IN THE

Court of Appeals of Maryland

September Term 2000

No. 91

MONTGOMERY COUNTY MARYLAND, *et al.*,

Appellants,

v.

ANCHOR INN SEAFOOD RESTAURANT, *et al.*,

Appellees.

On Appeal from the Circuit Court for
Montgomery County (Ann S. Harrington, Judge),
by Writ of Certiorari to the Court of Special Appeals

BRIEF OF APPELLEES ANCHOR INN SEAFOOD RESTAURANT, *ET AL.*

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QUESTIONS PRESENTED

I. Does state law providing that "the smoking of tobacco products is permitted" in bars and restaurants under certain circumstances preempt a local attempt to prohibit such permitted activity by regulation rather than by law or ordinance?

II. Does the local regulation banning smoking in certain bars and restaurants violate equal protection under either the federal or Maryland Constitutions?

III. At the time it purported to ban smoking by regulation, was the Montgomery County Council, as then constituted, authorized by state and county law to act as the local Board of Health without the participation of the County Executive and to adopt the anti-smoking regulation at issue?

IV. Does the attempt to consolidate legislative and executive powers in the current County Council acting alone as the Board of Health, and to circumvent the powers of the County Executive, violate the separation of powers as established by the Montgomery County Charter?

V. Was the local regulation banning smoking adopted in violation of the County Administrative Procedures Act or due process?

VI. Does state law delegating legislative authority to local Boards of Health, as applied in this case, violate separation of powers and nondelegation principles contained in the Maryland Constitution?

STATEMENT OF FACTS

Both Maryland and Montgomery County have long accommodated smokers and non-smokers by providing for smoking and non-smoking sections in bars and restaurants. MD. CODE ANN., HEALTH-GEN. § 24-502 (1996)[1]; MONTG. CO. BILL 1-87 (eff. July 10, 1987). There have been only two attempted deviations from this history of accommodation: the first by two state agencies in 1994 and the second by appellant Montgomery County Council purporting to act as the local Board of Health. The first attempt was rejected by the General Assembly and the second should be rejected by this Court.

In 1994, the state Commissioner of Labor and Industry and the Secretary of Labor, Licensing, and Regulation adopted broadly applicable workplace regulations (the "Labor Agency Regulations") that for the first time prohibited smoking in bars and restaurants. Those regulations were challenged in and upheld by this Court in *Fogle* v. *H & G Restaurant, Inc.*, 337 Md. 441 (1995). In response to the *Fogle* decision, the General Assembly passed a law clarifying its policy to accommodate both smokers and non-smokers by providing that "the smoking of tobacco products is permitted" under specified circumstances in a variety of locations including bars, taverns, restaurants, and clubs serving alcohol. BUS. REG. § 2-105(d)(1). Because the Labor Agency Regulations covered far more than just bars and restaurants, however, the General Assembly chose not to restrict agency authority to regulate but instead provided that the general permission to smoke in bars and restaurants applied "[n]otwithstanding any regulations" adopted by those agencies. *Id*. The General Assembly also included a savings clause for local legislative action, providing that "[t]his Act is not intended to pre-empt the authority of a county or municipal corporation *to enact any law or ordinance* that is more restrictive of smoking in establishments open to the public in which smoking is permitted under § 1 [codified as § 2-105(d)] of this Act." 1995 MD. LAWS, ch. 5 § 2 (emphasis added). That clause pointedly excluded protection of local administrative restrictions.

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[1] Subsequent references to the topical articles of the Annotated Code of Maryland will be to the article and section only.

The second attack on accommodation began on January 19, 1999, when the Montgomery County Council introduced Bill 2-99, which sought to prohibit smoking in bars and restaurants. *See* Bill 2-99 [Joint Record Excerpts ("E") 241-48]; Minutes, Jan. 19, 1999 [E249-51]. County Executive Duncan opposed the Bill. [E275-77] The Council nonetheless passed Bill 2-99 by a 5-4 vote and, as expected, the bill was eventually vetoed by the County Executive. Bill 2-99; Minutes, Mar. 2, 1999, at 11 [E273].

Anticipating that veto, however, the Council did something extraordinary: In the midst of its March 2 legislative session, the Council purported to switch hats and, sitting as the Board of Health ("Board"), introduced a previously unscheduled and undisclosed "resolution on a Board of Health regulation which would restrict smoking in restaurants." Minutes version 2, Mar. 2, 1999, at 2, 5 [E280, 283].[2] One week later the Council sitting as the Board passed Resolution 14-70, adopting a regulation banning smoking in bars and restaurants (the "Regulation"). The Regulation provides, in part, as follows:

> (a) **Smoking Prohibited**. A person must not smoke any tobacco product in the public area of any eating and drinking establishment licensed under Chapter 15 of the County Code.
>
> * * * *
>
> (b) **Exception**. This regulation does not apply in the bar and dining area of any eating and drinking establishment that:
>
> (1) is a club as defined in the state alcoholic beverages law,
>
> (2) has an alcoholic beverages license issued to private clubs under the state alcoholic beverages law, and
>
> (3) allows consumption of alcoholic beverages on its premises.

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[2] That resolution is the first regulation the Board ever wrote on its own, rather than simply incorporating an existing county law. Furthermore, there is no evidence that the public was present for, or even informed of, the purported meeting of the Board where the resolution was introduced. *Cf*. Minutes version 2, Mar. 2, 1999, at 2 (suggesting *post-hoc* alteration of agenda to reflect Board meeting) [E280]. Two Council Members expressed concern about procedural irregularity surrounding the resolution, particularly the lack of notice to municipalities subject to the Regulation but which would not have been bound by Bill 2-99. *Id*. at 5 (Subin concern over precipitous schedule and misleading statement to municipalities; Krahnke concern over lack of notice and comment) [E283].

* * * *

(d) **Applicability.** This regulation applies Countywide and supersedes any inconsistent provision in County Code Sections 24-9 and 24-9A.

The Regulation, adopted as an end-run around failed legislation, was challenged in and invalidated by the Circuit Court and is the subject of this appeal.

ARGUMENT

This case is not about the pros and cons of smoking. Rather, it is about the governmental processes set up to address such controversial issues. In its righteous fervor to attack smoking, the County Council seeks to bypass all manner of checks against the abuse of government power. But it is precisely in the face of such fervor that the procedural and structural checks on the exercise of power must be most scrupulously observed.

I. THE REGULATION IS PREEMPTED BY STATE LAW PERMITTING SMOKING IN BARS AND RESTAURANTS.

State law adopted in the wake of the *Fogle* decision expressly provides that smoking "is permitted" in bars and restaurants, with only a limited savings clause allowing localities to "enact any law or ordinance that is more restrictive of smoking." BUS. REG. § 2-105; 1995 MD. LAWS § 2, ch. 5. The anti-smoking Regulation forbids that which is expressly permitted by state law, but it is *not* a "law" or an "ordinance" within the terms of the savings clause. Consequently, it is preempted by state law. Judge Harrington agreed with appellees that the Regulation was preempted, finding that

> [T]he County Council, sitting as the Board, tried to accomplish by regulation what it could not accomplish through legislation. Although the Council's action would not have been preempted before March 1995, the enactment of § 2-105 preempted by implication future limitations on smoking in bars and restaurants, except for those specifically authorized by the savings clause. Resolution 14-70 is not a law or ordinance and therefore is not within the savings clause.

[E505]. That finding was correct and should be affirmed by this Court.

The regulation at issue in this case is preempted both by conflict with and implication from § 2-105. Preemption by conflict occurs because the Regulation "prohibits an activity which is *intended to be permitted* by state law." *Talbot County* v. *Skipper*, 329 Md. 481, 487 n.4 (1993) (emphasis added). Preemption by implication exists due to the "comprehensiveness with which the General Assembly has legislated the field" of smoking in bars and restaurants since the *Fogle* decision. *Id.* at 488 (citations and quotation marks omitted).

Responding to this Court's *Fogle* decision, the General Assembly undertook to provide detailed guidance about the conditions under which smoking is or is not permitted in bars and restaurants. Unlike the limited state law that existed when the Labor Agency Regulations were adopted, state law now specifies not only *where* smoking is permitted or restricted in bars and restaurants, it also specifies *how* and *by whom* further restrictions may be imposed. BUS. REG. § 2-105(d)(1) ("smoking of tobacco products is permitted" in a variety of locations including any establishment "generally recognized as a bar or tavern," any "bar in a hotel or motel," any "bar or bar area" in a restaurant, any "separate enclosed room not exceeding 40% of the restaurant," or a combination of bar area and separate enclosed room, combined not to exceed 40% of the restaurant); 1995 Md. Laws § 2, ch. 5 (savings clause applicable only to counties and municipalities and immunizing only those additional restrictions enacted by means of any "law or ordinance"). With respect to smoking in bars and restaurants, current law is far broader than it was when *Fogle* was decided and now comprehensively addresses the field.

