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Subject: [EXTERNAL] Online Form Submittal: Charter Review Committee Submission Form

Charter Review Committee Submission Form

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Comments, Questions or Concerns	COUNTY EXECUTIVE – THE "FULL TIME" CONUNDRUM AND RELATED ASPECTS At the May 6 meeting, following discussion, the decision was to consider language to clarify the current requirement in section 402 that the Executive "shall devote his full time to the duties of the office." One suggestion was to prohibit secondary employment. However, any express prohibition should be inclusive of all gainful endeavor – for example: "any trade, business, employment or endeavor conducted for compensation for the purpose of profit or financial gain, other than investment of personal assets that does not involve an active operation of a business or enterprise." It would be inappropriate to prohibit activity performed as an employee but not as an individual ("sole") proprietor or partner. And, what about service on the board or as an officer of MACO, PACE or other organizations that involve time and effort, sometimes significant, that reduces the "full time" to "devote ... to the duties of the office" or service as a member of the National Guard or a reserve unit of the armed forces that deploys on active duty on occasions. No matter how the "full time" mandate may be further clarified

or defined, it is largely an aspirational requirement – there is no mechanism for enforcement in the event that the Executive engages in activity other than in his capacity as the County Executive. For example, if he or she owns rental property or has an interest in an entity (LLC, etc.) that does and devotes time and effort to its operation or management. Although such a situation could be a "hot-button" during an election (or appointment to fill a vacancy) it is questionable whether an Executive could be removed from office, even if the Charter were amended to provide for removal for failure to devote his or her full time to the duties of the office.

Both practically and legally, it may be impossible to enforce a "full-time" mandate. For instance, if an Executive is involved in a business that, for example, owns and operates rental real estate and typically goes home or elsewhere for a couple hours at lunch time to both eat and to review business matters and make management decisions regarding them. If challenged, it seems doubtful that a court would consider such activity any different as to performance of "the duties of the office" than if he or she played tennis or went to the gym to exercise. And this scenario would pertain for other remunerative activity, such as being in an appraisal, accounting or other business.

Thinking Outside the Box

Is it in the public interest to require that the County Executive devote full time to the duties of office to the exclusion of other gainful activity? This requirement, in its political effect, eliminates a large number of competent and capable citizens who are reluctant to resign or reduce their employment or other remunerative endeavor to seek and, if successful, hold a position that is filled by election every four years. One very obvious result, both here and in other counties, is that the office of County Executive tends to be filled by those who are or aspire to be career politicians. Furthermore, regardless of how the "full time" requirement is clarified or expanded, it is impossible to enforce comprehensively – not only as to vacations, but also as to remunerative activity.
Although there may be times other than 9 to 5 on weekdays when the Executive should be actively engaged, those are the exception. And, as we have seen with the presence of a Director of Administration, it is not necessary to have an elected Executive at all, just as in the decades before the executive system began. In fact, most counties in Maryland do not have an elected Executive; nationwide, most counties of our size and larger do not have an elected executive.

It would be prudent and serve the public interest to revise the pertinent part of section 402 to state that the County Executive shall devote such time as may be required to perform the duties and responsibilities of the office. Eliminating the "full time" requirement would increase, not reduce the likelihood of having an effective Executive; electoral politics will largely prevent and surely eliminate a backslider in that office.

The Removal for Disability Quandary

Section 408 allows for removal of the County Executive only if he or she "is unable by reason of physical disability to perform the duty for a continuous period of six months." This lengthy period is completely inconsistent with the requirement in section 402 that the Executive must devote his or her full time to the duty of that office, or even such time as may be required for that purpose. In addition, there is a potentially time-consuming process for the removal of the Executive in the event of his or her disability – after the 6-month disability period has elapsed*, there must be a super majority vote of the Council and thereafter possible judicial appeal, which stays the removal until the trial court has ruled and, if that ruling is appealed, until the matter is finally resolved by an appellate court, which could take months, possibly much longer than a year after onset of the disability.

We recently came somewhat close to getting involved in this quagmire, which should be changed to provide a more practicable and prompter process for the removal of an executive upon his or her disability, and also under conditions such as prolonged absence without communication. Among other things, if the Executive remains disabled for a specified period (say, one week) the Council should be authorized to engage a physician to evaluate the Executive's physical and/or mental condition for the purpose of considering and deciding upon removal, which should be mandatory if, to a reasonable degree of medical certainty, such disability will continue either permanently or for a defined period (say, three months rather than six months) measured from the onset of such disability not the later date of the medical evaluation. And, if the Executive were to appeal, that should not stay the removal pending resolution of the appeal.

Another Disability Quagmire

Section 410 provides that, if the County Executive is temporarily absent or disabled, the Director of Administration "shall perform the duties of the County Executive" with "the

same rights, duties, powers and obligations as an elected incumbent in said office." Aspects of this transfer of authority to an "Acting County Executive," should be revised in light of recent events.

Among other things, there is no standard for determining what constitutes a "temporary absence or disability" (length of time, condition, etc.) or who makes the determination. Nor is there any requirement for notification of the Council or public when a temporary disability and transfer of authority begins or ends. In either case notice should be provided immediately. During Mr. Culver's illness last year, it appears that on occasion then Director of Administration Strausburg functioned as Acting County Executive – for example, he executed documents for the County, which are recorded in Liber 4645, folio 0302 (deed) and 4634, folio 342 (release of debt and lien), and may have taken other actions in that capacity. The point is not whether he did so appropriately pursuant to section 410, but that public disclosure of the disability and transfer of authority is not required.

Section 410 needs substantial revision to address its shortcomings mentioned above. It should also provide for a mechanism to resolve promptly any instance in which the Director of Administration believes that the Executive is disabled but the latter does not agree. A possible means to address this would be for the Director to be required promptly to notify Council, which then would be authorized (upon majority vote) to engage a physician to examine the County Executive and, if he or she refuses, to authorize the temporary transfer that would continue until the Executive consents to the examination and is found not to be disabled by the physician. If the Executive were to appeal, that should not stay the transfer of authority to an Acting County Executive pending resolution of the appeal. And, if there is any issue about the temporary disability of the elected or appointed Executive having ended, he or she should be required to provide clear and convincing evidence to either the Council or, if it disagrees, in a judicial appeal.

General Comment

Our recent experience makes manifest that Charter amendment is warranted to address the matters mentioned above. Under slightly different circumstances, there could have been a really difficult situation for both branches of the County Government. And, if the County Executive becomes disabled the public and Council should be notified as soon as possible

and kept informed, just as happened in the case of Governor Hogan's illness a few years ago.

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* Section 408 currently requires that for the Council to remove the County Executive, it must make "a finding that the County Executive is unable by reason of physical or mental disability to perform the duties of office for a continuous period of six months." Although this does not expressly state that this period of disability must have already occurred – i.e., that the Council cannot make the finding during that period – that could be how it would be construed in court. Thus, this aspect is another matter for which clarification seems appropriate – for example, by providing that the Executive could be removed during the disability period based upon an opinion by a physician that the disability will continue for the specified (6 months or other) disability period or if the Executive refuses to be examined by the physician.
