

MEMORANDUM

TO: County Council

FROM: Michael Faden, Senior Legislative Attorney

SUBJECT: **Public Hearing 2:** Expedited Bill 11-12, County Property - Disposition

Expedited Bill 11-12, County Property - Disposition, sponsored by Councilmembers Leventhal and Elrich, Council President Berliner, and Councilmembers Andrews, Riemer, and Navarro, was introduced on March 13, 2012. A public hearing was held on March 20 and a Government Operations and Fiscal Policy Committee worksession is tentatively scheduled for March 29 at 2:30 p.m.

Summary of Bill

Bill 11-12 would modify the procedures for disposition of County property and require the County Council to approve disposition of certain County properties. As defined in this Bill, "disposition" of property which the County owns or controls¹ includes any sale, lease or license for a term of at least 3 years, or lease or other document which includes an option to buy.²

Specifically, Bill 11-12 would modify County Code §11B-45 by:

- tightening up the current property disposition process (which includes an opportunity for Council comments but not approval) so as to preclude the broad exemptions found in current County regulations (see COMCOR §11B.45.01.02A-D, shown on ©13).³ This would be done by only allowing property "of nominal value" to be exempted from the current process.⁴ The current regulations exempt, among other categories, "parcels at the County Life Sciences Center" and "matters of significant or strategic interest to the County's economic development," which are not further defined;

¹"Property which the County "controls" would include property leased or licensed to the County government, as well as any property deeded to the County.

²See ©2, lines 6-8

³See amended subsection (a) on ©2, lines 3-19.

⁴See ©2, lines 4-6.

- requiring Council approval before any disposition of County property⁵ becomes final.⁶ Council approval would take the form of a resolution, adopted after the Council holds a public hearing with at least 15 days advance notice.

The Council would also approve the material terms of each property disposition, particularly the price or rent to be paid and any associated economic incentives.⁷ The purpose of this requirement is to avoid a situation where an Executive gains approval to dispose of a property and then modifies the terms of disposition in a way that (in the Council's or the public's view) might not be in the County's best interest. The Council's ability to approve the terms, as well as the disposition itself, is the crux of the disagreement (discussed further below) between Council legal staff and the County Attorney regarding this Bill.

State law⁸ requires the County to advertise the sale or other disposition of "any property belonging to the county or any agency thereof ... upon such terms and compensation as said county may deem proper" for 3 weeks in a newspaper circulated in the county "and giving opportunity for objections thereto." Council staff does not read this requirement as precluding the County from enacting a law providing for other public notice and opportunities to comment before the disposition is finalized. State law does not otherwise regulate the procedures for disposing of County property.

Council staff transmitted an information request (see ©24) to Executive staff, seeking data on recent property transfers. Responses to that request, are attached at ©25.

Summary of Legal Issues

The County Attorney, in reviewing this Bill, concluded that under the County Charter's division of legislative and Executive authority, the Council could reserve to itself the power to approve the sale or other disposition of County property, but not the terms on which that property would be sold or disposed of. See Hansen memo on ©29. Council legal staff disagrees.

The constitutional doctrine of separation of powers is generally not applicable to local government.⁹ Rather, Maryland courts look to the county charter and local law to identify governmental functions as legislative or executive at the local level.

In the case of *Prince George's County v. Silverman* (see opinion, ©5-12), the Court of Special Appeals confirmed that the Council can enact a law that requires Council approval before the County can sell or dispose of any County property. The Court affirmed a Circuit Court holding that the Prince George's County law requiring Council approval of the Executive's declaration that a property is surplus is "**a necessary and proper exercise of legislative checks and balances on the executive determination to dispose of County property.**" To hold otherwise could result in the County Executive's declaration that all the

⁵With certain minor exceptions; see ©2, lines 21-22.

⁶See new subsection (b) on ©2, lines 20-27.

⁷See ©2, lines 26-27.

⁸Maryland Code, Article 25A §5(B).

⁹*County Council of Montgomery County v. Investors Funding Corporation*, 270 Md. 403.

county-owned property is surplus.”¹⁰ The Court explained that “the procedure for disposing of surplus property...is designed to **insure fairness and to prevent arbitrary and discriminatory dispositions.**”

The Court in *Silverman* went on to say: “It is important to note that the [Prince George’s] code requires council approval only of the County Executive’s determination that the property is surplus; not approval of the prospective grantee.” Bill 11-12 conforms to this judicial guideline; it would authorize the Council to approve the material terms of any sale or lease (including the price or rent to be paid and any associated economic incentives), but *not* the identity of the buyer or lessee. In other words, if the Council approves a sale to one party on certain terms, it could not then disapprove the sale of the same property on the same terms to any other party.

To respond to the heart of the County Attorney’s argument, the Council would not have a governing interest in the identity of the prospective grantee, but **the Council clearly does have a fiscal interest in the amount of the proceeds.** A below-market sale is effectively a transfer, akin to an expenditure, of County resources, and the Council has the same interest in that kind of transaction as it has for any expenditure. Just as any Executive’s authority to buy property for the County is always subject to appropriation, the Executive’s authority to sell property would be subject to the Council’s fiscal authority under the Charter. Otherwise, as the Court in *Silverman* implied, the Executive could effectively give away County property without receiving full value.

In effect, the County Attorney argues that the executive powers clause of the County Charter would give the County Executive unfettered discretion to sell, lease, or transfer any item of County property, no matter its value, for any price, without any public or legislative check and balance.

Nowhere does the County Charter expressly reserve to the Executive the authority to dispose of County property, and *we are not aware of any Maryland case that so holds.*¹¹ The County Attorney’s memo lumps together all manner of Executive branch activities in searching for cases that uphold the Executive’s prerogatives. However, the *irrevocable* sale or transfer of valuable County property is qualitatively different from the day-to-day administration of County government and from the run-of-the-mill contracts that the County Attorney’s memo relies on.

In the last substantive paragraph of the County Attorney’s memo, he suggested some possible legislative solutions which do not go as far as this Bill but which, he concluded, would pass legal muster. In the interest of avoiding a legal deadlock, Council staff will be happy to explore variations on these suggestions or other alternative that would protect the Council’s interest in adopting effective checks and balances on asset disposition. But we do not concede that the options he proposed are necessary to comply with the County Charter.

¹⁰See 58 Md. App. at 53-54.

¹¹The County Attorney’s reliance on part of the *Silverman* case, is incorrect because that Court was guided by a specific provision (§402) of the Prince George’s County Charter which *expressly* assigns to that County’s executive branch the authority to “sign or cause to be signed on the County’s behalf all deeds, contracts, or other instruments.” The Montgomery County Charter has no similar language.

This packet contains:

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Expedited Bill No. 11 -12 _____
Concerning: County Property -
Disposition
Revised: 3-9-12 Draft No. 4
Introduced: March 13, 2012
Expires: September 13, 2013
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Councilmembers Leventhal and Elrich, Council President Berliner,
and Councilmembers Andrews, Riemer, and Navarro

AN EXPEDITED ACT to:

- (1) modify the procedures to dispose of County property;
- (2) require the County Council to approve certain dispositions of certain County properties; and
- (3) generally amend the County law regarding disposition of County property.

By amending

Montgomery County Code
Chapter 11B, Contracts and Procurement
Section 11B-45

| | |
|------------------------------|--|
| Boldface | <i>Heading or defined term.</i> |
| <u>Underlining</u> | <i>Added to existing law by original bill.</i> |
| [Single boldface brackets] | <i>Deleted from existing law by original bill.</i> |
| <u>Double underlining</u> | <i>Added by amendment.</i> |
| [[Double boldface brackets]] | <i>Deleted from existing law or the bill by amendment.</i> |
| * * * | <i>Existing law unaffected by bill.</i> |

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec. 1. Section 11B-45 is amended as follows:**

2 **11B-45. Disposition of real property.**

3 (a) The County Executive must adopt regulations to establish a process for
4 the disposition of any real property owned or controlled by the County,
5 other than surplus school facilities and [other] property of nominal value
6 identified in the regulation. As used in this Section, "disposition" means
7 a sale, a lease or license for a term of 3 years or longer, or a lease or
8 other document which includes an option to buy. The regulations must
9 provide for:

- 10 (1) coordination among public agencies, including any [municipal
11 corporation] municipality in which the real property is located;
12 (2) opportunity to reserve property for alternative public use;
13 (3) comparative analysis of reuse proposals before any disposition
14 actions; and
15 (4) public notice and hearing on possible dispositions before final
16 decision on disposition, except that the County Executive may
17 waive the public hearing requirement for any real property that:
18 (A) has nominal value; or
19 (B) is recommended to be reused by the County government.

20 (b) Before the disposition of any real property owned or controlled by the
21 County (other than a property which has either nominal value or an
22 appraised value lower than \$100,000) becomes final, the County
23 Council, by resolution adopted after the Council holds a public hearing
24 with at least 15 days advance notice, must approve:

- 25 (1) the disposition; and
26 (2) all material terms of the disposition, including the price or rent to
27 be paid and any associated economic incentives.

28 [(b)] (c) * * *

29 [(c)] (d) The Executive must adopt regulations to establish a process for
30 disposition of surplus schools. As used in this Section, "surplus school"
31 means any building used at any time as a public school and later
32 conveyed to the County and all or part of the land which constitutes the
33 school site[, and "disposition" means a sale or a lease with an option to
34 buy]. The regulations must provide for:

35 * * *

36 [(d)] (e) * * *

37 **Sec. 2. Expedited Effective Date.**

38 The Council declares that this legislation is necessary for the immediate
39 protection of the public interest. This Act takes effect on the date when it becomes
40 law.

