

**Open Work Session
Local Preference
September 26, 2017**

Mr. Taylor was asked to take the lead on the 10 percent procurement as he has done a lot of work on it. Mr. Taylor said the part he has looked at is the legal part, the policy part is for the other side of the table. Mr. Taylor said Council could go into closed session on this because it is legal advice that he is giving. He said he did not think that was necessary and probably not even warranted since this is a matter of general public interest, and he thinks Paul Wilbur probably agrees with him on that. He said he prepared a memo that is in the briefing book. He said he could go through that if Council wants him to line by line or case by case, but he thinks the short answer is, because of the precedent in Maryland, and particularly some rulings by the Court of Appeals, that there is an inherent risk in doing any kind of a local preference. He said the more important case is one that was decided about 25 years ago that involved towing companies in Baltimore County where they had essentially a local preference. You could only use towing companies within that county. That was challenged and the Court of Appeals ruled that it was unconstitutional under the Maryland Constitution. Mr. Cannon asked if they were eliminating the bid process entirely and isolating their business to only one entity as opposed to including a bid for everyone. Mr. Taylor said he does not know that they did it by bids, and he was not sure how the allocation was done, but, in any event, it was struck down and he thinks the principle on which it was struck down would be applicable here and essentially across the board. He said there are other opinions that he has found that indicate the same reasoning that he was offering to Council and that is there is this risk. Mr. Taylor said Montgomery County considered local preferences a few years ago and its county attorney made this same point, that there is precedent out there that makes this questionable. There was a recent, not an opinion, but what is called an advice letter by the Maryland Attorney General on a bill that came before the General Assembly this spring. He said he believes that was Prince George's County. He said that bill would have established a procedure in their tax sales where there would have been an initial tax sale where the only bidders could be people who lived in the County and he thinks that the County employees too were included in that, and they could bid also, even if they did not live in the County. He said that bill was subject to an advice letter by the Attorney General where he said he thinks it is questionable in essence. He did not say it was unconstitutional because they do not normally do that in the advice letters. He pointed out that there was a substantial chance that it could be found that way. Mr. Taylor said more or less it is the same analysis that he is making, so he thinks that anything that is done along that line has a risk component to it. He said someone may ask what is that risk? He said there are two aspects of it. Obviously, Council could pass a local preference or adopt a local preference policy and extend it to someone in a particular instance and it could be challenged. He said he thinks the greater risk is that now there are some other Maryland counties that do this. He stated that he is not saying there are none by any means. He said he does not know whether it is more or less than half of the counties, but it is a number, it is at least a handful or two, and one of those counties could be challenged and it could go up on appeal and there could be a ruling essentially striking it down. He said if that happened, and in the meantime before it happened, if this County were to extend local preferences on various matters, then essentially the precedent would already be established in the other case and those who wanted to make an issue of it here would essentially have a free ride. They would not have to go through much litigation because the precedent would already be there. He said he thinks that is the nature of the risk. He said what the Court of

Appeals would do, he would not even flip a coin because that is not how they decide things, but there is that risk there. He said he has sent his memo to the County Attorney, and he thinks he generally agrees that there is an inherent risk in doing this.

