoning, Land Use, & Economic Development

RE: Bill No. 11-12, County Property - Disposition

Opinion

The negotiation and execution of agreements and legal instruments disposing of County-owned interests in real property is an executive function. The County Charter vests executive functions in the County Executive. County Bill 11-12 violates the County Charter by authorizing the County Council to unilaterally veto a disposition of property. Although we conclude that Bill 11-12 is legally flawed, we suggest, at the conclusion of this memorandum, means by which the Council may exert legislative control over the disposition of County-owned property.

Background

On March 13, 2012, the County Council introduced Expedited Bill No. 11-12 concerning "County Property – Disposition" ("Bill"). The Bill proposes to amend Montgomery County Code § 11B-45 ("Disposition of Real Property") to, as stated in the Bill, "require the County Council to approve certain dispositions of certain County properties." (*Bill, p. 1*). The Bill provides that before the "disposition of any real property owned or controlled by the County . . . becomes final," the County Council, "by resolution . . . must approve . . . the disposition and all material terms of the disposition . . ." The Bill exempts from the proposed Council approval process property worth less than \$100,000 and leases with terms of less than 3 years. According to the Bill's accompanying memorandum, the Bill authorizes the Council to approve the "material terms of each property disposition" so as to "avoid a situation where an Executive

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gains approval to dispose of a property and then modifies the terms of the disposition”
(*Memorandum from Michael Faden to County Council dated March 13, 2012*).

Discussion

Article XI-A of the Maryland Constitution authorizes counties to adopt home rule charters. As described by the Maryland courts, these charters “function as ‘constitutions’ for the counties adopting them.” *Montgomery County v. Anchor Inn Seafood Restaurant*, 374 Md. 327, 331 (2003) (internal citations omitted). Section 3 of Article XI-A “mandates that a county adopting a home rule charter must select one of two types of government: (1) an elective legislative body known as the County Council without an elected County Executive or (2) an elected County Council plus an elected County Executive.” *Id.* In 1968, the County created the latter form of government through the adoption of a new charter. The County’s Charter separates “the county government into legislative and executive branches.” *Id.* Charter § 101 vests “all legislative powers” in the Council; Charter § 201 vests the “executive power” of County government in the County Executive. The *1968 Commentary Upon Proposed Charter* (July 10, 1968) states that Charter § 201 “is intended by this provision to confer **all** executive power of the County government upon the Executive. . . .” (Emphasis added) (*Commentary*, p. 18).

The “compartmentalization insured by the Charter between legislation on the one hand and administration and execution on the other is a distinction that has been acknowledged and acted upon by legislative bodies and the courts of other States.” *Scull v. Montgomery Citizens League*, 249 Md. 271, 282 (1968). When tasked with differentiating a legislative act from an executive one, the Maryland courts have cited to, or applied some variation of, a test articulated in *Scull*. The *Scull* court described the test as follows:

A recognized test for determining whether a municipal ordinance is legislative and so subject to referendum, or whether it is executive or administrative and is not, 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.

Id., see also *Eggert v. Montgomery County Council*, 263 Md. 243 (1971) (the County Council lacked authority to review the County Executive’s decision to construct a bridge within the County.)

Although there is no case applying the *Scull* test to a statute identical to that proposed by the Bill, the courts have applied the test in analogous contexts. In *City of Bowie v. County Commissioners for Prince George’s County*, the court ruled that a resolution authorizing the

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issuance of bonds for the acquisition of an airport was an executive act. 258 Md. 454 (1970). In *Queen Anne's Conservation, Inc. v. County Commissioners of Queen Anne's County*, the court ruled that "the negotiation of terms protective of public health, safety, or welfare, in a contract entered into by a local government body is a discretionary executive act, not a legislative one." 382 Md. 306, 321 (2004). As was aptly stated by the Court of Appeals in *Montgomery County v. Revere National Corporation*, "[w]hen the executive branch of the county government, in carrying out the laws and functions of government, enters into a contract, such action constitutes the exercise of executive discretion." 341 Md. 366, 390 (1996).