Contrary to such comprehensive state legislation, the Regulation commands that a "person must not smoke any tobacco product in any eating and drinking establishment" other than one in a private club. By prohibiting that which is expressly "permitted" under state law, the Regulation conflicts with that superior state law and is preempted. *See County Council* v. *Investors Funding Corp.*, 270 Md. 403, 423 (1973) ("By making unlawful the action which the Public General Law permits, this ordinance clearly creates a conflict" and is preempted). Furthermore, by intruding into a field covered in detail by state law – on the same aspect of smoking in the same locations addressed by state law –

the Regulation is preempted by implication. *See Allied Vending, Inc.* v. *Bowie*, 332 Md. 279, 300 (1993) ("comprehensive state-licensing scheme for cigarette vending machines" implies intent to occupy field of cigarette sales through vending machines); *Skipper,* 329 Md. at 492 (intent to preempt indicated "where the particular aspect of the field sought to be regulated by the local government is addressed by the state legislation").

The existence and detail of the savings clause, in particular, necessarily implies that any local action *not* within the savings clause is preempted. Where state law expressly provides for certain forms of local involvement, such "provisions indicate that when the General Assembly intended to authorize local government involvement * * * it expressly provided for such involvement," and "where the state statute had not authorized local government involvement, the Legislature likely contemplated that the regulation would be exclusively at the state level." *Skipper*, 329 Md. at 492; *see Long* v. *State*, 343 Md. 662, 666-67 & n.1 (1996) (applying *expressio unius est exclusio alterius* maxim). There would be no need for a savings clause – much less one limited to only certain forms of local action – if the law had no preemptive effect beyond that savings clause.

And because the Regulation is not the product of the *legislative* process – *i.e.*, a law or an ordinance – it is not saved by § 2 of the state statute. In *Inlet Associates* v. *Assateague House Condominium Association*, a municipality was required to act by "ordinance," but had instead acted by resolution. Rejecting the local action, this Court held:

> That municipal enactments must be in the form of ordinances when so required either by charter or statute is clear. … [W]henever the controlling law directs the legislative body to do a particular thing in a certain manner the thing must be done in that manner.

313 Md. 413, 428 (1988) (citation omitted); *id.* at 428-29 ("[a]n ordinance is distinctly a legislative act"; "if a municipal action is one of general application prescribing a new plan or policy, it is considered legislative and therefore must be accomplished by ordinance"); *Roselle Park Trust Co.* v. *Ward Baking Corp.*, 177 Md. 212, 220 (1939) ("statute that directs a thing to be done in a particular manner ordinarily implies that it shall not

be done otherwise"). Having adopted a regulation rather than enacted a law or an ordinance, the Board's action is not within the savings clause.[3]

Rejecting the plain meaning of state law, the Board claims (1) the Regulation is a "state," rather than local, exercise of authority not subject to preemption; (2) Section 2-105 limits only the authority of two state officials, but does not otherwise permit smoking; and (3) the Regulation is a law or ordinance under the savings clause. Appellants' Brief (hereinafter "Board Br.") 17-18. Each of those claims is in error.

A. THE REGULATION IS A LOCAL ACT SUBJECT TO PREEMPTION ANALYSIS.

The Board claims that the challenge to the Regulation raises only the "superiority of an Act of the General Assembly … over a regulation promulgated under the authority of another Act of the General Assembly," thus raising repeal-by-implication, not preemption, issues. Board Br. 19-20. This argument is misconceived.

First, the end product of a local exercise of state-delegated authority is still a "local" action subject to preemption by the state's own direct and specific exercise of statewide authority. Virtually *all* county activity, whether legislative or administrative, ultimately derives its authority from a state public general law. Just as a county's legislative exercise of an Express Power constitutes a local law, so too action by the Board constitutes a local regulation. Both are subject to preemption.

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[3] That laws and ordinances differ from regulations is well established. *See, e.g.*, BLACK'S LAW DICTIONARY 569 (abridged 5th ed. 1983) ("Ordinance. A rule established by authority; a permanent rule of action; a law or statute. In its most common meaning, the term is used to designate the *enactments of the legislative body* of a municipal corporation. An ordinance is the equivalent of a municipal statute, passed by the city council, or equivalent body") (emphasis added); *id.* at 668 ("Regulations. Such are issued by various governmental departments to carry out the intent of the law. Agencies issue regulations to guide the activity of those regulated by the agency and of their own employees and to ensure uniform application of the law. *Regulations are not the work of the legislature* and do not have the effect of the law in theory.") (emphasis added); *see also* STATE GOV'T § 10-101(g) (1998 Supp.) (APA definition of "[r]egulation" as a statement "adopted by a unit to: … detail or carry out a law that the unit administers").

Second, the Board is not even exercising supposed state authority directly, but at best is exercising authority secondarily delegated from the County. State law gives its authority directly to the county "governing body." HEALTH-GEN. § 3-201(b). As will be discussed in detail in Part III, the County Council acting alone is *not* the county governing body, and at best argues that its current authority arises from a local law enacted pursuant to § 5(Y) of the Express Powers Act. The second-hand authority of the *current* Board exists only by virtue of a local legislative act and thus remains "local" in character and subject to preemption.[4]

Third, even if the Regulation did have some "state" character to it, preemption analysis would still apply. In *Fogle*, this Court applied preemption analysis even though it was addressing a *state* regulation. 337 Md. at 464. And regardless whether this Court uses nomenclature other than "preemption," long-established norms of statutory construction would provide for the co-existence of two overlapping statutes by giving precedence to the more specific state law – here § 2-105(d). "It is well settled that specific terms covering a given subject matter prevail over general language of the same or another statute which might otherwise prove controlling." *Montgomery County* v. *Lindsay*, 50 Md. App. 675, 678-79 (1982). Giving priority to the more specific statute preserves meaning for *both* statutes within their respective areas. The Board's construction of the board-of-health provisions, however, would repeal another state law by rendering meaningless § 2-105(d) and the savings clause. Nomenclature aside, therefore, the result is the

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[4] The Regulation also is preempted by its own express conflict with – and claim that it "supersedes any inconsistent provision in County Code Sections 24-9 and 24-9A." Regulation § (d). Indeed, a county ordinance may not be repealed except through the same legislative process by which it was enacted. *See Valley Brook Dev., Inc.* v. *City of Bettendorf,* 580 N.W.2d 730, 731 (Iowa 1998) ("The validity of an ordinance is not affected by a resolution; it is amended, repealed, or suspended only by an ordinance."). Even the Board's alter-ego, the Council in its full legislative glory, lacks the unilateral authority to supercede county law. As the mere agent of the governing body, the Board is incapable of overruling a legislative enactment of that governing body. By purporting to supersede existing county law, the Regulation asserts a conflict that it must lose.

same: Specific state law on smoking in bars and restaurants takes precedence over the exercise of authority under generic board-of-health provisions.

B. STATE PERMISSION TO SMOKE IN BARS AND RESTAURANTS IS MORE THAN A LIMITATION ON TWO STATE AGENCIES.

Despite the plain language of § 2-105(d), the Board claims that § 2-105(d) "restrains only the authority of" the two state Labor Agencies and has no force against any other state or local official. Board Br. 21; *see also Amicus* Br. (similar). Such a narrow interpretation of § 2-105 is at odds with the language, structure, and history of the statute.

First, the language of the statute is broadly permissive. The relevant subsection is entitled "Permissible locations" rather than prohibited regulations. BUS. REG. § 2-105(d). The operative language then reads:

> Notwithstanding any regulations adopted by the Secretary under this section, the smoking of tobacco products is permitted in any of the following locations unless restricted as authorized under paragraph (3) of this subsection.

Id. § 2-105(d)(1)(i). The "[n]otwithstanding" clause is not a limitation on the general permission contained in the operative clause, but rather a simple denial that the broad permission might be limited by the pre-existing – and still extant – Labor Agency Regulations on smoking in the workplace. Those regulations applied to far more than just bars and restaurants, and having left them intact, it thus became necessary for the General Assembly to clarify that the newly enacted permission to smoke under certain conditions took priority "notwithstanding" the decision not to revoke those regulations.

Second, the Board's interpretation of the statute – as effective *only* against the Labor Agencies – would render other portions of the statute meaningless. For example, the final clause of the operative sentence – that smoking is permitted "unless restricted as authorized under paragraph (3)" – would make no sense if the permission to smoke were only operative against the Labor Agencies. The referenced paragraph (3) provides: "Notwithstanding the provisions of this subsection, *a proprietor* of an establishment * * * *may restrict or prohibit smoking* on the premises of the establishment." BUS. REG.