41 *Approved:*

42

Roger Berliner, President, County Council Date

43 *Approved:*

44

Isiah Leggett, County Executive Date

45 *This is a correct copy of Council action.*

46

Linda M. Lauer, Clerk of the Council Date

LEGISLATIVE REQUEST REPORT

Expedited Bill 11-12

County Property - Disposition

| | |
|---|---|
| DESCRIPTION: | Modifies the current procedures for disposition of County properties to remove certain exemptions. Requires County Council approval of certain property dispositions. |
| PROBLEM: | Apparently unrestricted Executive authority to dispose of County property on any terms after minimal advertisement and without public or legislative input. |
| GOALS AND OBJECTIVES: | To require the County Council, after public hearing, to approve the disposition of certain County properties and the terms of disposition. |
| COORDINATION: | Department of General Services |
| FISCAL IMPACT: | To be requested. |
| ECONOMIC IMPACT: | To be requested. |
| EVALUATION: | To be requested. |
| EXPERIENCE ELSEWHERE: | To be researched. |
| SOURCE OF INFORMATION: | Michael Faden, Senior Legislative Attorney, 240-777-7905 |
| APPLICATION WITHIN MUNICIPALITIES: | Applies only to property owned or controlled by the County. Would apply to County property located in a municipality. |
| PENALTIES: | Not applicable. |



PRINCE GEORGE'S COUNTY, Maryland v. Marc SILVERMAN

No. 682, September Term, 1983

Court of Special Appeals of Maryland

58 Md. App. 41; 472 A.2d 104; 1984 Md. App. LEXIS 301

March 8, 1984

PRIOR HISTORY: [***1] APPEAL FROM THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AUDREY E. MELBOURNE, JUDGE.

Executive of Prince George's County to execute a deed of conveyance to Silverman.

DISPOSITION: JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANT.

On appeal the County raises three issues for our consideration:

COUNSEL: Ralph E. Grutzmacher, Associate County Attorney for Prince George's County, with whom were Thomas P. Smith, County Attorney for Prince George's County and Michael O. Connaughton, Deputy County Attorney for Prince George's County on the brief, for appellant.

I. Whether the court erred in holding that the County Council's action regarding Resolution CR-120-1981, [***2] which pertained to the "Marton Tract", was illegal and improper.

Russell W. Shipley, with whom were Steven R. Smith and Shipley, Curry & Taub, P.A., Landover on the brief, for appellee.

II. Whether the court erred in holding that a contract for the sale of the "Marton Tract" existed between the County and Silverman.

JUDGES: Moylan, Liss and Bell, JJ.

III. Whether the County Executive has the capacity to contract to convey the "Marton Tract" in the absence of approval by the County Council.

OPINION BY: BELL

OPINION

FACTS

[*46] [**106] Marc Silverman (Silverman), Appellee, sought a Declaratory Judgment and a Writ of Mandamus to have Prince George's County (County), Appellant, convey the "Marton Tract" to him as the highest qualified bidder. The Circuit Court for Prince George's County ordered that the sale be ratified and that a Writ of Mandamus issue commanding the County

In 1980, the Board of Education conveyed the Marton Tract to Prince George's County. The Board of Education had acquired the tract in 1958 from the Marton family. The [*47] tract consists of approximately four acres of land and is part of Lot 7 in the Richard S. Hills Subdivision. The property lies north of Maryland Route 198 near the intersection of Route 198 and Interstate 95.

58 Md. App. 41, *47; 472 A.2d 104, **106;
1984 Md. App. LEXIS 301, ***2

Since March of 1977, the County has disposed of some 40 to 50 "major surplus properties" (property containing improvements or property valued in excess of \$ 25,000). Although Section 2-111.1 of the Prince George's County Code requires the County Executive to inventory surplus property for approval by the County Council *before* he disposes of it, in all of the 40 to 50 surplus property dispositions, the County Executive first secured [***3] a bona fide transferee/purchaser and *thereafter* submitted the matter to the council for approval. In all cases *except* the Marton Tract, the council approved the sale of the surplus property.

The Marton Tract was advertised for sale in January of 1981 as surplus property of the County. Silverman contacted Raymond Austin of the County's Bureau of Property Management in response to the advertisement. He received a "bid package" from that office. Silverman submitted a sealed bid, on a form entitled "Bid and Option to Acquire Real Property", in the amount of \$ 50,000 with a cashier's check for \$ 5,000 payable to the County.

The sealed bids were opened on February 27, 1981, and Silverman qualified to participate in the oral auction. At the auction, Silverman was declared the successful bidder at \$ 71,605. Silverman certified his bid on that same day. The only other competing bidders were Eileen and Wayne Updike, daughter and son-in-law of Clara Marton, at \$ 70,000. On March 11, 1981, the County cashed Silverman's check for \$ 5,000.

During April of 1981, the County Executive prepared the proposed list of surplus property dispositions, designated as Resolution CR-63-1981, [***4] and submitted the list to the County Council for approval. The Marton Tract was "deleted" from the list with no explanation.

On August 11, 1981, Austin informed Silverman that his bid for the Marton Tract had been accepted but that because [*48] the period for notification of acceptance of the option by the County had expired, the option was null and void. A tender of a check in return of the deposit accompanied that notification. In response to the letter from Austin, Silverman met with County officials in an attempt to ascertain the problem.

On August 28, 1981, the County informed Silverman that the County Executive intended to resubmit the

Marton Tract for approval as surplus property as Resolution CR-120-1981. When the council first considered CR-120-1981 on October 13, 1981, it voted 6 to 5 in favor of approval; then one councilman changed his vote to defeat the resolution 6 to 5. Following that action the council approved, by a vote of 6 to 5, a motion to table consideration of the resolution indefinitely. At no point during their consideration did the council make any reference to whether the subject property was needed for a public purpose. The transcript of the [***5] council proceedings indicated that some council members felt the prior owners, the Martons, had been unfairly forced to sell their land.

At the time CR-120-1981 was under consideration by the County Council, legislation was pending which would have amended the provision in the Code regarding the prior owners rights to reacquire surplus property. On October 13, 1981, when the council considered the sale of the Marton Tract, the Code provided:

Notwithstanding the foregoing provisions of this subsection (d), a person from whom property was acquired by the County, or the person's successor in interest, shall have first right over municipality, any government entity or agency other than Prince George's County, or any other person to reacquire the property (or such portion of it which is declared surplus) if all the following conditions are met:

...

(3) The determination of the County Executive that the property is surplus occurs within *ten (10)* years after County acquisition. (Emphasis added).

[*49] Prince George's County Code

Section 2-111.1(d).

The pending legislation would have changed the period during which the prior owners had a right [***6] to reacquire the property from 10 to 15, 25, or 40 years. (Note -- Section 2-111.1 was in fact amended on [**108] June 23, 1982 to extend the period to 25 years.)

When Silverman filed the instant action to enforce

58 Md. App. 41, *49; 472 A.2d 104, **108;
1984 Md. App. LEXIS 301, ***6

his option to purchase the Marton Tract, Clara Marton intervened. The court found Clara Marton would be entitled to reacquire the property only if the following two conditions were met: (1) The Council's action on CR-120-1981 was legal and proper, and (2) Amended Section 2-111.1 applied to this case. After a thorough and well reasoned discussion, the court found:

the County Executive's determination that the Marton Tract is no longer needed for a public purpose was correct, there being no evidence to the contrary; that the Council's failure to approve -- the "Marton Tract" as surplus was motivated by legally unauthorized considerations, i.e., prolonging a sale of county property until a Code Amendment could be enacted that would enure to the benefit of a special interest; that the purchaser [Silverman] met all the procedural requirements made known to him by the County; and that Petitioner, Marc Silverman, should be granted the relief he seeks in these proceedings [***7] for the reasons herein set forth.

The court further found that under the law in effect at the time the matter was before the County Council, Clara Marton had no right of reacquisition because the 10 year period had expired.

I. *Whether the Council's action regarding the Marton Tract was illegal and improper.*

The lower court found that the council's sole function in considering CR-120-1981 was to determine whether the [*50] Marton Tract was needed for a public purpose. Since the council indefinitely tabled the resolution to allow Section 2-111.1 to be amended so that a prior owner could reacquire the property, the court held the council acted improperly and arbitrarily.

The County contends that based on the applicable statutory provisions, which require the council to approve the Executive's determinations, the trial court invaded the province of the County Council in determining that it considered impermissible factors. The County cites *County Council for Montgomery County v. District Land Corp.*, 274 Md. 691, 337 A.2d 712 (1975) in support, which holds that the motives, wisdom or propriety of a

municipal governing body in passing an ordinance are not subject [***8] to judicial inquiry.

Our discussion of this issue is addressed in two parts: (A) whether the court had authority to address the matter; (B) whether the court erred in finding the council's action improper.

A.

