


MEMORANDUM

April 9, 2012

TO: County Council

FROM: Robert H. Drummer, Senior Legislative Attorney 

SUBJECT: **Addendum:** Bill 14-12, Economic Development Fund – Amendments

Council staff received the attached bill review memorandum from the County Attorney (©1) after the public hearing packet went to print. The County Attorney opined that the Bill violates the separation of powers provisions in the County Charter by: 1) authorizing the Council to amend and approve the strategic economic plan developed by the Executive; and 2) authorizing the Council to veto an Executive's decision to expend appropriated funds. The County Attorney also pointed out that both legal issues can be resolved by amendments to the Bill.

Council staff disagrees with some, but not all of the County Attorney's conclusions. As the County Attorney concedes, the adoption of a strategic economic plan "involves the creation of a policy of general application." The County Attorney compares this to the adoption of a regulation. However, it is also comparable to an act of the legislature. The difference is that the Bill would delegate to the Executive the task of developing a proposed strategic plan for Council approval. Council staff agrees that an amendment requiring the Executive to adopt a strategic plan by regulation would serve a similar purpose. However, we disagree that the Bill, as drafted, necessarily violates the separation of powers in the Charter by delegating to the Executive the task of proposing a strategic plan that the Council could adopt on its own as legislation.

Council staff agrees that the Council cannot reserve the right to veto the Executive's expenditure of appropriated funds. The County Attorney suggested that the Council could produce the same result by prohibiting expenditures greater than \$500,000 in the appropriation for the Economic Development Fund in the budget resolution. Council staff believes that this cap could also be placed in the Bill directly. Council staff will work with the County Attorney on amendments to address these issues for discussion at the PHED Committee worksession.



OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett
County Executive

Marc P. Hansen
County Attorney

MEMORANDUM

April 5, 2012

TO: Steve Silverman, Director
Department of Economic Development

FROM: Marc Hansen *Marc Hansen*
County Attorney

RE: Bill No. 14-12, Economic Development Fund - Amendments

Opinion

The County Charter vests executive functions in the County Executive and establishes an annual appropriation process that does not allow the Council to condition or control funds after the funds have been appropriated. Bill 14-12 (Bill) violates the separation of powers provisions of the County Charter by: 1) authorizing the Council to amend and approve an economic development strategic plan prepared by the Executive pursuant to criteria set out in the Bill; and 2) authorizing the Council to veto an executive decision to expend appropriated funds.

Both of these legal flaws may be avoided by amendments to the Bill. The Council may require that the strategic economic development plan be adopted by a method (1) or (2) executive regulation. This would preserve Council input on the details of the plan without violating the Charter's separation of powers provisions. The Council may in the annual budget provide that no expenditure in excess of \$500,000 (or some other sum certain) may be made from the Economic Development Fund (EDF). This, in effect, would require the Department of Economic Development to obtain a supplemental or special appropriation to make an economic development fund loan or grant in excess of the ceiling set in the annual budget resolution.

Background

The Bill proposes to modify § 20-75 of the County code and create a new § 20-76. The Bill would authorize the Council to exert greater control over the expenditure of funds allocated to the EDF. Section 20-73 authorizes the Director of the Department of Economic Development (Director) to create the EDF. The EDF is "continuing and non-lapsing" and is comprised of:

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- (1) all funds appropriated to it by the County Council;
- (2) all payments on any loan from the Fund;
- (3) all interest earned on funds in the Fund; and
- (4) all funds received from any other public or private entity.

The Bill would require the Director to spend EDF funds “consistent with” an “economic development strategic plan” approved by the Council under the Bill’s proposed § 20-76. The Executive would be required to submit the plan every 2 years, and the Council may amend and must approve the plan. The Bill would further require the Director to provide the Council “with all fiscal analyses and other supporting documents for any proposed offer of assistance to a private employer valued at more than \$100,000.” Lastly, the Bill would require Council approval for “each offer of assistance to a private employer valued at more than \$500,000.”

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 the County 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 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.

The Bill requires the Executive to create an economic development strategic plan, and requires that the plan address certain areas such as job creation, growth in tax base, workforce education, etc. But, after commanding the Executive to create an economic development plan, the Bill provides that the Council may amend the plan and must approve the plan before it may be implemented. This approach is inconsistent with the Scull test and is tantamount to a legislative veto. Under the *Scull* test, the Council may create a law that commands the Executive to implement a policy articulated in the law, but the Council cannot then exercise control over the way the Executive implements that policy.