The Attorney General has also provided pertinent guidance. In 2000, the Attorney General concluded that the General Assembly was not permitted to require the Stadium Authority to submit certain construction contracts to a legislative committee for approval. 2000 Md. AG LEXIS 19. The Attorney General wrote:

The distinction [between the right to review and comment and the right to approve or disapprove a contract negotiated by an executive agency] is critical. A provision that rendered the Stadium Authority's individual agreements subject to legislative approval would establish a legislative veto over executive action. Although this Office once concluded that a statute reserving to a legislative committee a veto over proposed regulations was not clearly unconstitutional, 63 *Opinions of the Attorney General* 125, 127-28 and 150-51 (1978), there was little judicial authority on the subject at that time. Subsequently, most state courts that have considered the issue have held that legislative veto provisions violate the separation of powers provisions of their respective state constitutions. See generally Rossi, *Institutional Design and the Lingering Legacy of Anti-Federalist Separation of Powers Ideals in the States*, 52 *Vand. L. Rev.* 1167, 1201-04 & nn. 186-90 (1999) (collecting cases and noting that, with one exception, legislative vetoes have been found unconstitutional by every state court to consider the question). Similarly, the United States Supreme Court has held that a provision giving Congress a legislative veto violated the federal constitution. *INS v. Chadha*, 462 U.S. 919 (1983). *Id.* at 25-27.¹

The negotiation and execution of a contract to dispose of property is an executive function.² Under the County Charter, that function has been delegated to the Executive. The Bill intrudes upon the Charter's separation of powers by authorizing the Council to exercise an illegal "legislative veto" over a core executive function. See *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983). As Mr. Faden's memorandum acknowledges, the Council intends that the Bill will enable it to review and approve the terms of a contract

¹ This opinion was authored by now Court of Special Appeals Judge Robert Zarnoch.

² Of course, this Charter-driven rule must yield to higher law. For example, State law authorizes the County Council to dispose of surplus school sites. See *Md. Code Ann., Educ.* § 4-115.

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negotiated by the executive – contract negotiation is not a legislative function because it is accomplished on a case-by-case, *ad hoc*, basis rather than through “an enactment of general application.” *Scull v. Montgomery Citizens League*, 249 Md. 271, 282 (1968).

It has been suggested that a Maryland Court of Special Appeals decision, *Prince George’s County v. Silverman*, 58 Md. App. 41 (1984), supports the proposed provisions of the Bill. In *Silverman*, the court affirmed a lower court’s decision to compel the Prince George’s County executive to convey land to a prospective purchaser. *Silverman* does not establish a rule that a legislative body may approve the terms of a contract disposing of property. Indeed, the Court approved a Prince George’s County ordinance that allowed for a legislative determination that property was “surplus.” But this determination does not stand for the proposition that the disposition of land is a legislative function. Indeed, the court in *Silverman* upheld a disposition contract entered into by the executive without council approval. An argument has been advanced that the Council can approve all of the terms of a disposition contract, but not the identity of the prospective purchaser; this argument is illogical. The branch of government with the authority to determine who to transfer the property to must necessarily be the branch that determines the terms and conditions of the disposition.

Although we conclude that Bill 11-12 violates the separation of powers mandated by the County Charter, we do not mean to imply that the Council is without the authority to exert control over how the Executive effects a disposition of County-owned property. For example, the Council could enact legislation to require the Executive to provide the Council with an opportunity to comment on the terms of any proposed property disposition, including the sale price. The Council could require that the Executive must dispose of surplus property at fair market value. Finally, the Council could require the Executive to obtain Council approval before declaring County-owned property as surplus.

Please contact us if you would like to discuss our opinion.

Cc: Michael Faden, Senior Legislative Attorney