The standard of review by the circuit court when the County Council or another administrative body is acting in a quasi-judicial or administrative capacity is whether the action was arbitrary, capricious, or discriminatory. *County Council v. Carl M. Freeman Assoc.*, 281 Md. 70, 74, 376 A.2d 860 (1977); *See also; Montgomery County v. Woodward and Lothrop*, 280 Md. 686, 706, 376 A.2d 483 (1977); *Stratakis v. Beauchamp*, 268 Md. 643, 652, 304 A.2d 244 (1973). The test to determine whether action is legislative or administrative is whether the action is one making new law, i.e. 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. *City of Bowie v. County Comm'r for Prince George's County*, 258 Md. 454, 463, 267 A.2d 172 (1970).

In considering CR-120-1981 on October 13, 1981, the council was not functioning in a purely legislative [***9] capacity. [*51] Rather, it operated in a quasi-judicial or administrative capacity. The council dealt with the disposition of one isolated parcel of property. The effect of its decision was restricted to the individuals who had an interest in the property and had no effect on the general safety or welfare. The council essentially adjudicated Silverman's rights in the property. Thus the trial court did not invade [**109] the province of the council because it did not attack the validity of a legislative enactment; rather it simply determined whether the council's action on Resolution CR-120-1981, pursuant to a *prior* legislative enactment (Section 2-111.1 of P.G.Co. Code), was arbitrary and discriminatory.

The County's reliance on *District Land Corp., supra*, for the proposition that the court invaded the legislative province of the council is misplaced. The Court of Appeals held in that case that a comprehensive rezoning plan bearing a substantial relationship to the public health and welfare enjoys a strong presumption of validity, and that the motives, wisdom, or propriety of a municipal

58 Md. App. 41, *51; 472 A.2d 104, **109;
1984 Md. App. LEXIS 301, ***9

body in passing the ordinance effectuating the comprehensive rezoning are [***10] not subject to judicial inquiry. The adoption of a sectional zoning map in that case, was deemed a "legislative" act because it concerned legislative facts, e.g. zoning of a large area and impact on general welfare of the county. In the case at bar, however, the consideration of the Marton Tract involved the council in a quasi-judicial capacity.

B.

The trial court did not err in holding that the council's failure to approve CR-120-1981 was improper and arbitrary.

The initial question we must address, for purposes of the instant case, is within which branch of the government does the power to dispose of surplus property lie.

Executive Branch

Article XI-A of the Maryland Constitution (Home Rule Amendment) sets forth the steps to be taken at the local level to establish a charter local government. Section 1 of [*52] Article XI-A the Home Rule Amendment authorizes the counties to choose a charter form of government, which if adopted by the voters of the county, becomes the law or "constitution" of the county. Section 2 mandates the adoption by the Maryland General Assembly of a grant of express powers for those counties choosing a charter form of government. Pursuant [***11] to the mandate, the General Assembly enacted the "Express Powers Act", codified in *Article 25A of the Annotated Code of Maryland*. Article 25A, Section 5(B) of the Maryland Code permits the disposition by the County of "any real or leasehold property belonging to the County, provided the same is no longer needed for public use."

The Prince George's County Charter, Article IV, Section 402 enumerates the specific powers of the executive branch of the county government. It provides that all those specific powers vested in Prince George's County by the Constitution shall be vested in the County Executive. Among the enumerated powers is the power to "sign or cause to be signed on the county's behalf all deeds, contracts, and other instruments . . ." Prince George's County Charter, Article IV, Section 402(8).

Prince George's County Code, Subtitle Two,

Division 2, Section 2-111.1 sets forth a framework for the declaration of county owned property as surplus and the disposal of the property. It provides in pertinent part:

The County Executive shall be authorized to sell, lease or otherwise dispose of any County owned real property, no longer needed for public use or in furtherance [***12] of the public purpose, in accordance with the following provisions:

(a) The County Executive shall establish an inventory of all real property and improvements titled in the name of Prince George's County . . .

(b) The County Executive, at least once annually, shall review the inventory of all real property and improvements held in fee by Prince George's County and shall [*53] transmit, for the approval by resolution of the County Council, a list of all properties to be leased, offered for sale, or otherwise disposed of . . .

Pursuant to the above, we agree with the trial court that the County Executive was empowered to dispose of county [**110] owned surplus property in accordance with the requirements of Section 2-111.1.

Legislative Branch

Subsection (S) of the Express Powers Act, *Article 25A, of the Maryland Code* provides:

The foregoing or other enumeration of powers in this article shall not be held to limit the power of the county council, in addition thereto, to pass all ordinances, resolutions, or by-laws, not inconsistent with the provisions of this article or the laws of the State, as may be proper in executing and enforcing any of the powers [***13] enumerated in this section . . . as may be deemed expedient in maintaining the peace, good government, health and welfare of the county.

This section contains a general grant of power to pass

58 Md. App. 41, *53; 472 A.2d 104, **110;
1984 Md. App. LEXIS 301, ***13

laws for the peace, good government, health and welfare of the County. Pursuant to this grant of power, measures may be passed which are necessary and beneficial, and will be adjudged valid by the courts, provided they are reasonable and consistent with the laws and policy of the State. *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151, 161, 252 A.2d 242 (1969). Thus where council legislation bears a reasonable relationship to the implementation of an enumerated power, the legislation will be upheld.

Applying the above analysis to the County Code we agree with the trial court that:

(1) The requirement that the County Executive annually inventory all County owned property no longer needed for a public purpose is necessary for the Council to be apprised of the County's surplus land holdings and proper to return to the tax rolls or other governmental agencies; and

[*54] (2) The provision requiring Council approval that properties are in fact surplus is likewise a necessary [*14] and proper exercise of legislative checks and balances on the executive determination to dispose of County property: To hold otherwise could result in the County Executive's declaration that all the county-owned property is surplus.

The problem in this case, however, is not whether Section 2-111.1 is valid, but whether Section 2-111.1 was properly followed. Section 2-111.1 sets forth the procedure for disposing of surplus property. It is designed to insure fairness and to prevent arbitrary and discriminatory dispositions. It is important to note that the code requires council approval only of the County Executive's determination that the property is surplus; not approval of the prospective grantee.

Prince George's County has been disposing of its surplus property in contravention of the code. Despite the code's requirement of obtaining approval before a grantee has been selected, the County has condoned the Executive's procurement of the grantee first. In the 40 to 50 surplus property cases, the property was advertised as surplusage in newspapers, sealed bids were accepted, oral

auctions were held and bona fide deposits were cashed prior to council approval by resolution. [***15] The reason for ignoring the specifics of Section 2-111.1 was obviously to enable the council to know the identity of the grantee and his proposed use of the property. This procedure contravenes the legislative intent of Section 2-111.1 which is to prevent discrimination and arbitrary action.

Pursuant to the code, the council's sole duty was to consider factors directly related to whether the property was no longer needed for public use. It was not authorized to table the matter until a code amendment could be enacted that would enable the Marton family to repurchase the property. In its answers to Interrogatories propounded by Silverman, the County admitted that the property was in fact surplus property. Since it is undisputed that the property was surplus, it is clear that the council acted arbitrarily in failing to approve CR-120-1981. The court did not err.

[*55] [***111] II. *Whether a contract for sale of the "Marton Tract" existed.*

By ratifying the sale of the Marton Tract, the trial court implicitly found that a contract existed between Silverman and the County. Prince George's County contends that there never was a contract between the two parties because [***16] the County never accepted the Bid and Option Agreement submitted by Silverman. The County asserts that the option became null and void by the terms of the agreement itself when the 45 day period for acceptance set forth in paragraph IIB of the agreement expired. The County cites *American Medicinal Spirits Company v. Mayor and City Council of Baltimore*, 165 Md. 128, 166 A. 407 (1933) in support, which states at p. 133, 166 A. 407:

Since the offeror was at liberty to make no offer, it was free to determine and impose whatever terms it might choose, and among these it might require that its offer be accepted within a designated time and in a specific manner. If no acceptance is made in the manner and within the period fixed by the offer, the offer necessarily expires. *Williston v. Contracts*, Sections 53, 61, 76.

The County further urges that the 45 day provision

58 Md. App. 41, *55; 472 A.2d 104, **111;
1984 Md. App. LEXIS 301, ***16

amounted to a right to terminate the contract, and in the absence of fraud, undue influence, or mistake, such a reservation is valid and enforceable. *Acme Markets, Inc. v. Dawson Enterprises, Inc.*, 253 Md. 76, 251 A.2d 839 (1969); *Kahn v. Janowski*, 191 Md. 279, 60 A.2d 519 (1948).

At the outset [***17] we note that although the facts of *American Medicinal Spirits*, *supra*, appear similar to those of this case, we find the reliance by the County thereon misplaced. In *American Medicinal Spirits*, a company contracted to purchase land from the city conditioned on the city passing an ordinance within one year. The city failed to pass the ordinance within the specified period. The Court held the contract amounted to a unilateral offer to purchase by the company and that one term of the offer was not met. Therefore, the purchaser/company could opt to declare the [*56] contract null and void. The rationale behind this holding was obviously to prevent the city from procrastinating and to assure the company that an effort would be made to fulfill the terms of the contract in a timely manner. The Court did not address the issue before us -- whether the city/seller (or in this case the County) could purposefully avoid passing the ordinance and then declare the contract null and void.

Silverman posits that the County did in fact approve his bid by negotiating his check of \$ 5,000; by acknowledging in an informal memorandum that the bid for the property was ratified and by Austin's [***18] letter of August 11, 1981, stating the County accepted his bid. Additionally, Silverman asserts that he had the sole right to exercise the option; therefore it was not even necessary for the County to accept. As to the allegations concerning the 45 day provision in the agreement, Silverman contends the provision was an illegal and unenforceable provision.