The creation of a strategic economic plan certainly carries some elements of law or rule making, because it involves the creation of a policy of general application—and so the economic development plan is analogous to a regulation. A regulation is a mechanism for an executive branch agency to fill in the details of a policy adopted by the legislature. Therefore, although not free from reasonable debate, I believe the Council could require the Executive to adopt periodically an economic development plan by Executive Regulation. By specifying that the

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regulation be a method (1) or (2) regulation, the Council could retain considerable (although not complete) control over the details of the plan.

The Charter also lays out the respective roles of the Executive and the Council in enacting a budget. Under Charter § 303, the County Executive submits a proposed budget to the Council. Under Charter §§ 304 and 305, the Council conducts a budget hearing, modifies the budget if it so chooses, approves the budget, then appropriates the funds needed to support the budget. The Charter allows the Council to supplement the budget (see §§ 307 and 308), but contains no provision allowing the Council to reverse an appropriation. For nearly four decades the Office of the County Attorney has consistently advised that the Charter prohibits the Council from amending an appropriation after it is adopted (except to approve a supplemental or special appropriation), or conditioning an appropriation on subsequent Council approval.¹

Based on the foregoing legal analysis, the Bill by authorizing the Council to approve offers of assistance of more than \$500,000 violates the Charter in two distinct ways. First, the provision trenches upon executive authority by allowing the Council a legislative veto over a discretionary executive decision. Second, the provision permits the Council to “dis-appropriate” funds if the Council has appropriated funds of \$500,000 or more to the EDF and the executive chooses to expend those funds. The Charter does not authorize the Council to take back monies that have been appropriated.

The Council, however, may in the annual budget provide that no expenditure in excess of \$500,000 (or some other sum certain) may be made from the EDF. This, in effect, would require the Department of Economic Development to obtain a supplemental or special appropriation to make an EDF loan or grant in excess of the ceiling set in the annual budget resolution. Through this budget process the Council may retain approval authority for EDF loans or grants over a specified ceiling.

Please contact me if you would like to discuss this opinion.

Cc: Kathleen Boucher, Assistant Chief Administrative Officer
Robert H. Drummer, Senior Legislative Attorney
Clifford Royalty, Chief, Division of Zoning, Land Use and Economic Development

¹ See attached County Attorney Opinion to Robert Kendal, Director, Office of Management and Budget (April 7, 1999)

Office of the County Attorney
Montgomery County, Maryland

MEMORANDUM

April 7, 1999

TO: Robert K. Kendal, Director
Office of Management and Budget

VIA: Charles W. Thompson, Jr. *Charles W. Thompson Jr. [Signature]*
County Attorney

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

SUBJECT: Authority of Council to Impose Conditions on Funds Already Appropriated

QUESTION

On May 28, 1998, the County Council adopted Resolution No. 13-1281 which approved the FY 99 Capital Budget for the Montgomery County Government. Resolution No. 13-1281 appropriated \$2,202,000 to construct the Wheaton Market Place Parking Facility. This appropriation was subject to conditions set out in Project Description Form No. 509955 (PDF)—the PDF is part of the six year Capital Improvements Program (CIP), which also was approved by Resolution No. 13-1281. The PDF provided that Grandview Avenue would be incorporated into the parking facility. On March 23, 1999, the County Council introduced a resolution to amend the PDF to retain Grandview Avenue. The resolution further provides, "A construction contract must not be awarded until at least 60 days after the Department of Public Works and Transportation delivers to the Council a revised conceptual design reflecting the scope of work in this project description."¹

You have asked: What is the legal effect of the resolution amending the PDF on the authority of the executive branch to enter into a contract to construct the Wheaton Market Place Parking Facility using the funds appropriated by the Council in Resolution No. 13-1281.

¹This resolution would, as a practical matter, prevent the executive branch from entering into a contract to construct the Wheaton Parking Facility during FY 99.

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ANSWER

We conclude that the Council does not have the authority to condition or reduce an appropriation after the Council has approved the appropriation. The Charter requires the Council to adopt a budget that sets a fiscal plan for a fiscal year and assigns to the County Executive the responsibility for carrying out that plan. Amending an appropriation after it has been approved would be inconsistent with these Charter provisions.