§ 2-105(d)(3) (emphasis added). There is no need to give a *proprietor* special authorization "[n]otwithstanding" the permission to smoke if such permission were not otherwise effective against the proprietor and others. Like the savings clause for county laws, this reservation of authority for proprietors shows that the General Assembly understood the operative language of subsection (d)(1) to be a general grant of permission rather than merely immunity from the Labor Agencies alone.

Third, the savings clause language emphasizes the general grant of permission to smoke, protecting local authority "to enact any law or ordinance that is more restrictive of smoking in establishments open to the public *in which smoking is permitted under Section 1 of this Act*." (Emphasis added.) This last clause identifies the underlying rule that "smoking is permitted," and does not refer to this permission in terms of a right to be asserted against the Labor Agencies alone. Indeed, though providing for local choice concerning stricter limitations, the savings clause protects only legislative, not administrative, action consistent with the law's reassertion of legislative primacy against agency overreaching. It is unbelievable in that context that the General Assembly rebuffed state agency excess only to allow local agency excess.

Fourth, the history of § 2-105 provides additional confirmation that a broader permission to smoke was intended. The law was passed to rebuff, in comprehensive terms, an administrative attempt to thwart the legislative policy of accommodating smoking in bars and restaurants. Thus, while the bill that was introduced in the House *started out* as a mere limit on the Labor Agencies themselves, that approach was not what was enacted into law. *Compare* House Bill 1368 (First Reader, March 2, 1995), at 2 ("Secretary may not propose or adopt any regulation that restricts the smoking or possession of tobacco products in any of the following establishments") [E446] *and* House Bill 1368 (Third Reader, March 16, 1995), at 3 ("Secretary may not propose or adopt any regulation that restricts the smoking of tobacco products in any of the following" locations) [E453], *with* BUS. REG. § 2-105(d), *supra* p. 9.

The preemptive "is permitted" language that is the focus of this case was not added to the bill until March 22, 1995, when the House concurred in an amendment re-

placing the prohibitory language directed at the Labor Agencies with the current permissive language authorizing smoking more broadly. *See* House J. of Proceedings, March 22, 1995, at 1975 [E460-66]. It was simultaneously with this switch from narrow restrictive language to broad permissive language that the savings clause also was added to the bill. *Id*. at 1979. It is this dramatically amended version of House Bill 1368 that then became law. *See* House Bill 1368 (Enrolled and Approved, March 27, 1995) (final redlined version) [E468-78]. Contrary to the Board's assertions, the evolution of § 2-105 demonstrates both it goes beyond a narrow restriction on the Labor Agencies and that such a limited law was expressly considered and rejected by the General Assembly.[5]

C. THE REGULATION IS NOT A LAW OR AN ORDINANCE FALLING WITHIN THE SAVINGS CLAUSE.

The Board's final claim is that the Regulation falls within the scope of the savings clause because "the undefined term 'law' is a broad, generic term that includes 'regulations.'" Board Br. 21. That claim is incorrect. While in some contexts the word "law" can include a variety of government edicts, in this case the word "law" is not being used

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[5] The Attorney General wrongly relies on two letters his office wrote opining that an *earlier version* of the bill did not preempt local authority. *Amicus* Br. 12. Both letters – dated prior to the March 22 amendment – are not even discussing the provisions that finally became law, but rather the earlier version of the bill that did not yet contain the relevant language that the "smoking of tobacco products is permitted." *See* Zarnoch-McCabe Letter (March 9, 1995), at 1 (bill would "prohibit the Secretary * * * from proposing or adopting regulations") [Apx. 1]; Israel-Lewis Letter (March 14, 1995), at 1 (bill provides that "certain State officials may not completely ban smoking in certain places") [Apx. 3]. The early bill indeed simply limited Labor Agency power, would not have preempted local activity, and, not surprisingly, *had no savings clause*. The savings clause was added when the operative language was changed to a broad and preemptive grant of permission to smoke. *See* Sen. Fin. Comm. Rep. on the 1995 legislation (amendment "restates the bill's provisions to say where smoking 'is permitted' *instead of limiting the Secretary's authority*") (emphasis added) [Apx. 5]. Contrary to the Attorney General's unsupported account of anti-tobacco forces irrelevantly seeking the savings clause to ward off non-existent preemption, *Amicus* Br. 13, the savings clause has real meaning occasioned by the preemptive effect of the March 22 change in operative language.

in that manner. The grammar and context of the sentence, the common usage of the words "law" and "regulations," and the General Assembly's usual practice all combine to show that "law" is being used in its specific and narrow sense of meaning a legislative enactment, as distinguished from an administrative or other legal requirement.

First, the language of the savings clause uses the word "law" in its particularized sense rather than in its collective sense. The sentence preserves "the authority of a county or municipal corporation *to enact any law or ordinance that is more restrictive of smoking*." 1995 MD. LAWS ch. 5, § 2 (emphasis added). That language – "any law" as opposed to "by law" – refers to some particular law or laws, rather than to the body of law as a whole. Only when the word "law" is used as a collective or mass noun can it sometimes (though not always) be read to refer to all variety of governmental edicts.

The definitions provided in Black's Law Dictionary are particularly instructive:

> **law. 1.** The regime that orders human activities and relations through systematic application of the force of politically organized society, or through social pressure, backed by force, in such a society; the legal system <respect and obey the law>. **2.** The aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action <the law of the land>. **3.** The set of rules or principles dealing with a specific area of a legal system <copyright law>. **4.** The judicial and administrative process; legal action and proceedings <when settlement negotiations failed, they submitted their dispute to the law>. **5.** *A statute* <*Congress passed a law*>. – Abbr. L. **6.** COMMON LAW <law but not equity>. **7.** The legal profession <she spent her entire career in law>.

BLACK'S LAW DICT. 889 (7th ed. 1999) (emphasis added). Most of the definitions refer to law in its collective sense: the "regime," the "aggregate," the "set," or the "process" of law. In that collective sense, "law" can often include regulations, as well as any other authoritative rule, requirement, or process. But the savings clause refers to local authority "to enact *any law*" that "*is*" more restrictive. (Emphasis added.) The use of "law" in the savings clause is more particularized and is being used in the sense of the fifth definition provided; it refers to a local "statute," *i.e.*, a legislative enactment.

Second, numerous statutory examples having the same structure as the savings clause show that when used in its specific sense, the word "law" does not include regulations. This specific and distinguishing use of the word "law" occurs frequently in other savings clauses. One of many such examples is Environmental § 13-401, which provides: "This title does not affect any authority of a political subdivision of this State or any other unit of this State to adopt or enforce *laws, ordinances, rules, or regulations* that govern wells or the use of water." (Emphasis added.) That particularized use of the word "laws" as distinct from "regulations" shows that the General Assembly knew how to preserve regulations when such was its intent. There are many other examples of such particularized use of the word "law."[6]

Third, the cases cited by the Board for an all-inclusive definition of "law" each presents the word in a very different linguistic context than here. Thus, in *Town of Berwyn Heights* v. *Rogers,* 228 Md. 271, 274-75 (1962), the relevant statutory phrase referred to a remedy "[i]n addition to all other remedies provided by law." But the phrase "provided by law" plainly uses "law" in the collective sense, not the particularized sense.[7] Likewise in *Sugarloaf Citizens Association* v. *Northeast Maryland Waste Dis-*

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[6] *See, e.g.,* BUS. REG. § 6-201(d)(1) (referring to "the laws and regulations about charitable organizations"); *id.* § 10-315(f) (certain signs "shall be consistent with the local law, ordinance, or regulation governing signs"); FAM. LAW § 5-585(a) (expressly superceding "[a]ll restrictions imposed by the laws, ordinances, or regulations of all subordinate jurisdictions within the State"); HEALTH-GEN. § 7-1002(b)(2) (treatment "in compliance with relevant laws and regulations"); *id.* § 8-205(a) (reporting requirements "subject to the provisions of state and federal laws and regulations governing confidentiality"); *id.* § 21-305(b)(6) ("Nothing in this subtitle shall preempt the right of a county to require a permit under the authority provided by a local law, ordinance, or regulation" under certain circumstances); MD. ANN. CODE OF 1957, art. 27 § 734B (referring to preemption of "any State, county or municipal law, ordinance, or regulation that conflicts with" this subtitle); *see also Mayor and City Council of Baltimore* v. *New Pulaski Co*., 112 Md. App. 218, 230 (1996) ("[ENVIR. § 9-502(c)] provides that 'any rule or regulation adopted under this subtitle does not limit or supersede any other county, municipal, or State law, rule, or regulation that provides greater protection'").