Before we address the parties' contentions, we must determine exactly what the agreement entitled "Bid and Option to Acquire Real Property" represents.

An option to purchase property is a continuing offer to sell by the optionor which is irrevocable during the stated period. *Beall v. Beall*, 291 Md. 224, 434 A.2d 1015 (1981). An option is not a mere offer to sell, but is a binding agreement if supported by consideration. *Blondell v. Turover*, 195 Md. 251, 72 A.2d 697 (1949). The optionee has what is termed a power of acceptance, and when he accepts the offer in the prescribed manner,

the option is exercised and a binding bilateral contract of sale is created. *Straley v. Osborne*, 262 Md. 514, 278 A.2d 64 (1971).

Paragraph IIB of the agreement between Silverman and the County provides:

within 45 days after [***19] Optionee has been notified that his bid was accepted, Optioner shall notify Optionee in writing that his Option was accepted. If notice is [**112] not given to Optionee within the allotted time, this Option shall become null and void.

[*57] This provision implies that the County retains the power to revoke its "offer" and thereby prevent the formation of a binding contract. Since by definition, an option cannot be revoked, this agreement, despite its title, cannot be deemed an option contract. Accordingly, we must analyze the parties' positions under general contract principles.

A contract is formed when an unrevoked offer made by one person is accepted by another. An "offer" is the "manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." 1 *Restatement Contracts (2d)* § 24 (1979). A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows that the person making it does not intend to conclude a bargain until he has made a further manifestation of consent. *Foster & Kleiser v. Baltimore County*, [***20] Md., 57 Md.App. 531, 470 A.2d 1322 (1983) citing 1 *Restatement Contracts (2d)* § 26 (1979). By the same token, an invitation to bid is not an offer, but the bid or tender is an offer which creates no right until accepted. *Rofra, Inc. v. Board of Education*, 28 Md.App. 538, 346 A.2d 458 (1978). Acceptance of an offer can be accomplished by acts as well as words; no formal acceptance is required. *Porter v. General Boiler Casing Co.*, 284 Md. 402, 409, 396 A.2d 1090 (1979); *Duplex Envelope Co. v. Baltimore Post Co.*, 163 Md. 596, 605, 163 A. 688 (1933).

Judge Adkins, writing for this Court in *Foster & Kleiser*, *supra*, espoused the principle that a provision in a contract requiring council approval amounts to a condition of acceptance; and therefore, there can be no

binding contract until such approval is forthcoming. In addition, the requisite approval must comply with the applicable laws. In that case, Foster & Kleiser leased a tract of land in Baltimore County owned by County Mutual Acceptance Corp. The lease was terminable upon 60 days prior written notice from either party. Baltimore County offered to purchase the property. The agreement between Baltimore County [***21] and County Mutual stated:

[*58] In the event that this Agreement is not approved by the Baltimore County Council, this Agreement shall become null and void . . .

County Mutual terminated Foster & Kleiser's lease, and the contract of sale was approved by the County Council. Foster & Kleiser brought suit, alleging among other things, that the submission of the contract of sale by Baltimore County to County Mutual was an offer to purchase the land; that the offer was accepted when County Mutual executed the contract; and that there was a binding contract subject to approval of the County Council. We held at p. 538 of 57 Md.App., 470 A.2d 1322:

there could be no binding or enforceable contract until approval by the County Council had occurred. Therefore, what Foster & Kleiser claims was an offer submitted to County Mutual by Baltimore County was not an offer, but merely part of preliminary negotiations. County Mutual could not have accepted this "offer" without further action by the County, that *action being approval by the County Council, as required by the County Charter.* (Emphasis supplied).

The Baltimore County Charter § 715 stated in [***22] pertinent part:

. . . Any contract . . . must be approved by the County Council before it is executed if the contract is

- (1) For the purpose of real or leasehold property where the purchase price of the property is in excess of \$ 5,000 . . . Balto.Co.Code 1978 (1982 Cum.Supp.)

Applying the above principles to the sequence of events in this case, we hold that a binding contract did exist between Silverman and the County. The advertisement for sale of the Marton Tract by the [**113] County did not constitute an offer. *Rofra, Inc., supra*. Rather, Silverman's bid, initially at \$ 50,000 and finally at \$ 71,605, constituted his offer to purchase the property. There is no Statute of Frauds problem because Silverman certified his bid in writing on the same day. The County accepted Silverman's offer when [*59] it declared Silverman the successful bidder. The negotiation of Silverman's \$ 5,000 check by the County, on March 11, further confirmed its acceptance.

By the terms of the agreement, however, this acceptance was conditioned on "notice [being] given to the Optionee within 45 days." This provision enabled the council to approve or disapprove [***23] the sale. Had this provision stated that the entire agreement required approval by the council and the applicable statute reinforced such a requirement, as in *Foster & Kleiser*, we would have to hold that a binding bilateral contract was not formed for lack of acceptance. In this case, however, the applicable statute, Section 2-111.1 of the Prince George's County Code, mandated that the Council only approve the determination that the property was surplus, and no more. If the council had in fact determined that the property was needed for a public purpose, the County could then declare the agreement void. As we discussed in Issue I, *supra*, however, the council conceded that the property was surplus. Therefore, the condition in the contract requiring council approval was fulfilled and the County is deemed to have accepted Silverman's offer.

Moreover, the County's subsequent action in this case constituted a waiver of its right to invoke the 45 day provision. The right to rescind may be waived by "continuing to treat the contract as a subsisting obligation." *Michael v. Towers*, 253 Md. 114, 117, 251 A.2d 878 (1969), quoting *Kemp v. Weber*, 180 Md. 362, 24 A.2d 779 [***24] (1942). "If a party . . . does any act which recognizes the continued validity of the contract or indicates that he still feels bound under it, he will be held to have waived his right to rescind." *Lazorcak v. Feuerstein*, 273 Md. 69, 76, 327 A.2d 477-481 (1974). See also, *Bagel Enterprises, Inc. v. Baskin and Sears*, 56

58 Md. App. 41, *59; 472 A.2d 104, **113;
1984 Md. App. LEXIS 301, ***24

Md.App. 184, 467 A.2d 533 (1983). The Court of Appeals in *Coopersmith v. Isherwood*, 219 Md. 455, 150 A.2d 243 (1963) elaborated on this principle, stating at p. 462, 150 A.2d 243:

A right to rescind, abrogate, or cancel a contract must be exercised promptly on discovery of the facts from which it [*60] arises; it may be waived by continuing to treat the contract as a subsisting obligation. The general rule is that the right to rescind must be exercised within a reasonable time, although there is authority to the effect that the mere question of how much time a party to a contract has permitted to elapse is not necessarily determinative of the right to rescind, the important consideration being whether the period has been long enough to result in prejudice to the other party.

In this case, the County continued to treat its agreement with [***25] Silverman as a subsisting obligation by reconsidering the Marton Tract under Resolution CR-120-1981 in October of 1981, long after the 45 days expired. Furthermore, the council's act of "deleting" the Marton Tract from the first resolution, and its act of indefinitely tabling the second resolution certainly amounted to prejudice to Silverman. In light of the above, the County is estopped from invoking a defense based on the 45 day provision.

III. *Whether the County Executive has the capacity to contract to convey the "Marton Tract" without approval by the County Council.*

The County contends the Executive lacked the capacity to sell the "Marton Tract" to Silverman. Silverman asserts that this issue was not preserved for our review. *Md.Rule 1085*.

Although this issue was not directly raised below, the court indirectly addressed this issue when it considered what powers the Legislature and Executive have pursuant to Section 2-111.1. Therefore, we do [**114] not dismiss by virtue of *Rule 1085*. Silverman also argues

that the county is estopped from raising this issue.

To apply estoppel, the party claiming the benefit of estoppel must have been misled to his detriment and [***26] must have changed his position for the worse, having believed and relied upon the representations of the party sought to be estopped. *Dorsey v. Beads*, 288 Md. 161, 171, 416 A.2d 739 (1980); *Neuman v. Travelers Indemnity Co.*, 271 Md. 636, 654, 319 A.2d 522 (1974); *Lusby v. First National Bank*, 263 Md. 492, 505, [*61] 283 A.2d 570 (1971); *Savonis v. Burke*, 241 Md. 316, 319, 216 A.2d 521 (1966). This Court in *Zimmerman v. Summers*, 24 Md.App. 100, 330 A.2d 722 (1975) elaborated on the principle stating at p. 123, 330 A.2d 722:

[T]he rule now to be followed in Maryland however is that equitable estoppel may be applied not only when the conduct of the party to be estopped has been wrongful or unconscientious, and relied upon by the other party to his detriment, *but also when the conduct, apart from its morality, has the effect of rendering it inequitable and unconscionable to allow the rights or claims to be asserted or enforced.* (Emphasis added).