DISCUSSION

The starting point for determining the legality of the proposed budget amendment lies in an examination of the provisions of the Charter that govern the appropriation process.² In Montgomery County the appropriation process is governed by Article 3 of the County Charter. Section 303 provides, "The County Executive shall submit to the Council . . . proposed capital and operating budgets . . . for the ensuing fiscal year . . ." (Emphasis added). The County's fiscal year begins on July 1 and ends on June 30 in the following calendar year.³ Section 305 requires the Council to, "approve each budget . . . and appropriate the funds therefor not later than June 1 of the year in which it is submitted." The County Executive may disapprove or reduce any item in the budget approved by the Council.⁴ The Council may approve any item disapproved or reduced by the County Executive by the affirmative vote of 6 Council members prior to June 30th.⁵ Not later than June 30th the Council must impose taxes necessary to finance the budget.⁶ Moreover, the Council must not set tax rates at a level that would create a General Fund surplus that exceeds 5 percent of the General Fund revenue for the preceding year.⁷ The surplus is available to fund supplemental or emergency appropriations. Section 307

²See McQuillin, *Municipal Corporations*, Section 39.66 ("Of course, statute or charter provisions, if any, relating to appropriation ordinances must be complied with or else the appropriation will be held void.")

³Charter Section 301.

⁴Charter Section 306.

⁵Charter Section 306.

⁶Charter Section 305.

⁷Charter Section 310.

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(Supplemental Appropriation) and Section 308 (Emergency Appropriation) authorize the Council, subject to certain restrictions, to add appropriation authority to the budget during the fiscal year.

The language of the Charter undoubtedly envisions an annual appropriation process and circumscribes the Council's authority during the fiscal year to amend the budget—limiting amendments to additions to appropriation authority. The Charter grants the Council no authority to delete, reduce, or condition an appropriation after an appropriation becomes final. An appropriation becomes final after the Council adopts the annual budget on or before June 1st or after a supplemental or emergency appropriation has been approved.

It is true that Charter Section 302 authorizes the Council to amend the CIP at any time. It has been suggested that this Charter provision authorizes the Council to impose new conditions on a capital appropriation that has been previously approved. But the only legal effect of the CIP is found in Section 303, which requires that the County Executive's proposed capital and operating budgets for the ensuing fiscal year be consistent with the Executive's proposed CIP. In short, the CIP creates a legally non-binding financial plan for the County. The 1968 *Commentary Upon Proposed Charter, Montgomery County, Maryland* is consistent with this conclusion:

The purpose of this section [302] is to make more orderly and systematic the growth of governmental activities and to increase the coordination among programs and finances. The approval of six-year programs by the Council as the basis for the County budget should preclude large unanticipated tax increases in future years. Through long-range planning it will be possible to adjust the tax program so that a great increase should not be necessary in any one year.

With respect to Section 303, the *Commentary* merely summarizes that the Executive must submit a proposed budget that is consistent with the six-year programs.

The Charter's prohibition against conditioning or deleting an appropriation after the appropriation has been approved advances both sound fiscal policy and the Charter's decision to vest the County's executive power in the County Executive. If an appropriation could be conditioned—or even deleted in its entirety—after the appropriation becomes final, the ability of the executive branch to undertake projects—an executive function—would be seriously undermined. Moreover, the deletion of an appropriation after June 30th would undercut the intent of the Charter to limit the imposition of taxes to those necessary to fund the budget plus a surplus not exceeding five percent of the previous year's General Fund revenue.

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The general rule appears to be: Where an annual budget is required, the budget cannot subsequently be changed by the legislature absent charter authority to do so. See McQuillin, *Municipal Corporations*, Section 39.66 ("But if an annual appropriation ordinance is required by statute, or charter, for the ensuing year, such ordinance cannot be changed, after the beginning of such fiscal year, by an ordinance changing appropriations.")

For nearly three decades the Office of the County Attorney has maintained that the Charter prohibits the Council from amending an appropriation after it is adopted except to adopt a supplemental or emergency appropriation. As early as 1971, the Office of the County Attorney concluded, "Again, there is clearly no authority for the Council to act on any appropriation item later than May 1 of any fiscal year, except as stated in Section 306, after executive veto, and further except as provided in Sections 307 and 308 dealing with supplemental and emergency appropriations."⁸ In the 1971 opinion, County Attorney David L. Cahoon went on to observe:

The approval of a capital budget item and the making of an appropriation for a budget item establishes the fiscal policy of the legislative body for that fiscal year. The body can specify with particularity the projects for which such funds are to be spent. However, leases, contracts, land acquisition, construction plans and all other actions to implement that fiscal policy are administrative and executive in nature and, under our Charter, are the exclusive province of the executive branch.⁹

The 1971 opinion finally concluded that the Council may not approve capital appropriations contingent on later Council approval during the same fiscal year.

In 1975, County Attorney Richard S. McKernon—relying on David Cahoon's 1971 opinion—concluded that "once the County Council has appropriated funds for a particular fiscal year, the Council may not, during that same fiscal year restrict the expenditure of appropriated funds."