[7] Furthermore, this Court in *Berwyn Heights* never purported to construe the word "law," but rather focused on the "in addition to" language in the quoted phrase. The Court's

posal Authority, the statutory reference to "a right * * * *required by law* to be determined only after an opportunity for an agency hearing" again uses law in its collective sense, with the exact same phrasing, "by law," to help indicate generality rather than specificity. 323 Md. 641, 651 (1991) (quoting STATE GOV'T § 10-201(c)(1)). Because each of the cases cited by the Board uses the word "law" in a different grammatical context than it is used in the savings clause, none of them are appropriately applied to this case.[8]

Fourth, the Board's expansive construction of the word "law" would encompass "ordinances" as well as "regulations," thus rendering part of the savings clause meaningless. The better reading of the phrase "any law or ordinance" is to refer to the legislative enactments, respectively, of a "county or municipality." That reading preserves meaning for the word "ordinance" and provides grammatical consistency between the parallel references in the savings clause to the enacting bodies and their enactments.

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holding that the exhaustion doctrine was inapplicable did not turn on whether the administrative remedy was provided "by law," but merely upon whether the remedy was meant to be exclusive. 228 Md. at 275.

[8] The claim that the Department of Legislative Services "routine[ly]" uses law to include regulations, Board Br. 22, similarly fails to consider the grammatical context in which "law" is used. In the only instances cited by the Board, the statutory language at issue uses the phrase "required by law." 1999 MD. LAWS, ch. 54 (General Revisor's Notes); 1988 MD. LAWS, ch. 54 sec. 10 (General Revisor's Notes). Furthermore, there are numerous examples where references to "law, ordinance, or regulation" are left intact, *see infra* at 13 n.6, suggesting that the Department of Legislative Services understood the different use of the word "law" in different contexts. Interestingly, both of those Revisor's Notes rely upon a case that states only that a rule "adopted pursuant to statutory authority * * * has the force and effect of law." *Maryland Port Admin.* v. *John W. Brawner Contracting Co.*, 303 Md. 44, 60 (1985). That language does not define "law" to include rules or regulations. It merely holds that the latter are legally binding. Given that the Revisor misunderstood the case law, and given that the General Assembly expressly disavowed the 1999 Revisor's Notes, this Court should not take such Notes as indicative of legislative intent regarding the use of the word "law" in a different statute and a different grammatical context. *See* 1999 MD. LAWS, ch. 54 sec. 10 (the "Revisor's Notes, Special Revisor's Notes, General Revisor's Notes, and catchlines contained in this Act are not law and may not be considered to have been enacted as a part of this Act") [E479-81].

Fifth, the use of the word "enact" in the savings clause corroborates that only legislative actions are saved from preemption. It is common usage that laws are "enacted" whereas regulations are "adopted" or "promulgated." *See* Black's Law Dictionary, at 546 (defining "enact" as "**1.** To make into law by authoritative act; to pass <the statute was enacted shortly before the announced deadline>. **2.** (Of a statute) to provide <the statute of frauds enacts that no action may be brought on certain types of contracts unless a plaintiff has a signed writing to prove the agreement>.").[9] The General Assembly can be presumed to have understood that common usage of the word "enact" when it selected it to describe conduct by a "county" or "municipal corporation" creating a law or an ordinance. By contrast, administrative entities are said to "adopt" regulations, and nobody is heard to say that the SEC or the FCC or the EPA "enacted a law today."[10]

Sixth, the statute enacting the savings clause declares a limited "purpose of * * * providing that this Act is not intended to preempt *certain authority* of counties and municipalities." House Bill 1368, at 2 (Enrolled and Approved version) (emphasis added) [E469]. The limited purpose of saving only "certain" authority suggests the correlative

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[9] *See also* BLACK'S LAW DICTIONARY 546 (defining "enactment" as "**1.** The action or process of making into law <enactment of a legislative bill>. **2.** A statute <a recent enactment>."); *id.* ("**enacting clause.** The part of a statute stating the legislative authority by which it is made and when it takes effect.")

[10] The Board's federal cases discussing the phrase "an enactment of Congress," Board Br. 22-23, do not use the verb "enact" in reference to regulations, but rather deal with the specialized language and context of the Assimilated Crimes Act, 18 U.S.C. § 13(a), and seem to recognize that their construction is contrary to normal usage. *See, e.g.*, *United States* v. *Brotzman*, 708 F. Supp. 713, 715 (D. Md. 189). The California case of *Posey* v. *State*, 225 Cal. Rptr. 830, 838 (Cal. App. 1st Dist. 1986) likewise relies on an uncommon definition in a specialized statute, and then proceeds to contextually distinguish laws from regulations "that are promulgated." Finally, in *Montgomery County* v. *Revere Nat'l Corp.*, 341 Md. 366, 384 (1996) the zoning enactments were so named because the statutory language began by requiring ordinances and only later was language added to the statute allowing district councils to proceed by resolution. *See infra* at 17.

purpose *not* to save "other" county and municipal authority. That purpose supports the natural reading of the savings clause: It preserves "laws" but not regulations.[11]

In sum, as used in the savings clause, "any law" has a specific meaning of any legislative enactment, and does not include administrative edicts. The Regulation in this case is not encompassed within the savings clause and hence it is preempted.

The General Assembly has a long-standing policy of accommodating both smokers and nonsmokers in bars and restaurants. Under state law smoking "is permitted" as specified in bars and restaurants. A local choice to be less accommodating must be enacted through a "law or ordinance." Because the Regulation conflicts with the language and the implications of state law and is not a saved law or ordinance, it is preempted.

II. THE REGULATION VIOLATES EQUAL PROTECTION.

The Fourteenth Amendment of the United States Constitution provides that "no state shall deny to any person within its jurisdiction equal protections of the laws." Article 24 of the Maryland Declaration of Rights states that "no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, … or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." As this Court has noted, "it is well established that Article 24 embodies the same equal protection concepts found in the Fourteenth Amendment to the U.S. Constitution." *Verzi* v. *Baltimore County*, 333 Md. 411, 417 (1994).

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[11] The Attorney General wrongly claims that the Senate Finance Committee included regulations in the savings clause by stating that "'this bill does not preempt local authority to regulate smoking more stringently than state law.'" *Amicus* Br. 14-15. That claim misapprehends the meaning of the words "to regulate," which carry no particular connotation of administrative, as opposed to legislative, action. (For example, Congress' power "to regulate" commerce.) Insofar as the abbreviated Committee summary might fail to elaborate on the detailed distinctions made by the statute itself, the statutory language is more probative of intent.

In this case, the Regulation divides the category of eating and drinking establishments and exempts some such establishments from the smoking ban if they operate as part of a club. That classification has no relation to the object of the Regulation, as the purported health hazards of smoking are no different at the bar at Burning Tree Country Club than they are at the Anchor Inn. Judge Harrington found that the only differences between a "club" housing an eating and drinking establishment, which is exempt, and a bar or restaurant, which is covered, "are that a club has a specific purpose and is not operated for profit." [E509]. She went on to note that "[a]lthough a non-profit entity may be treated differently for tax purposes, it is subject to the same health and safety regulations," and that "[a]ll person, be they employees, members, diners or guests, whether at a club or a public establishment, are equally vulnerable" to environmental tobacco smoke in such establishments. [E509-10].[12] She concluded that a "distinction in a health regulation that fails to recognize this is arbitrary and capricious," and consequently in violation of equal protection requirements. [E510].

The only difference that even conceivably explains the classification exempting clubs is that clubs and those who visit them carry considerable political and financial clout. Had the Regulation applied equally to bars and restaurants in clubs, neither it nor its sponsors would have survived the political fallout. But while the politics of the situation readily explains the Board's classification, it does not *justify* the classification. Indeed, the core purpose of equal protection is to allow those who are politically weak to gain some measure of protection from the politically strong who are otherwise similarly situated. As Justice Jackson so aptly noted:

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[12] None of the Board's previous health and sanitation regulations exempt private clubs. Resolution 11-985, Aug. 2, 1988 (Food Service Regulation; adopting code provision on inspections of food service facilities, safe food handling and hygiene practices, sanitary equipment and methods, and cleanliness, water supply, and waste disposal; all applicable to private clubs); Resolution 11-365, June 30, 1987 (adopting provisions of County Code including Ch. 15, Eating and Drinking Establishments, and Ch. 24, §§ 4-8, Health or Sanitation; all applicable to private clubs); *cf.* Resolution 13-1410, Aug. 4, 1998 (Tobacco – Distribution to Minors; no exemption for distribution by a private club).

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation *and thus to escape the political retribution that might be visited upon them* if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Railway Express Agency v. *New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring) (emphasis added). This Court has firmly endorsed Justice Jackson's vision of equal protection. *See Verzi*, 333 Md. at 416-17; *Attorney General* v. *Waldron*, 289 Md. 683, 728 (1981).

To allow the Board to impose an onerous regulation applicable only to the politically disfavored because it could not have passed the Regulation otherwise would be to allow precisely that which equal protection seeks to prevent. In this case, bars and restaurants that are alike for all purposes relevant to health or sanitation are treated differently solely to escape "political retribution." Under equal protection principles, "a law which operates upon some persons or corporations, and not upon others like situated or circumstanced or in the same class is invalid." *Salisbury Beauty Schools* v. *State Bd. of Cosmetologists*, 268 Md. 32, 60 (1973).