The practice of the County Council prior to its consideration of CR-120-1981 and subsequent thereto has been to have the County Executive enter into a contract with the prospective purchaser of surplus [***27] property before submitting the matter to the council for its approval. The County cannot now deny the validity of the procedures it created for its own benefit. Silverman relied on representations that the Executive had the capacity to contract. It certainly would be "inequitable and unconscionable" to allow the County now to assert this defense.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

COMCOR 11B.45.01 Disposition of Real Property

11B.45.01.01 Purpose

1.0 To provide policies and procedures whereby disposition is made of certain County- owned real property.

11B.45.01.02 Applicability

2.0 These policies and procedures apply to the disposition of all County-owned real property except:

- A. parcels at the Montgomery County Life Sciences Center;
- B. former school sites containing school buildings no longer in public school use;
- C. sites acquired for specific purposes such as roads, housing projects, and public parking facilities and parking lot districts; sites disposed of for purposes related to roads, housing, matters of significant or strategic interest to the County's economic development; or public parking facilities in parking lot districts;
- D. sites, generally, which are leased for under five years, or splinter parcels which are leased for any length of time.

11B.45.01.03 Definitions

3.0 COUNTY AGENCY - Any department or Agency of the Montgomery County Government.

3.1 COUNTY-WIDE PUBLIC USE - Use of real property available to or benefiting all residents of Montgomery County.

3.2 DISPOSITION - The placement of a site in reservation, the leasing of a site, other than splinter parcels, for five years or more, the assignment of the site's reuse to a County or Outside Agency, or the declaration of the site as surplus.

3.3 EXECUTIVE ORDER ON REUSE AND DISPOSITION - Instrument by which the County Executive places a site in reservation, approves a lease, assigns a reuse, declares a site surplus.

3.4 LEASE - A contract for use of a site, other than a splinter parcel, for five years or more.

3.5 LOCAL MUNICIPAL USE - Use of real property by a limited number of County citizens. This would include use restricted to residents of a local municipality or the application of special fees or other restrictions on non-local residents for use of the property.

3.6 OUTSIDE AGENCY - Any agency, outside the Executive and Legislative branches of the Montgomery County Government. This would include but not be limited to WSSC, MNCPPC, Revenue Authority, Housing Opportunities Commission, MCPS, Montgomery College, and Local Municipalities.

3.7 SALE BY DIRECT NEGOTIATION - The sale of real property is confined to negotiations between the County and a single potential purchaser. The bid process and the public offering are waived.

3.8 SALE BY FIXED PRICE - An offering of real property for sale at a fixed price. This form of sale is usually part of a sale where other factors such as proposed uses and design are considered as important as the price.

3.9 SALE BY MINIMUM PRICE COMPETITION - An offering of real property for sale to the public wherein a minimum acceptable sales price is stated. Bids below the stated minimum price are not accepted.

3.10 SALE BY PUBLIC AUCTION - A public sale conducted by an auctioneer.

3.11 SALE BY REUSE COMPETITION - An offering for sale based on the proposed reuse. The prospective purchaser is chosen according to the reuse deemed most in the public interest. Price is of secondary importance.

3.12 SALE BY SEALED PROPOSALS - An offering of real property for sale to the public. The highest offer wins the rights to negotiate a contract for purchase. As implied, all proposals are secret until the official time of opening. If contract negotiations fail, the offering is withdrawn.

3.13 SITE RESERVATION - An action taken by the County Executive, via an Executive Order, to defer further disposition actions on the site in question:

- A. in order that the site may be used in accordance with an approved Master Plan,
- B. pending determination of the site's suitability for a project contained in an adopted Capital Improvement program, or
- C. in anticipation of greater reuse or disposal prospects in the future.

Sites placed in reservation may be leased.

3.14 SPLINTER PARCELS - Parcels of such size, shape, topography or other characteristics as to have only nominal value.

3.15 SURPLUS SCHOOLS - Real property that is not needed to meet the present and anticipated future needs of County Agencies and Outside Agencies and that has been designated as surplus by Executive Order pursuant to a Reuse Analysis.

3.16 SURPLUS SCHOOL SITES - Unimproved school sites that have been declared surplus by the Board of Education, approved for transfer by the State of Maryland, and transferred to the County.

3.17 TAX SALE PROPERTY - Property acquired by the County as a result of non-payment of taxes.

11B.45.01.04 Policy

4.0 The County Executive may, pursuant to this Executive Regulation, dispose of County- owned real property not currently programmed, except those properties excluded under Section 2.0, Applicability.

4.1 Property disposition shall be done in a fair and equitable manner that is open to public scrutiny. Review and comment on disposition of real property shall be invited, as specified in this Executive Regulation, from County Agencies, Outside Agencies (including but not limited to MNCPPC, MCPS,

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and Local Municipalities, where applicable), the public at the public hearing (per Section 9.2.B.), and the County Council.

4.2 Proposals that respond to certain reuse preferences of the County (as supporting other, non-financial public policy objectives) may be given priority over proposals offering higher prices.

4.3 Sites designated for particular public uses in an approved Master Plan (including portions of sites which may be needed for road improvements) and sites which may be suitable for approved CIP projects shall be placed in reservation.

4.4 All other things being equal, County-wide public uses would be given first priority, municipal public uses would be given second priority, quasi-public uses third priority, and private uses would be given fourth priority.

4.5 Sites placed in reservation for Master Plan purposes, or designated by the County Executive for use by an Outside Agency, shall be transferred to the Outside Agency upon payment of the fair market value as determined pursuant to this Executive Regulation, or in accordance with other payment policies established by the County Executive. For sites transferred to the MNCPPC for parks, the MNCPPC shall pay remaining debt service.

4.6 Sites sold to private purchasers must be sold at prices not less than their fair market value as determined by the Director, DPWT (based on one or more independent appraisals), unless otherwise specified in the Executive Order on Reuse and Disposition.

4.7 In disposing of property to private users, the County shall install site improvements only in exceptional cases.

4.8 The County Executive may dispose of County-owned real property through leases containing rights of first refusal to purchase, or options to purchase, provided that the material provisions of these Executive Regulations are complied with at the time of disposition.

11B.45.01.05 Responsibilities and Authority

5.0 Contract Review Committee (CRC) shall approve for compliance with law and Executive Regulations

- A. the method of disposition,
- B. the Request for Proposals, and
- C. the contracts for sale of surplus real property.

5.1 County Attorney's Office shall

- A. approve all deeds, contracts, leases, and forms as to form and legality;
- B. approve the use of outside counsel, and
- C. assist in contract negotiation as needed.

5.2 Department of Public Works and Transportation (DPWT) shall

- A. develop and maintain an inventory of real property,
- B. administer the disposition of real property, and
- C. establish the necessary Departmental procedures and practices.

5.3 Department of Finance shall

- A. administer the disbursement and receipt of funds, and
- B. refer the annual inventory of tax sale properties to DPWT for disposition.

5.4 Office of Management and Budget (OMB) shall

- A. participate in the Preliminary Reuse Review, and
- B. review and comment on Reuse Analyses.

5.5 Chief Administrative Officer (CAO) or his designee shall

- A. approve and sign all options, contracts, and leases; and
- B. approve the Reuse Analysis for referral to the County Council, the Planning Board, and the general public.

5.6 County Executive

- A. shall execute all deeds of conveyance, covenants, and restrictions incidental to the transfer of property by the County.
- B. shall approve the reservation of properties via Executive Order,
- C. shall approve the reuse assigned to a site, via Executive Order, and
- D. shall approve the declaration of a site as surplus, via Executive Order.

5.7 Planning Implementation Section shall

- A. participate in the Preliminary Reuse Review, and
- B. review and comment on Reuse Analyses.

5.8 Office of Procurement shall

- A. be responsible for Bids and Requests for Proposals and review all contracts for sale for compliance with law and Executive Regulations.

5.9 The County Council shall

A. be provided with opportunity to review and comment on the Reuse Analysis (including recommendations) prepared by DPWT, and,

B. approve all proposals to sell properties acquired through tax sales, pursuant to Section 52-38 of the Montgomery County Code, 1994, as amended.

11B.45.01.06 Services

6.0 Subject to County law, Administrative Procedures and existing appropriations, DPWT may arrange or contract for services, work or facilities furnished by an individual or agency, public or private, in connection with the proposed or actual disposition of property. This shall include but not be limited to:

- A. Appraisal services
- B. Legal services
- C. Engineering and/or architectural services
- D. Newspaper and other media services
- E. Installation of public facilities
- F. General planning/consulting services

11B.45.01.07 Inventory of Real Property

7.0 DPWT shall develop and maintain an inventory of County-owned real property.

11B.45.01.08 Initiation of Disposition Process

8.0 If a site is in the DPWT inventory as provided for in 7.0 above and is deemed by DPWT preliminarily suitable for disposition, DPWT shall, as a first step, refer the site to Planning Implementation Section and to OMB for Preliminary Review under the procedure below for Determination of Reuse.

11B.45.01.09 Determination of Reuse

9.0 Step 1 - Preliminary Review (OMB and Planning Implementation Section)

A. Master Plan - Within fourteen days, Planning Implementation Section shall review the site in relation to approved Master Plans. Planning Implementation Section should consult informally with the MNCPPC if necessary to ascertain a clear understanding of the Master Plan regarding the site in question. A site specifically designated in an approved Master Plan for particular public uses, or that portion of such site which may be needed for right-of-way for road improvements in the Master Plan, shall be recommended for placement in reservation. If, after review, questions remain about the intention of the Master Plan, the site shall not be placed in reservation for Master Plan purposes.

B. Functional Use - Within fourteen days, OMB shall review the site as to its desirability for future public use as fire stations, police stations or other projects as contained in an adopted Capital Improvements Program (CIP). Current use of the site should be included in this analysis. A site identified as potentially suitable for use in an approved CIP project shall be recommended by OMB to DPWT to be held in reservation until its suitability is determined.