⁸In 1971 the Charter required the Council to adopt a budget by May 1.

⁹In reaching this conclusion, County Attorney Cahoon relied on *Hormes v. Baltimore County*, 225 Md. 371, 170 A.2d 772 (1961); and *Anne Arundel County v. Bowen*, 258 Md. 722, 267 A.2d 168 (1970).

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In 1982, County Attorney Paul A. McGuckian concluded that the Council could not adopt a supplemental appropriation for the solid waste fund contingent on the Council subsequently appropriating in the capital budget money for the design and construction of a plastic liner at the Oaks Landfill. The opinion concluded with respect to this issue:

A Council-imposed prohibition on the County Executive's expenditure of these appropriated funds until subsequent Council appropriation of FY 82 or FY 83 funds for the plastic liner would, in the words of the Court of Appeals in *Anne Arundel County v. Bowen*, 258 Md. 713, 267 A.2d 168 (1970), "amount, in the light of the language of the Charter, to an impermissible invasion of the province of the County Executive." *Bowen* at 722, 267 A.2d at 178.

In 1984, County Attorney McGuckian was asked for advice concerning a Council proposal to appropriate only 60 percent of the parking budget within the Department of Transportation and only 6 months of the Cable and Management Systems budgets. The County Attorney observed, "It is quite clear from the Charter language that the County Council must act on an annual basis through the budget and appropriation process to express its fiscal policy for the coming fiscal year." The opinion concluded that the Executive must consider the funding approved by the Council in the budget as the funding that is available for the entire fiscal year, even if it is substantially less than that proposed by the Executive.

The interpretation held by the Office of the County Attorney since 1971 concerning the County's budget process is consistent with an opinion issued by the New Hampshire Supreme Court. The Supreme Court of New Hampshire rejected the legislative practice of requiring the Governor to obtain approval from the legislature before appropriated money could be spent.¹⁰ At issue before the New Hampshire Supreme Court were footnotes in the budget bill requiring the Governor to obtain prior approval of a legislative committee before the Governor could purchase certain computer hardware or expend funds to maintain buildings and grounds under the jurisdiction of the Department of Administrative Services. The Court began by noting that the New Hampshire Constitution provides for a separation of powers between the legislative, executive, and judicial branches of government. The court concluded that the New Hampshire legislature could not, through the appropriation process, exercise executive functions given to the executive branch of government. The court held that letting contracts to purchase computer

¹⁰*In Re Opinion of the Justices*, 219 New Hampshire 714, 532 A.2d 195 (1987).

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hardware or maintain buildings and grounds of state government were characteristically an executive function that cannot be exercised by the legislature.

Conceptually we see no difference between an appropriation conditioned on obtaining further legislative approval before the money may be spent and an interpretation of the Charter which would permit the Council, on its own initiative during the fiscal year, to add conditions to the expenditure of funds already appropriated. Both constitute an impermissible invasion of the power of the Executive as envisioned by the Charter and undermine the Charter's vision of a financial plan that is in place for at least one fiscal year.

CONCLUSION

The Charter authorizes the Council to set fiscal policy for the County not later than June 30th of each year for the ensuing fiscal year. We certainly agree with our predecessors that the Council may condition the expenditure of funds before June 1st.¹¹ But we find that the budget process as established in the Charter and the Charter's provision for a separation of powers between the legislative and executive branches of County government prevent the Council from amending or reducing an appropriation after the appropriation has been approved. We wish to be clear that the Council is authorized under Charter Section 302 to adopt the pending resolution amending the Wheaton PDF, but the amendment will be advisory only. Accordingly, the money appropriated for the Wheaton parking facility under Resolution No. 13-1281 may be encumbered during FY 99 to fund a construction contract so long as the construction design is consistent with the conditions imposed by the Council under Resolution No. 13-1281.

MPH:plb:wmm

cc: Douglas M. Duncan, County Executive

¹¹The authority of the Council to condition an appropriation, however, is not without some limitation. See *Bayne v. Secretary of State*, 283 Md. 560, 392 A.2d 67 (1978) (legislature may condition an appropriation if the limitation is "directly related to the expenditure of the sum appropriated, does not, in essence, amend either substantive legislation or administrative rules adopted pursuant to legislative mandate, and is effective only during the fiscal year for which the appropriation is made.")

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Isiah Legett, President, County Council

Bruce Romer, Chief Administrative Officer

Timothy Firestine, Director of Finance

Deborah Snead, Assistant Chief Administrative Officer

Michael Faden, Senior Legislative Attorney

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