Rather than explain and defend the genuine reasons for its classification, the Board instead relies on the supposed laxness of equal protection review, a call for judicial restraint, and a single paragraph of speculative fiction regarding what the Board "might have," "could have," or "may have" been thinking when it adopted the Regulation. Board Br. 24-26, 27. The Board both underestimates the strength of review that is appropriate in this case, and overestimates the rationality of its fictitious justifications.

A. RATIONAL BASIS REVIEW DOES NOT INVOLVE TOTAL ABDICATION, PARTICULARLY CONCERNING IRREGULAR EXERCISES OF AUTHORITY.

While there is no denying that rational basis review is not the most rigorous check on government authority, it must still mean *something*. Both Maryland and federal courts have found equal protection violations before, even under rational basis scrutiny. *See, e.g.*, *Verzi*, 333 Md. at 426-27 ("no rational basis for the classification of in-county and out-of-county towers"); *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 446 (1985) ("State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational"). Furthermore, Article 24 is somewhat broader than its federal analogue, and "a discriminatory classification may be an unconstitutional breach of the equal protection doctrine under the authority of Article 24 alone." *Verzi,* 333 Md. at 427. Under Maryland equal protection jurisprudence, therefore, "a legislative classification [must] rest upon 'some ground of difference having a fair and substantial relation to the object of the legislation.'" *Id.* at 419 (quoting *State Bd. of Barber Examiners* v. *Kuhn*, 270 Md. 496, 507 (1973)).

But to hear the Board describe it, there is nothing that could possibly fail rational basis review; the Board can just make things up after the fact and virtually anything is an adequate basis for drawing seemingly arbitrary classifications. With all due respect, that is not and should not be the law, particularly when it comes to administrative classifications adopted through a procedure that, at best, is irregular and purportedly unreviewable.

First, rational basis is often applied with teeth, particularly under the Maryland Constitution. *See Frankel* v. *Board of Regents of the Univ. of Md. Sys.*, 361 Md. 298, 315 (2000) ("'Court has not hesitated'" to strike down laws even under "minimal" version of rational basis test) (citations omitted); *Verzi*, 333 Md. at 418-19 (noting statutes struck down by U.S. Supreme Court under rational basis test; noting that this Court of Appeals has "not hesitated to carefully examine a statute and declare it invalid if we cannot discern a rational basis for its enactment"); *Waldron*, 289 Md. at 710, 715 ("broadening array of cases which trigger [a] 'sharper focus'" under rational basis scrutiny that "is not 'toothless'" noting "vitality of this State's equal protection doctrine" even under rational

basis test); *see also Cleburne*, 473 U.S. at 448-50 (vigorous application of rational basis review testing each justification with no effort to speculate in favor of City). This Court in particular often eschews the type of speculative deference to hypothetical and improbable justifications that the Board now proffers. *Frankel*, 361 Md. at 317 (testing classification against "stated object of Board's policy" rather than against fictitious or speculative policies); *Mayor and City Council of Havre de Grace* v. *Johnson*, 143 Md. 601, 608 (1923) (Court "certainly cannot assume" different risks posed by different categories; evaluating distinction based on "more reasonable and probable view"). In fact, this Court has gone in the opposite direction to hypothesize situations where a classification would not serve the proffered justification. *Frankel*, 361 Md. at 317-18 (using hypotheticals to debunk relation between classification and stated goals); *Verzi*, 333 Md. at 425-26 ("not difficult to envision numerous other situations" where classification not aligned with justifications; discussing likely equivalence of harms in non-regulated situations).

A common element found in the cases applying a more rigorous rational basis test is that the challenged classification somehow subverts the political checks that would otherwise protect the disfavored class. For example, with residential or territorial classifications, non-residents typically lack sufficient access to the relevant political processes, and their interests are severed from (and opposed to) the interests of residents who *are* in a position to impose a political check on arbitrary action. *Cf. Verzi*, 333 Md. at 420-21 (discussing cases rejecting territorial classifications). Exempting or disfavoring nonresidents is thus an example of isolating the politically weak and is equivalent to exempting the powerful "club" set in order to isolate the less powerful bars and restaurants catering to a less favored class of smokers.[13]

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[13] And while smoking itself may not be a constitutionally protected "right," it is certainly a valued privilege dating back to colonial times and protected by the General Assembly. Furthermore, most of the plaintiffs in this case are not complaining as smokers, but as business owners and employees who wish to serve the smoking market and who will lose jobs and businesses as a result of the regulation. Although it is not the Court's place to *weigh* such consequences against the risks of smoking, those consequences are nonethe-

Second, given the extreme irregularity of the "administrative" conduct in this case and the total absence of normally applicable administrative procedures for ensuring reasoned decisions, the Court should increase its scrutiny still further. That the regulatory procedure was an end-run around existing political checks is further reason to take a more skeptical approach because such conduct is less likely to "be rectified by the democratic processes." *Cleburne*, 473 U.S. at 440. While great deference may be due legislative bodies acting in their full sovereign capacities and subject to well-established checks and balances, such deference should not extend to a *faux*-agency adopting regulations directly in spite of the legislative process and not even subject to the usual administrative review procedures that check arbitrary and capricious agency action. Extreme deference here would make a mockery of equal protection and, because the Board claims to be free of even APA review, would arguably violate due process as well.

B. THERE ARE NO CONCEIVABLE RATIONAL BASES FOR EXEMPTING BARS AND RESTAURANTS IN CLUBS FROM THE REGULATION.

The Board offers not a single explanation of how the classification it drew is related to the health and safety purpose it claims for the Regulation. In fact, unlike previous equal protection cases before this Court where there was considerable "specific testimony" as to the reasons for a classification, *Montgomery County* v. *Fields Road Corp.*, 282 Md. 575, 580-81 (1978), the Board here has never offered its reasons for the club exemption. Instead it offers speculation: the Board "might have decided" to ban smoking "in phases"; it "could have concluded that the economic burdens" of the Regulation on clubs would be "too great"; it "may have viewed" its responsibilities differently as between patrons of "public" and "private" establishments; and finally, the Board "simply may have decided to follow State law," which supposedly distinguishes "between restaurants and private clubs for smoking regulation purposes." Board Br. 27-28. None of

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less of a character that if they are to be imposed must be imposed in an equal manner as adjudged by *heightened* rational basis scrutiny.

these arguments can sustain a regulation whose stated "objective" is sanitation and disease prevention.

Phases Must Still Have Rational Bases. There is nothing to suggest that the Regulation was only the first step in an otherwise rational progression of a larger effort. But even assuming it was, step-by-step approaches must still delineate their steps rationally. Had the Board instead started by regulating all establishments owned by red-heads, with the excuse that it would turn to blondes and brunettes when it got around to the next phase, it is inconceivable that such an excuse would pass equal protection muster. Merely picking an arbitrary or invidious category and calling it a "phase" adds nothing. Whatever distinguishes one category or phase from the next must still be related to the purpose of the regulation and to reason for taking things one step at a time. *Cf. Fields Road*, 282 Md. at 580-81 (analyzing testimony on reasons for classification and discussing how decision to cover less than entire field related to policy behind statute).

No Rational Relation to Economic Burdens. The club exemption has no rational relation to concern for economic hardship. Typically such concern drives exemptions based on size or annual revenues. But mere "club" status has no relationship to economic strength or weakness. While a small bar with a smoking clientele will likely be destroyed by the Regulation, it is hard to imagine that Burning Tree would be disproportionally injured. If anything, it is the for-profit bars and restaurants, not the non-profit clubs, that would disproportionately suffer an economic burden.

Furthermore, economic concerns are beyond the Board's competence and authority, and have nothing to do with a sanitation or disease prevention objective. While such concern may be a valid *legislative* consideration, the Board lacks the legislative authority to balance general social and economic concerns against its sanitation objectives. As an *agency* tasked with health, not economics, it may not rely on such a distinction. *Cf. Justiana* v. *Niagara County Dept. of Health,* 45 F. Supp.2d 236, 243-44 (W.D.N.Y.

1999) (striking down regulation because "the Board engaged in the legislative function of balancing economic factors with competing health considerations).[14]

Responsibilities In Public versus Private Settings. The Board's speculation that it may have lesser responsibilities towards patrons of bars and restaurants within clubs is belied by the statutes setting out board-of-health authority, by the nature of that authority, and by the Board's consistent practice. Indeed, clubs are not exempt from any other health requirements, employee protection requirements, or even Montgomery County's more balanced prohibitions on smoking in workplaces *other than* eating and drinking establishments, which apply to the shared workspaces of clubs without special exemption. M.C.C. §§ 24-9, 24-9A. The Board offers no credible reason as to how eating and drinking establishments in clubs are differently situated from a health perspective.