C. For each site recommended for reservation by either Planning Implementation Section or OMB, DPWT shall forward an Executive Order on Reuse and Disposition to the County Executive for decision together with its own recommendations, those of OMB, those of Planning Implementation Section, and other supporting documents as applicable.

D. Subsequent to County Executive approval, DPWT shall forward copies of the approved Executive Order to all appropriate County and Outside Agencies.

E. If a site is placed in reservation for use by an Outside Agency (pursuant to an approved Master Plan), DPWT shall prepare an agreement for transferring the site to that agency. Payment for the site shall be the appraised fair market value based on the highest and best use, unless otherwise provided for in the Executive Order on Reuse and Disposition, or in accordance with other payment policies established by the County Executive. For sites transferred to the MNCPPC for parks, the MNCPPC shall pay remaining debt service.

F. If, as a result of the Preliminary Review, no reservation of the site is made by the County Executive, DPWT shall proceed to administer the Secondary Review as provided below.

9.1 Step 2 - Secondary Review (Agencies)

A. DPWT shall prepare and distribute to all appropriate County and Outside Agencies information pertaining to the site and shall invite them to propose reuses. Further, agencies shall be encouraged to identify any future needs that might require easements or covenants for attachment to the deed in the event the site is sold; any community use occurring on the site; and any municipal zoning or Master Plan provisions that should be considered.

B. Agencies shall notify DPWT in writing, within 30 days, of their interest in, or comments on, the site. The notification shall include the proposed reuse, if any, along with the pertinent supporting data sufficient to justify the Agency's proposed reuse.

9.2 Step 3 - Reuse Analysis

A. DPWT shall prepare and submit to the County Executive via the Chief Administrative Officer a Reuse Analysis on each site not reserved under the provisions of 9.0 above. This analysis shall include, but not be limited to, a discussion of the following:

1. Proposals made under the Secondary Review process.
2. Individual site characteristics including, but not limited to, zoning (including municipal zoning, where applicable), topography, improvements, utilities, access, and transportation.
3. Marketing conditions including, but not limited to, the cost of development, financing, the scheduled availability of public facilities for the site, and other conditions of the market.

4. All reuse options identified by DPWT or by others to this point, with the advantages and disadvantages of each.

5. Recommendations by DPWT.

6. If DPWT recommends that the site be transferred to any Outside Agency, the appraised fair market value shall be included in the Reuse Analysis.

B. The County Executive shall conduct a public hearing on the DPWT reuse recommendations pursuant to AP 1-9, Public Hearings. (Note: In addition to advertisement requirements provided for in AP 1-9, notice shall be sent to all County Council members, the heads of all Outside Agencies, and the heads of all civic associations whose areas encompass or abut the subject parcel.) The County Executive may waive the requirements of sections 9.2.B., 9.2.C., and 9.2.D.

1. for splinter parcels and

2. for recommended reuse of the site by a County Agency.

The County Executive shall notify the County Council of his waiver decision and his reasons therefor.

C. Simultaneously with the advertisement of the public hearing, DPWT

1. shall transmit the Reuse Analysis to the MNCPPC and to other appropriate County and Outside Agencies (including the BOE and applicable municipality) with an invitation to comment at or before the public hearing provided for above; and

2. shall transmit the Reuse Analysis to the County Council who shall provide comments, if any, on or before the date of the public hearing provided for above. The CAO or his designee shall offer to consult with the Council regarding the Reuse Analysis.

D. After the public hearing, DPWT shall coordinate with the Hearing Officer to submit to the County Executive

1. the Hearing Officer's Report;

2. the Reuse Analysis;

3. responses from MNCPPC and other agencies;

4. the results of consultation with the County Council;

5. an Executive Order on Reuse and Disposition, ready for signature; and,

6. other relevant materials.

E. The County Executive shall, by Executive Order,

1. specify a reuse of the site by a County or Outside Agency, along with any conditions on that reuse;

2. place the site in reservation for determination of reuse at a later date; or
3. declare the site surplus and available for sale in accordance with specified conditions, if any.

F. If use by a County Agency is approved by the County Executive, DPWT shall administer the transfer of control to the receiving agency subject to the following stipulations:

1. The receiving agency shall make substantial progress towards the reuse of the property within two years from the date of the transfer.
2. Extension of control exceeding two years shall be granted only by Executive Order.
3. In the event an extension is not granted, DPWT shall reassume control over the property and reinitiate the reuse process.
4. If the property is being considered for transfer to a third party, the receiving agency shall replace DPWT in the administration of Sections 10.0, 10.1, 11.0, 11.1, 11.2, 12.0, 13.0 through 13.6, 14.0 through 14.2 where these Sections are applicable to the transfer. The price to be paid by the third party shall be the appraised fair market value of the site unless provided for otherwise in the Executive Order on Reuse and Disposition or in other payment policies established by the County Executive.
5. Receiving agencies shall file semi-annual progress reports with DPWT.

G. If use by an Outside Agency is approved by the County Executive, DPWT shall administer the transfer of ownership to the appropriate agency upon:

1. Execution of an agreement, and
2. Payment to the County of the appraised fair market value based on the Highest and Best Use, unless otherwise stipulated in the Executive Order on Reuse and Disposition or in other County Executive policy decisions. For sites transferred to the MNCPPC for parks, the MNCPPC shall pay remaining debt service.

H. If the site is declared surplus, DPWT shall proceed to sell it as provided for below.

11B.45.01.10 Selection of Sale Method

10.0 If not stipulated in the Executive Order on Reuse and Disposition, DPWT may dispose of the site by sale in accordance with any method permitted by State and local law, including but not limited to:

- A. Minimum price competition
- B. Sealed bids
- C. Fixed price
- D. Direct Negotiation
- E. Reuse Competition

F. Related variations and combinations of the preceding

G. Public Auction

The criteria for the selection shall include, but not be limited to, general market conditions, potential reuse, characteristics peculiar to the individual site, and conditions of the financing market.

10.1 DPWT shall submit its recommendations for the method to be used to sell the surplus real property, together with supporting Justification, to the CRC for approval. CRC shall approve or disapprove the selected method on the basis of compliance with Law and Executive Regulations.

11B.45.01.11 Requests for Proposals

11.0 If a disposition method involving public offering is selected, DPWT shall develop, and the Office of Procurement shall issue a Request for Proposals or Bids.

11.1 The Request for Proposals or Bids is the formal public notice of the offering of the land. It should be accomplished through publication in one or more newspapers of general circulation in the County and through mailed notices to all persons and firms that have signified to DPWT a bona fide interest in acquiring any of the land in the offering. The information contained in the invitation, at a minimum, should include:

A. Identification of land to be offered.

B. A general description of the types of development permitted and conditions of use, plus general notice to bidders of the need to comply with Zoning Ordinance requirements in the event rezoning is proposed.

C. Identification of the kind of disposal and the disposal method, including criteria and procedures for making selection.

D. The cutoff date of the receipt of proposals, if established. This is required in the case of minimum-priced competition, sealed bid, and public auction disposal methods.

E. Instruction on how to obtain further information about the terms and conditions of the disposal and procedures for submitting proposals. The instructions shall state the amount of any fee charged by DPWT for the offering documents (Prospectus) if applicable.

11.2 The Prospectus shall contain all the terms and conditions of the offering. It must be readily available to all prospective purchasers promptly after publication or issuance of the first invitation for proposals. DPWT shall submit copies of the Prospectus to the Office of Procurement prior to publication. The Prospectus should normally contain:

A. The site Plan and Declaration of Covenants and Restrictions, if any. Also, a clear statement of any other restrictions imposed on the property. A description of the property for which proposals are invited, including:

1. Legal and other description sufficient to identify clearly the boundaries and area of the land involved, together with a map or plat showing the location of the land. Location of existing and proposed streets and utilities to serve the property, to the extent available.

2. Information on general grades and evaluations, if available.
3. Information on: test borings and their analysis to the extent available, location and type of existing basements, foundation walls, footings, abandoned utilities, and the extent and character of fill.
4. The County shall not be liable for the accuracy of data and the Prospectus shall contain the appropriate disclosure statement.
 - B. A statement as to kinds of proposals that may be submitted and a description of the method of selecting purchasers.
 - C. Proposed form of contract of sale.
 - D. Statement of requirements for the submission of proposals, including place, cutoff date and time, and documentation required as to the bidder proposal, including the good faith deposit or bid bond requirements.
 - E. All forms specifically required from the bidder in submitting proposals, including the Warranty of Non-Collusion.
 - F. Statement describing carrying charges, if any, that may be charcred against the selected bidder prior to transfer of title and payment of the purchase price and the proposed form of deed by which the County will convey title to the land.

11B.45.01.12 Selection of Purchaser

12.0 Upon receipt of bids (or proposals, depending on the selection method employed), DPWT, in consultation with the Office of Procurement, shall select the prospective purchaser.

11B.45.01.13 Contract Negotiation

13.0 Once the purchaser has been selected, DPWT shall negotiate the contract of sale.

13.1 A Declaration of Covenants and Restrictions may be used to provide a recordable document specifying the land use controls on the site. It may cover all or only a portion of the site. The declaration, if used, shall be recorded by DPWT in the County's land records, give constructive notice of its provisions, and be legally enforceable.