Mr. Wilbur then said that he agrees with the memo that Bob put together of the supporting cases, that he agrees with what he has come up with there. He said certainly there are counties that do local preference, but we have a Court of Appeals decision that he thinks makes it legally risky to adopt a local preference. Mr. Cannon said he was not sure that in the examples that were given, and that he hadn't really had a chance to formally review anything yet, but it appeared from the brief description that these particular policies were alienating other vendors and only allowing for local. He said Council is not suggesting that. They are certainly leaving any type of bid process open to all vendors, but adding just one qualifier and that is a 10 percent local. He said it appeared to him, from what Bob had just described, that those particular counties were completely alienating other vendors in preference of using local vendors only. Mr. Taylor said that is why he said there is an inherent risk. In other words, it is not a matter of certainty, but that he would quote some language from the Court of Appeals. Now they are talking about any kind of a preference, whether it is the kind Mr. Cannon is speaking of or just a percentage on a bid or an RFP. The quote is, and this is the Court of Appeals speaking, "Such classifications generally do not advance a legitimate government interest but are intended instead to confer the monopoly of a profitable business upon residents of one geographic area to the exclusion of the residents of other areas." Mr. Taylor said that principle applies broadly across the board regardless of what the specifics might have been in the towing case in Baltimore County, and that principle has been recognized by other people who have looked at this to say there was an attorney for the Montgomery County Government who more or less said the same thing. There was the AG's letter from the spring regarding the Prince George's County matter. He said it is not like he is speaking alone on this and the difficulty is that the Maryland Court of Appeals is kind of out there on this. They take a very liberal or expansive view against local preferences. Mr. Taylor said there are other courts that have upheld local preferences. Mr. Cannon said Mr. Taylor suggested that Council should probably reach out to other counties that implement similar policies, and he thinks that is a good idea. He said that would be in the hands of Mrs. Hurley, maybe through the help of MACO, to find out what counties have similar policies and see exactly how it has played out for them. Mr. Taylor said St. Mary's County had, maybe not the original ordinance on this, but it is the one that Queen Anne's County essentially adopted. He said he believes there are at least a handful, maybe two handfuls, of counties that have it. Another route would be to just simply ask the Attorney General, if you want another opinion on it. He said he thinks Council is going to have a hard time getting anybody to give it a definitive opinion because of the Court of Appeals case. Mr. Joe Holloway asked how many people the County does business with that reside in the County or their business is owned in the County. Mr. Taylor said they could find out that information. Mr. Joe Holloway said he thinks Mr. Cannon said that somebody contacted him that is probably talking about a lot larger sum when it comes to bidding. He said he had somebody contact him that has lost a couple of bids over just a few dollars. He said he does not know if Bob and Paul could put their heads together and maybe find a way to do this that would insulate us from the legal part of it. He said he does not know if that is possible or not. Mr. Taylor said there are a couple ways you could minimize the risk. The Queen Anne's County ordinance, for example, applies to local preference in favor of someone who essentially has a business in that county that is owned by people in the county. It is very limited. In other words, for example, Staples is a business here in the county that pays taxes and employees local people but it is certainly not locally owned. He said under Queen Anne's County's ordinance, they would be adversely affected by their ordinance. It could be written differently so that it would apply the local preference only to people that do not have a place of business here and are not locally owned. He said that would be one way certainly to minimize the risk. Another way to do it

would be to cap it in terms of dollar amount so it would apply, for example, to purchases of say \$2,500 or less and that would minimize the risk in two ways. It would knock down the number of potential transactions, and it would also knock down the cost-benefit ratio, if you want to look at it that way, of filing a suit because it does cost money to do that. He said there are a couple of ways that risk could be minimized, but it's still there.


Mr. Joe Holloway said for the benefit of the audience, the reason this came up is that he had a person that owns a pretty large business in Wicomico County that is a family-owned business, employs a lot of people, has a lot of inventory, and he lost a bid for just a few hundred dollars to a company outside the state. Of course his argument is hey, we are paying all these taxes, you know we are employing all these people, we have been here for 50 years or 75 years. You know, we should have some preference. Mr. Joe Holloway said he kind of had to agree with him in a way. He said he understands the risk when it comes to being sued by the places, but if the County could find some way to minimize that risk and still make this work, that would be wonderful. There was no further discussion.

Signatures on next page


**Minutes of Open Work Session
Local Preference
January 3, 2017**




John T. Cannon, President



Larry W. Dodd, Vice President, District 3



Ernest F. Davis, District 1



Marc Kilmer, District 2



John B. Hall, District 4



Joe Holloway, District 5

_____absent_____

Matt Holloway, At-Large



Laura Hurley, Council Administrator