The suggestion by *Amicus* that the public can more easily avoid private clubs and that regulating such clubs would be a greater invasion of privacy is almost perverse in its irrationality as applied to this case. There is nothing about being a "club" under the State alcoholic beverages law that suggests being closed to the public. MD. ANN. CODE OF 1957 art. 2B § 1-102(4)(i) ("'Club' means an association or corporation which is organized and operated exclusively for educational, social, fraternal, patriotic, political or athletic purposes and not for profit.") Likewise, having a "club" liquor license is not conditioned on being closed to the public or only selling to members. *Id.* § 6-301(a)(1) (Class C beer, wine, and liquor license authorizing "the holder to keep for sale and sell all alcoholic beverages at retail at any club, at the place described in the license, for consumption on the premises only"). Thus, many "clubs" with eating and drinking establishments can

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[14] The Attorney General cites cases upholding classifications that are materially different, and far more rational, than the classification made here. For example, in *Justiana* the court rejected an equal protection claim based on an exemption for precisely the group *denied* an exemption by the Board: bars, taverns, and bar-areas in restaurants. 45 F. Supp.2d at 239. The Regulation, by contrast, divides bars and restaurants into two groups with no distinction related to health. And in *Fagan* v. *Axelrod*, 550 N.Y.S.2d 552, 559 (N.Y. Sup. 1990), the law exempted restaurants and bars under numerous circumstances, and economic considerations were well within the province of the New York *legislature*.

serve the public, sell alcohol to the public, and, under the Regulation, allow the public to smoke. And in Montgomery County there is a special "country club license" that allows the licensee to sell certain alcoholic beverages "*to any customer* at the place described in the license, for consumption on its premises only." *Id.* § 6-301(q)(2)(iv). A good deal of the difference in treatment between clubs, regular bars, and restaurants turns on the fact that clubs must be *non-profit*. *Id.* § 1-102(4)(i). Hence it is no surprise that clubs are treated differently than for-profit bars and restaurants for things like license fees and taxes. But non-profit status has nothing to do with the health effects of smoking on employees and patrons at bars and restaurants in clubs.

That bars and restaurants in clubs with liquor licenses may be open to the public amply demonstrates that the proposed excuse is irrational. But what makes the excuse truly perverse is that the Regulation, like the vetoed Bill 2-99 before it, contains no exception for *private functions* at bars and restaurants.[15] It thus applies to normal bars and restaurants regardless of whether the public has access at all, and exempts bars and restaurants in clubs with equal disregard for whether the public has access. And, of course, such fictitious public/private concerns were nowhere to be found under county law restricting smoking in all other workplaces within clubs, for example, meeting or game rooms, where the general public is even *less* likely to be present and where any privacy interests would be even stronger.

Finally, the public at large can equally avoid any bar or restaurant that allows smoking, regardless of whether it is in a club. Indeed, it is undisputed that in Montgomery County, a vast majority of restaurants are smoke free by their own election, providing the public with ample choice. Clubs are thus no more or less easily avoided than other bars and restaurants allowing smoking. Of course, as for the Regulation's stated goal of protecting employees, the employees of bars and restaurants in clubs are identically situ-

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[15] Faden Mem., March 5, 1999 (proposed resolution "is substantively identical to Bill 2-99") [E296]; Faden Mem., Feb. 22, 1999, at 1 ("Bill 2-99 * * * repeals an exemption in the current law for 'private functions,'" where the restaurant is entirely taken over by a private party) [Apx. 6]; Regulation § (d) ("supercedes" County Code).

ated as employees in other bars and restaurants, and have no greater or lesser avoidance capacity. The notion of public avoidance thus has nothing to do with the actual purpose of the Regulation, as described by its author, to protect employees from the supposed harms of environmental tobacco smoke. *See* Council Member Berlage, May 19, 1999 ("bottom line with this legislation is you cannot say to a Montgomery County citizen that if they work in a factory * * * they are guaranteed a smoke-free working environment and then turn around and say to someone who works in a restaurant or bar, you don't get that protection") [E428].

State Health Laws Do Not Treat Clubs Differently from Bars or Restaurants. As for the Board supposedly following state law, that too is insufficient, and in this case, irrational. Thus, the Board argues that its exemption employs the same class used in the state Smoking in the Workplace Act that forms the basis of the preemption claim in Part I, *supra*. Board Br. 28 (citing BUS. REG. § 2-105(d)(1)(i)4, which permits smoking in clubs). This argument is remarkable given that the Board has elided from its quote those portions of the very same law that *also exempt bars and restaurants* having alcohol licenses. *See* BUS. REG. § 2-105(d)(1)(i)2(C) (smoking permitted in "any establishment that: * * * is generally recognized as a bar or tavern"); *id.* § 2-105(d)(1)(i)5 (smoking permitted in the "bar or bar area" of a restaurant or separate smoking area). The separate reference to clubs in a context that treats them *the same* as bars and restaurants hardly supports the different treatment imposed by the Board.

At the end of the day, the Board exempted clubs for none of those reasons. Rather, they exempted the clubs to avoid the political firestorm that would have rained upon their heads had they told the politically powerful at Burning Tree, Congressional, *et al.* that they could not have a cigar after dinner or could not have a drink and a cigarette. Appellees argued as much in the circuit court, [E233-34, 436-37], and the Board has never denied it. Indeed, the linguistic contortions and hypothesized justifications offered by counsel merely confirm appellees' claim.

While rational basis review may occasionally invite searches for "conceivable" grounds of distinction, there is nothing in the cases that requires this Court to accept speculative reasons that were definitively *not* the reason in fact for the classification. And where the governmental entity is a rogue "agency" operating outside virtually all constraints, this Court should tighten its scrutiny even more. As Justice Jackson long ago noted, "nothing opens the door to arbitrary action so effectively" as to allow government officials to impose their edicts unequally in order to "escape the political retribution that might be visited upon them" otherwise. *Railway Express*, 336 U.S. at 112-13. Yet that is precisely what the Board has done and it cuts to the heart of the equal protection guarantee, even viewed through the lens of rational basis review.

III. THE LEGISLATIVE COUNCIL THAT ADOPTED THE REGULATION LACKED AUTHORITY TO DO SO UNDER EITHER STATE OR COUNTY LAW.

State law has always vested primary local board-of-health authority in the governing body of a county. Because the County Council alone is not the governing body in Montgomery County, and because the governing body had not delegated board-of-health authority to the Council acting alone, the Regulation is invalid.

From 1886 through 1982, state law provided that the "board of county commissioners * * * shall, *ex officio*, constitute a local board of health for their respective counties." MD. ANN. CODE OF 1957, art. 43 § 45 (1957) (1980 Repl. Vol. (1981 Cum. Supp.)). When it existed, the board of county commissioners was the governing body of its county. The 1915 ratification of the Charter Home Rule Article of the Maryland Constitution, Article XI-A, allowed certain counties to replace their governing county commissioners with governing bodies consisting of either a county council having unified legislative/executive powers or a combination of a legislative county council and a county executive, thus bifurcating the governing power. MD. CONST. Art. XI-A, § 3. That Article thus provided that any reference to "County Commissioners" was to "be construed to refer to * * * the President or Chairman and County Council" and presumably the Council alone if such was the form of the charter government. *Id.* This Court has

interpreted that provision to require identification of the "corporate body which is the successor to the former county commissioners." *County Council* v. *Maryland Reclamation Assocs., Inc.*, 328 Md. 229, 232 (1992). In Montgomery County, the board of county commissioners was superceded in 1948 by a unitary county council (hereinafter the "Governing Council"). The Governing Council, in turn, was succeeded in 1970 by a county executive and a legislative county council (hereinafter the "Legislative Council").

In 1982, Article 43, § 45 was transferred to the newly created Health-General Article, and its language was revised to clarify what had always been true: that the county governing body possessed primary board-of-health authority. Current law thus states that in a charter county "the governing body is *ex officio* the board of health for the county, unless the governing body establishes a board of health." HEALTH-GEN. § 3-201(b); *see also* 1982 MD. LAWS, ch. 21, at 178 (Revisor's Notes) (substitution of the phrase "governing body" for "board of county commissioners" used "for clarity"). Consistent with this Court's analysis of successorship for purposes of the Charter Home Rule Article, the phrase "governing body" has been repeatedly and consistently interpreted to mean both the County Council and the County Executive *acting jointly* where the two entities coexist. *See, e.g.*, *Maryland Reclamation*, 328 Md. at 236 n.3 (in Environmental Article, "the term 'county governing body' * * * mean[s], in a charter county, the council and the executive together"; sections "do not authorize a county council itself to adopt or amend a county's solid waste management plan. Instead, the authority is repeatedly granted to the 'county governing body' or the 'governing body of [the] county.'") (*citing* ENVIR. §§ 9-501, 9-503 to 505, 9-507 & 9-514).[16]

Based on the plain meaning of the phrase "governing body," Judge Harrington held that, while the pre-1970 Governing Council may have been the Board of Health,

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[16] *See also* MD. ANN. CODE OF 1957, art. 95 § 22F(a)(4)(iii) ("governing body" is the "county executive and the county council"); TAX-PROPERTY § 1-101(n) (same); TRANS. § 8-610 ("action by the local governing body of a charter county with a county executive means a majority vote of the county council * * * [w]ith the approval of the county executive" or a two thirds vote over the denial of approval).