13.2 The time permitted for the performance of each obligation in the disposal agreement shall be specified. Such times should be tailored to meet the circumstances, avoiding unnecessary risks and encouraging timely compliance by the purchaser.

13.3 The obligations of DPWT and the purchaser for the installation of any site improvements which are to be provided after the agreement is executed shall be specified in the disposal agreement. The County shall install site improvements only in exceptional cases.

13.4 The land disposal agreement must be adequately secured by a good faith deposit in cash, certified check or other approved security. The amount of the deposit or other security shall be determined by the Director, DPWT. It is normally between 5% and 15% of the purchase price.

13.5 If various segments of a property are to be conveyed on separate dates, a schedule shall be annexed to and made part of the agreement, setting forth the legal description, date of conveyances and amount to be paid for each segment. The determination of the dates and payments for the various conveyances shall be coordinated with DPWT's appraisals and determination of market value. The amount to be paid for a segment may be its market value (as of the date of conveyance) or the prorata share of the total purchase price (although, cumulatively, the purchaser pays only the total contract price for the entire property). The good faith deposit shall be based upon the sales price of the entire property. A map outlining the segments shall be annexed to the agreement.

13.6 Before authorizing a disposal, DPWT shall determine that the purchaser possesses the qualifications and financial means and responsibility to acquire and develop (where applicable) the land in accordance with the proposed disposal agreement.

11B.45.01.14 Approval of Contracts; Notice

14.0 DPWT shall submit all contracts along with supporting documents to the CRC for determination of compliance with the Request for Proposals or Bids and applicable law and Regulations. Once approved by the CRC, the contracts shall be submitted to the Chief Administrative Officer or his designee for execution.

14.1 All proposals to sell property acquired through tax sale shall be approved by the County Council, pursuant to Section 52-38 of the Montgomery County Code, 1994, as amended.

14.2 The proposed disposition shall be advertised by DPWT once a week for three successive weeks in at least one local newspaper of general circulation. In addition, DPWT shall send a notice regarding the disposition to the County Council and to appropriate County and Outside Agencies. The advertisement and Notice shall include the following:

Terms of Sale

Compensation

Purchaser

Proposed use

Legal Description

Opportunity shall be given for objections thereto. Severability

The provisions of these regulations are severable and if any provision, clause, sentence, section, word or part thereof is held illegal, invalid or unconstitutional or inapplicable to any person or circumstances, such illegality, invalidity or unconstitutionality, or inapplicability shall not affect or impair any of the remaining provisions, clauses, sentences, sections, words or parts of these regulations or their application to other persons or circumstances.

(Administrative History: Reg. No. 31-97; Dept.: Public Works and Transportation; Supersedes: Reg. No. 67-91 AM)

Faden, Michael

From: McMillan, Linda
Sent: Friday, March 09, 2012 4:04 PM
To: Dise, David E.
Cc: Brenneman, Cynthia; Boucher, Kathleen; Faden, Michael; Mihill, Amanda
Subject: Information Request - Bill 11-12, Property Disposition
Importance: High

Hello,

As you are aware, Bill 11-12, County Property - Disposition, is scheduled to be introduced at next Tuesday's (March 13th) Council session. The public hearing is scheduled for March 20th at 1:30 p.m. The GO Committee will have a worksession as a part of their March 26th (2:00 p.m.) session.

The bill as drafted would apply to the sale of property with a value of less than \$100,000 or a lease for a term of 3 years or longer or lease with an option to buy where the real property being leased has a value of less than \$100,000. In order for the Council to have a better understanding of how this bill would have impacted sales and leases in the last 3 years, I am requesting the following information:

(1) A list of all land sales that occurred in 2009, 2010, and 2011 and the sales price.

(2) A list of all leases with a term of 3 or more years that were executed in 2009, 2010, and 2011 and the value of the real property that was leased.

(3) A list of all leases with an option to buy that were executed in 2009, 2010, and 2011 and the value of the real property that was leased.

The information can be provided by calendar year or fiscal year if one is easier than the other, as long as it is the same for all three responses.

In addition to those transactions included in the draft bill, Council staff understands that the County allows private entities to use County property (land and/or facilities) through a **license**. Please provide a description of what such a license is, when it is used, the process for issuing such a license, and where it is authorized in law or regulation. I have not been able to find such a mechanism in COMCOR 11B.45.01

With regard to leases, I also note that the definition of a lease in COMCOR is "a contract for use of a site, other than a splinter parcel, for five years or more." I do not see such a definition in the Code (but might be missing it.) Is it current practice that any "lease" arrangement is for a period of 5 years or more?

It would be most helpful if you could send a response by the **end of the day on Thursday, March 15th** so that it can be included in the packet for the public hearing that will be distributed on March 16th. If March 15th is not workable, we do need to have the information by the end of the day on Tuesday, March 20th so that it may be included in the GO Committee packet that will be distributed on March 22nd.

I am hopeful that there is a central source in Finance or Procurement for this information. If you have questions or problems with meeting this request, please call or e-mail me or Mike Faden.

Thanks,

Linda

Linda McMillan
Senior Legislative Analyst
Montgomery County Council
linda.mcmillan@montgomerycountymd.gov
240-777-7933

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ME



DEPARTMENT OF GENERAL SERVICES

Isiah Leggett
County Executive

David E. Dise
Director

MEMORANDUM

March 22, 2012

TO: Linda McMillan, Senior Legislative Analyst
County Council

FROM: David E. Dise, Director 
Department of General Services

SUBJECT: Request for Information on Dispositions

RECEIVED
MONTGOMERY COUNTY
SERVICES

2012 MAR 22 PM 12:11

In response to your request, attached, please find a spreadsheet listing the various documents that were executed in 2009, 2010 and 2011, disposing of County owned property. In the limited amount of time we had to respond, we had input from DGS, DED, DOT's PLD and Acquisition Sections, DHCA (none identified) and DEP (none identified). Please note that we didn't include documents that are in progress, but not signed, like the Police HQ disposition that DED is handling.

Also note that we did not receive any specific information on documents from MNCP&PC, although we did receive a general response from Bill Gries. As you may know, "there are more than 10,000 acres of parkland titled in the name of the County, in more than 800 different parcels, so this [Bill 11-12] does have the potential to get a little cumbersome as we manage our park system. We have agricultural leases, park house rentals, public/private partnerships, facility leases, utility easements, road and intersection improvements, etc. that could have us going to the Council for disposition approvals on a pretty regular basis."

In response to your question #1, the bottom of the spreadsheet shows a list of 10 sales. They were executed by DGS, DOT and DED and ran the gamut from straight dispositions to development deals where the County leveraged land for other benefits for important initiatives like the SGI (transit oriented housing) and the redevelopment of downtown Silver Spring.

Office of Real Estate

Request for Information on Dispositions

In response to your question #2, the first 40 documents are leases and licenses that exceeded 3 years in length. We don't appraise property for the purpose of leasing or licensing it, so the only value we could associate with each lease was the annual rental amount, which, in most cases, increases each year. We are not clear whether you would be looking for an appraisal of an entire building or just part of the building if we leased a small suite in a large building. Neither seems to add relevant information to a discussion of the merit of the lease. We believe some discussion might be in order before this requirement is codified. Ordering appraisals on all leases would significantly increase time frames and operating budgets and overburden our limited number of appraisers.

In response to your question #3, no department identified any leases with options to purchase that were executed or implemented within the timeframe parameters.

You also asked about the difference between leases and licenses and when we choose to use licenses. Leases convey real estate rights. Licenses convey no real estate rights. They are basically permission to use the premises and are terminable on very short notice. We use them mostly where we have contractors who are offering services out of County owned space (HHS contractors are our biggest category of licenses) and we need to be able to terminate them in the event they fail to perform their services. We need continuity of services. We wouldn't want HHS to terminate a contractor without the ability to terminate his use of County space, so that the next contractor could move in and begin providing services immediately. When the contractor is no longer needed to provide services, for whatever reason, he no longer needs to be in County space. If he was vested with real estate rights, we would have to go through a process to evict him. We also use licenses in instances where we just don't want to give a third party any rights in our real estate.

In response to your question about where the authority arises to use licenses, the County Attorney advises that the authority to license County property usually arises as an implied authority to implement a County program. The authority to implement a County program arises generally out of the County Code and/or the County budget. The Express Powers Act is general enabling authority to acquire and dispose of County property, but that general enabling authority is most often effectuated by a county law and/or budget appropriation.

Please call me if you have any questions.

DD:CB:DREAMS:RE:projects:cyndi's temp:Response to Linda McMillan on Dispo

| Responsive Documents | | | | | | | |
|----------------------------|--------------------------------------|------------|---------------------------|-------------------------------------|--|--------------------------------------|-----------|
| | INSTRUMENT | DATE | PROPERTY | GRANTEE/LESSEE/LICENSEE | COMMENT | CONSIDERATION | LEAD DEPT |
| Leases and Licenses | | | | | | | |
| 1 | First Amendment to License Agreement | 1/5/2009 | 4301 Willow Lane | Wonders Child Care | Expired 6/30/2011-currently running mo to mo | N/A | DGS |
| 2 | License Agreement | 1/5/2009 | 12612 Galway Drive | Academy Child Development | Expires 12/31/14- 2- 2 year options | \$10,038 | DGS |
| 3 | License Agreement | 3/27/2009 | | | Terminates concurrently with underlying | | |
| 3 | First Amendment | 6/24/2010 | 1301 Piccard Drive | People Encouraging People | Contract for Services | \$1.00 | DGS |
| 4 | License Agreement | 3/24/2009 | 12100 Darnestown | Cricket Communications | 3/24/2014 | \$24,600.00/YR | DGS |
| 5 | License Agreement | 4/17/2009 | Damascus Tower | Nextel | Telecom agreement with 5 year term | \$29,034/YR | DGS |
| 6 | License Agreement | 5/4/2009 | 1109 Spring Street | Mental Health Associates | Terminates concurrently with underlying | | |
| 7 | License Agreement | 5/26/2009 | 7-1 Metropolitan Ct. | Pan-Asian Medical | Contract for Services | \$1.00 | DGS |
| 8 | License Agreement | 7/1/2009 | 15910 Somerville Street | Knowledge Learning Center | Expires 05/26/2014 | None | DGS |
| 9 | License Agreement | 7/1/2009 | 12900 Middletown Road | Peppertree, Inc. | Expires 12/31/14- 2- 2 year options | \$79,450/YR | DGS |
| 10 | 1st Amend to Lease | 7/7/2009 | 20130 Wasche Rd | Robert Harney | Expires 6/30/13- 2 2 year options | 29,056/YR | DGS |
| 11 | 1st Amend to License | 8/26/2009 | 3950 Ferrara Dr | Mental Health Associates | 5 year lease extension | caretaker to provide certain repairs | DGS |
| 12 | License Agreement | 8/26/2009 | Fire Station 31 | Nextel | Expiration in 8/2014 | \$14,052/YR | DGS |
| 13 | License Agreement | 11/20/2009 | One Lawrence Court | Powell Recovery Center | Telecom agreement with 5 year term | \$29,034/YR | DGS |
| 14 | Amendment to License Agreement | 1/6/2010 | 14327 Stonebridge Drive | Academy Child Development | Terminates concurrently with underlying | | |
| 15 | License Agreement | 1/15/2010 | 2103 Luzerne Avenue | Rockville Day Care Assoc. | Contract for Services | \$1.00 | DGS |
| 16 | 2nd Amend to Lease | 3/19/2010 | Wasche Rd, Dickerson | John and Jane Hunter | Expires 4/30/2013-no options | \$25,000/YR | DGS |
| 17 | 2nd Amend to Lease | 3/19/2010 | Martinsburg Rd, Dickerson | William Willard | Expires 4/30/2013-2-2 year options | \$32,790/YR | DGS |
| 18 | Letter Agreement to exercise option | 3/24/2010 | 7425 Macarthur Blvd. | Clara Barton Day Care | 17 ac. Farm Lease; 5 yr term | \$765/YR | DGS |
| 19 | 3rd Amendment to Lease | 3/29/2010 | Wasche Rd, Dickerson | David Scott | 56 ac. Farm lease; 5 yr term | \$1,800/YR | DGS |
| 20 | License Agreement | 5/10/2010 | Seven Locks Road | All Star Fleet Services | Expires 6/30/2013-1-2 year option | \$32,971/YR | DGS |
| 21 | License Agreement | 5/13/2010 | 14705 Avery Road | Chrysalis House | 312 ac. Farm lease; 5 yr term | \$11,587.50/YR | DGS |
| 22 | License Agreement | 6/9/2010 | 734 University | Casa De Maryland | Terminates concurrently with underlying | | |
| 23 | Second Amendment to Lease Agreement | 6/25/2010 | Strathmore Hall | Strathmore Hall | Contract for Services | \$1.00 | DGS |
| 24 | Second Amendment to Lease Agreement | 7/1/2010 | 101 Monroe Street | Montgomery County Revenue Authority | Terminates concurrently with underlying | | |
| 25 | License Agreement | 8/20/2010 | E. County Gov't Ctr. | Mobile Med. Inc. | Contract for Services | \$1.00 | DGS |
| 26 | License Agreement | 8/25/2010 | E. County Gov't Ctr. | Peoples Wellness Ctr. | License to use barn for 5 years | \$1,500/YR | DGS |
| 27 | License Agreement | 3/1/2011 | 14701 Avery Road | Maryland Treatment Centers | Expires 08/20/2015 | None | DGS |
| 28 | License Agreement | 3/15/2011 | Draper Barn | William F. Willard Farms | Expires 08/25/2015 | None | DGS |
| 29 | 1st Amend to License | 3/28/2011 | Land near library | Damascus Heritage Society | Terminates concurrently with underlying | | |
| 30 | Lease Agreement | 4/14/2011 | 10611 Tenbrook Drive | Arc of Montgomery | Contract for Services | \$1.00 | DGS |
| 31 | License Agreement | 5/2/2011 | Brickyard Rd | Nick's Organic Farm | 18 yr term - extended to 2026 | \$1.00 | DGS |
| 32 | Lease Agreement | 6/9/2011 | MacDonald Knolls | CHI, Inc. | Current Term expires 4/30/2013-restrictive covenant pushes final term until 2022 | \$20,076/YR | DGS |
| | | | | | exp. 1/1/12; 8/15/12; 12/31/12 | various | DGS |
| | | | | | Lease of closed school w/15 year term | \$71,150/YR | DGS |

Property Dispositions
2009 Forward

Office of Real Estate
Department of General Services

| | INSTRUMENT | DATE | PROPERTY | GRANTEE/LESSEE/LICENSEE | COMMENT | CONSIDERATION | LEAD DEPT |
|----|--|------------|---|-------------------------------|---|---|-----------|
| | Leases and Licenses | | | | | | |
| 33 | License Agreement | 9/26/2011 | 7511 Holly Avenue | Quality time Learning Center | Expires 6/30/2013-2-2 year option | \$11,917.00/YR | DGS |
| 34 | 3rd Amend Lic Agrmnt | 9/30/2011 | Fire Station 31 | APC Realty d/b/a Sprint | Telecom agreement with 5 year term | \$34,549/YR | DGS |
| 35 | 5th Amend Lic Agrmnt | 10/16/2011 | Fire Station 31 | Verizon Wireless | Telecom agreement with 5 year term | \$34,549/YR | DGS |
| 36 | Lease Agreement | 10/31/2011 | 12901 Town Commons Dr., Germantown | Black Rock | Lease renewal/ 7 year extension Terminates concurrently with underlying Agreement for Services | \$1.00/YR | DGS |
| 37 | License Agreement | 11/14/2011 | 4805 Edgemoor Lane | Conflict Resolution Center | Agreement for Services | None | DGS |
| 38 | License Agreement | 11/18/2011 | 981 Rollins Ave. | Mobile Med. Inc. | Term extension expires 11/18/2016 | None | DGS |
| 39 | License Agreement | 12/2/2011 | 13411 Riley's Lock Road | Hearts and Homes for Youth | Terminates concurrently with underlying MOU | None | DGS |
| 40 | Lease Agreement | 3/9/2012 | 29 Courthouse sq. | Peerless Rockville | Term extension expires 03/9/2017 | \$13,419.00/YR | DGS |
| | Deeds | | | | | | |
| 1 | Deed | 1/20/2010 | Southlawn Lane | Konterra Limited Partnership | Swap of Southlawn for Kensington Parcel | Land and parking improvements worth \$1,215,000 | DGS |
| 2 | Deed | 1/29/2010 | Kemptown Church Rd | Eunice Waters | 15,941 sf | \$930 | DOT- ACQ |
| 3 | Deed | 6/24/2010 | PLD Lot #16 | RST LLC | Part of Assemblage for Galaxy residential building | \$1,278,000 plus 160 spaces, the first 60 free | DOT-PLD |
| 4 | Master Planning and Real Estate Purchase Agrmnt that will lead to a deed | 12/20/2010 | County Services Park | EYA/SCP Associates | Master Planning document with purchase schedule based on number of lots sold | TBD | DGS |
| 5 | Deed | 2/14/2011 | Peary High School | Berman Hebrew Academy | Berman exercised option to purchase | \$1,829,595 | DGS |
| 6 | Deed | 5/18/2011 | Blunt Road, Germantown | Islamic Society of Germantown | Sale of surplus property | \$50,000 | DGS |
| 7 | Deed | 8/17/2011 | Par A, Blk E, Silver Spring. PLD Lot #1 | Foulger Pratt | Exercise of option to purchase that was obtained during Silver Spring redevelopment project | \$10,810,875 | DOT-PLD |
| 8 | Deed | 8/17/2011 | Parcel N/Q - Shady Grove Life Sciences Center | BioReliance Corporation | BioReliance executed its right to purchase under a 1998 Lease-Purchase Agreement | \$634,713 | DED |
| 9 | Deed | 9/12/2011 | EMOC Casey 6 | Oakmont Limited Partnership | Sale of pipestem parcel re: Roberts closing | \$114,000 | DGS |
| 10 | Development Agreement that will lead to a deed | 9/26/2011 | 2nd District Police, Bethesda | JBG Associates | Disposition of 2nd District property in exchange for property w/new building; we put in \$7.5M for the improvements | We obtain land in trade | DGS-DBDC |



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 *Cliff*
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

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

Kathleen Boucher
March 16, 2012
Page 3

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 Appeals Judge Robert McDonald.

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.

Kathleen Boucher
March 16, 2012
Page 4

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