> a critical event occurred in 1970 when Montgomery County created the Office of the County Executive. This action necessarily divested the Council of many of its powers. Prior to 1970 the Council possessed both the legislative and executive powers of the County. After 1970, the Council became solely a legislative body. * * * In 1970, the Council along with the Executive became the governing body for Montgomery County. Because the two, acting together, have not established a local Board of Health, the governing body is *ex officio* the local Board of Health.

[E502-03] (citations and footnote omitted).

The Legislative Council today cannot and does not claim that it alone is the governing body of Montgomery County. Instead it argues that a 1961 amendment to the Express Powers Act supposedly authorized the governing body of a charter county to "designate" a County Council to act *alone* as the board of health; that the Governing Council in 1965 so designated the "Council"; and that such designation remained effective to empower the current Council notwithstanding its 1970 conversion from a Governing Council to a Legislative Council. Board Br. 6, 14. Those arguments, however, assign incorrect meaning to the words "county council" as used in pre-1970 county law, and add the non-existent qualifier "acting alone and unchecked" to the reference to county councils in the Express Powers Act. Any county designation of the "County Council" prior to 1970 was simply a designation of the governing body itself to act as board of health. Authority once granted the Governing Council cannot in this case be claimed by the non-governing Legislative Council acting alone. And state board-of-health law has never authorized a county council to act alone and beyond the constraints of its charter. The Express Powers Act's generic reference to a "county council" should properly be read to refer to a council in its normal role in relation to the county governing body – be that role exclusive or shared with a county executive.

A. THE 1961 EXPRESS POWERS ACT AMENDMENTS DID NOT CONFER BOARD OF HEALTH AUTHORITY ON THE LEGISLATIVE COUNCIL.

The 1961 amendment of the Express Powers Act to add § 5(Y) does not authorize the designation of a legislative council to act alone as a board of health. As written in

1961, § 5(Y) provided that a charter county had the power to "organize and establish a County Board of Health, or to provide that the County Council shall be the County Board of Health," having the powers and duties provided under Article 43. MD. ANN. CODE OF 1957, art. 25A, § 5(Y). While the first clause provided a new power to create a separate Board of Health to exercise power otherwise possessed by the governing body *ex officio*, the second clause referring to the County Council was a wholly unremarkable codification of the interaction between Article 43 and the Charter Home Rule Article. In Montgomery County, for example, the Governing Council, as corporate successor to the County Commissioners, already possessed primary board-of-health authority under Article 43. Section 5(Y) merely confirmed that continued status should the County choose not to establish a separate board of health.

Appellants state that the new § 5(Y) also applied to charter counties that "had an elected executive," Board Br. 9, thus implying that the section allows such a county to provide that its *legislative* council, acting independently from the executive, can be the board of health. There are several problems with that considerable leap in reasoning.

First, appellants cite to no county that in 1961 had provided for a separate county executive or had a charter separating powers as Montgomery County now does. Indeed, the Attorney General suggests that the "county council" language was added at the suggestion of Montgomery County, *Amicus* Br. 5 n.3, which at the time had a unitary governing council. Given the lack of legislative history suggesting a different purpose, it is more natural to infer that the General Assembly took and used the language in the context from whence it came: To refer to a governing county council that was in fact the successor to the county commissioners.

Second, even assuming the existence of counties with separate legislatures and executives, there is nothing in the language that suggests a legislative counsel was newly authorized to act outside the usual parameters of legislative action. In other instances where a legislative council has authority to act, that authority is nonetheless subject to executive veto regardless of whether each and every grant of authority expressly provides as such. Rather, the normal checks and balances within the charter system are assumed

as background, and any power conferred against that background is subject to such checks and balances unless there is express provision to the contrary.[17] Given the troubling consequences of allowing the Legislative Council to be freed from the normal checks and balances of the Charter, such a conflict between state law and the Charter should not be lightly inferred. Any potential ambiguity in the law in 1961 created by the existence of both legislative and governing councils is best resolved by reading the reference to county councils as meaning such councils acting according to their normal role in the governing process, with whatever normal check is provided by the county executive.

Third, given that board-of-health authority had for its entire existence been under the control of the governing body, it would represent a remarkable change in law to place that authority beyond the control of part of the governing body. Indeed, given that the latter clause of the original § 5(Y) seems merely to refer to the initial board-of-health authority granted by Art. 43, § 45 in combination with the Charter Home Rule Article's succession rules, appellants' reading that § 5(Y) refers to a Legislative Council alone suggests that the General Assembly to amended, *sub silencio*, Article 43, or altered the succession rule of § 3 of the Charter Home Rule Article. Neither suggestion is plausible.

The 1982 amendment of § 5(Y) is entirely consistent with this view. That amendment altered the language to recognize the counties' power to organize and establish a

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[17] Appellants' reference to the Regional District Act, Board Br. 15 n.16, provides an instructive counterpoint. As noted in *Eggert* v. *County Council*, a clause in the County Charter immediately following the creation of the County Executive (but now gone) expressly provided that zoning powers "'shall be exercised by the Council as prescribed by law *and the exercise of such powers shall be exempt from veto by the County Executive*.'" 263 Md. 243, 258 (1971) (quoting MONTG. CO. CHARTER § 110) (emphasis added). Such express exemption from executive veto suggests the assumed applicability of that veto otherwise. This Court's decision in *County Council* v. *Carl M. Freeman Ass'n*, 281 Md. 70, 76-77 & n.5 (1977) similarly noted that the General Assembly, in response to the invalidation of a zoning action taken by resolution rather than by ordinance, expressly amended its zoning laws to affirmatively ratify the procedurally deficient resolutions and regulations and then affirmatively authorized future actions by resolution as well as by ordinance. Interestingly, the language of the ratifying Act confirms the contextual difference between and "ordinance' and a "regulation" or "resolution." *See* Part I, *supra*.

county board of health "to act instead of the county council as the county board of health under Title 3, Subtitle 2 of the Health General Article." 1982 MD. LAWS, ch. 770. As a clarification of the existing law it may not change the law, but it can certainly shed light on what the existing law meant if there are competing interpretations. By stating that a separately established board of health would act "instead of" the county council, this amendment confirmed that the county council previously acted by default, in its role as successor (in whole or in part) to the county commissioners, and in its role (in whole or in part) as the "governing body" of a charter county. Nothing at all in this language suggests that a county council was ever authorized to act alone and apart from its normal function within the governing structure of a county and freed from normal checks and balances. Indeed, the language suggesting that the county may establish a separate board "instead of" the county council in its default role strongly implies that the county may not designate a legislative council *alone* to act outside the constraints of that default role.

B. WHEN THE REGULATION WAS ADOPTED THE GOVERNING BODY HAD NOT ESTABLISHED THE LEGISLATIVE COUNCIL AS THE BOARD OF HEALTH.

Lacking any direct board-of-health authority as a governing body, the Legislative Council claims that the governing body nonetheless established the Council alone as the board of health and that such delegation survived Montgomery County's 1970 creation of the County Executive and divestment of executive authority from the County Council.

The Legislative Council cites to a 1965 County law that mirrored the 1961 amendment to the Express Powers Act by stating that the "county council is hereby designated as the County Board of Health" which would have and exercise the powers of a local board of health under Article 43. 1965 L.M.C. ch. 14 (codified at M.C.C. § 2-65). But this law at best confirmed this existing state of affairs and used updated nomenclature accordingly. The substituted phrase "County Council" at most carried as its meaning the

"successor" to the county commissioners. In short, it meant, and would have been understood to mean, the "governing body" of Montgomery County.[18]

Any bare reference to the County Council pre-1970 simply does not distinguish between its legislative and executive roles, and at worst must be read to refer to the Council in its full governing-body role as successor to the county commissioners. If the reference to the Council is read as a reference to the governing body, then such reference must now include both the Council and the Executive acting together, and the Council is not authorized to act alone.[19]

Finally, the Legislative Council argues that after the creation of the County Executive, the County Council revised unrelated portions of the County Code to specify where the County Executive was substituted for the County Council, but neglected to adjust the references to the County Council acting as the Board of Health. Board Br. 10. From this it leaps to the conclusion that the Legislative Council had the power to act

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[18] Appellants also cite to a 1950 law passed by then-new Governing Council adopting an amended version of prior public local law regarding the exercise of board of health authority. Board Br. 8 n.10. The prior law provided that "the County Commissioners, sitting as the local Board of Health," had authority "to adopt and enforce all needful rules and regulations concerning sanitation for eating and drinking establishments, habitable buildings, and water supplies." 1943 MD. LAWS, ch. 1002. The law adopted by the Governing Council substituted the words "County Council" for County Commissioners, but otherwise was identical to the prior law. 1950 M.C.C. § 24-1. Of course, in 1950 the Governing Council *was* the successor to the County Commissioners, and § 24-1 merely conformed the terminology to reflect the then-current governing body.

[19] Alternatively, the designation of the Council as an administrative Board could be read to refer only to the Council in its *executive* capacity. Such a reading is supported by *Scull* v. *Montgomery Citizens League*, 249 Md. 271, 280 (1968), which observes that the pre-1970 Charter identified as one of the Governing Council's "executive powers," the power to act "as a local board of health" in "executive session." Such authority, however, was *completely* transferred to the County Executive in 1970, and the Legislative Council thus would have had *no role at all* in adopting board-of-health regulations unless it legislatively revoked the prior establishment of a separate board and resumed its role as part of the joint governing body having primary board-of-health authority. *Cf*. *Eggert*, 263 Md. at 260 ("the County Executive, having been vested with the executive power, has the sole power to reconsider the prior executive action of the old County Council").

"alone" as the board of health. *Id*. That argument simply does not follow from the cited adjustments. Furthermore, in the statutory provisions where "County Executive" was substituted for County Council, the new charter completely divested the Council of its role handed it to the new Executive. But where the Council was to keep its normal role as a participant in the governing body, subject to veto, there would be no need to remove prior references to the Council given that its legislative role would be continuing. Thus, while the references to the Council acting as Board of Health remain unchanged in their pre-1970 language, they do not imply that such acts are immune from executive veto any more than other acts of Council.

The Legislative Council's claim of authority depends entirely on the notion that the Express Powers Act authorizes Montgomery County to provide that the Legislative Council may act *alone*, rather than in its usual role as part of the governing body, and that such a provision was made before 1970 and remained valid when the regulation was adopted. Both propositions are wrong and the Legislative Council lacks authority to act alone as the Board of Health.

C. THE REGULATION EXCEEDS A LOCAL BOARD OF HEALTH'S SUBSTANTIVE AUTHORITY UNDER STATE AND COUNTY LAW.

Even assuming, *arguendo*, that the governing body delegated authority to the legislative Council alone, § 24-1 of the County Code only authorizes the council acting as the Board of Health to "adopt and enforce all needful rules and regulations *concerning sanitation* for eating and drinking establishments …." (emphasis added). And even the full board-of-health authority is limited to the HEALTH-GENERAL § 3-202(d) power to adopt regulations on any "nuisance or cause of disease."[20] But the Regulation banning

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[20] Appellees recognize that County Code § 2-65 states that the Board of Health "shall have and exercise all the powers of a local board of health as provided in" the Maryland Code, which in authorizes the adoption of "rules and regulations on any nuisance or cause of disease in the county." HEALTH-GEN. § 3-202(d). But where the County Code

smoking in bars and restaurants does not regulate sanitation, nuisance, or a cause of disease as those terms are used in their respective statutes. The Regulation is thus beyond the substantive authority of the Board however constituted.

When interpreting statutes, "[w]ords are granted their ordinary signification so as to construe the statute according to the natural import of the language used without resorting to subtle or forced interpretations for the purpose of extending or limiting its operation." *Meadowridge Industrial Center Ltd. Partnership* v. *Howard County*, 109 Md. App. 410, 429 (1996).

Although not expressly defined, contextual use reveals that the word "sanitation" concerns garbage disposal, water and sewer service, and avoiding communicable diseases through cleanliness and pest control requirements. *See, e.g.,* M.C.C. § 25-40(a) ("All plumbing * * * shall be so constructed, installed and maintained to prevent cross connections or other sanitary hazards."); *id.*§ 25-40(b) (referring to a "sanitary bath, water closet and lavatory"); *id.* § 25-46(a)(3) & (4) (addressing "sanitary food handling practices" and requiring inspections "as to the cleanliness of food and food containers and as to the protection of food from spoilage"); *id.* § 25-46(f) (ice to be "obtained from sanitary sources and handled in a sanitary manner"); *id.* § 25-50(b)(1) (requiring certain items of linen "to keep the bed in a comfortable and sanitary condition").[21]

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has delegated general authority over nuisance and disease throughout the county, but expressly provides only narrower authority "*concerning sanitation* for eating and drinking establishments," the narrower provision controls with respect to such establishments. Any other interpretation would render § 24-1 meaningless given that sanitation is already encompassed within the broader grant relating to "nuisance or cause of disease." Reading § 24-1 as a narrowing of authority with respect to bars and restaurants, however, preserves meaning for the broader grant of authority, which would continue to have full effect in contexts other than those covered by § 24-1.

[21] The term "sanitation" and variants thereof also appear occasionally in state laws and regulations, confirming the contextual understanding of the term obtained from the County Code. *See* HEALTH-GEN. § 21-324(c) (defining "[u]nclean and unsanitary conditions"); ENVIR. Title 9 ("Water, Ice, and Sanitary facilities").

The Regulation, however, has nothing to do with sanitation, but rather crosses into the broader field of public health. Indeed, the fact that long-standing state sanitation laws have never been enforced against smoking in the public areas of bars and restaurants provides persuasive evidence that the ordinary signification of "sanitation" has never been understood to encompass public smoking. *See* HEALTH-GEN. § 21-314 (requiring Secretary to notify a food establishment if inspectors find the establishment "in an unsanitary condition" and to take various corrective measures); *id*. § 21-324(a)(1) (requiring a "food establishment" to "be kept in a clean and sanitary condition at all times"); M.C.C. § 15-1(a)(1) (addressing "unsanitary conditions" in restaurants).

As briefed in depth in the court below, the Board's sweeping definition of sanitation as covering *anything* related to health is certainly not the typical manner in which the word is used. The typical meaning is that provided by appellees, and encompasses garbage disposal, water supplies, and sewage. But given that the Board thinks sanitation involves any means of "preserving" or "restoring" health, its statutory authority would presumably cover regulations requiring public exercise, hospital and doctor licensing, regulation of medical schools, all drugs and pharmaceuticals, all environmental issues that could impact human health (for example, pollution), and pretty much any aspect of life causing stress – a well-recognized threat to health. The very notion that one would refer to sky-diving as a "sanitation" issue due to the health hazards of falling from the sky is simply absurd, regardless of whether it fits into some literal interpretation of a dictionary definition. The Board nonetheless embraces such a limitless view of its "sanitation" authority, claiming the right to regulate not only spoiled or infected food such as diseased meats, but also the right to regulate perfectly normal foods such as bacon. Though the very nature of foods such as bacon (or any meats) involves long-term health risks, they can hardly be said to be "unsanitary" in the normal use of that word. The Board's view thus would remove all possible limits on its authority and let it ban *all* fatty foods as unhealthy. "Sanitation" authority does not come close to authorizing the Board to dive into the smoking debate, regardless of how important the Board may think the issue is as a general health matter.

Even assuming further that the Board could exercise full state-law authority over "any nuisance or cause of disease" in eating and drinking establishments, the Board still lacks authority to enact the Regulation.

First, voluntary smoking in the public areas of bars and restaurants in compliance with state law is not a legal "nuisance." Behavior authorized by the legislature and done in the place and manner so authorized is *not* a nuisance. *See State ex rel. Comm'nrs of the Township of North Bergen* v. *WOR-TV Tower*, 121 A.2d 764, 766 (N.J. Super. 1956) ("where the doing of a thing that would otherwise be a public nuisance is authorized by legislative authority, *the doing of that thing by the person so authorized in the manner authorized cannot constitute a public nuisance* in the absence of negligence and such negligence must consist of something more than the doing of the authorized act") (emphasis added).[22] As discussed in Part I, *supra*, state law declares that smoking is permitted in bars and restaurants and even addresses whether smoking areas must be closed off and separately ventilated, expressly rejecting such requirements. BUS. REG. § 2-105(d)(1)(i)(5) & (d)(1)(ii). That specific authorization removes smoking from any general definition of the term nuisance.

Second, voluntary smoking in the public areas of bars and restaurants is not a "cause of disease" as that phrase is used under state law. As with "sanitation," contextual usage in other state statutes demonstrates that the ordinary signification of the phrase "cause of disease." *See* HEALTH-GEN. § 18-101 (entitled "Investigations into causes of disease and mortality"; refers to the "causes of disease and, particularly, the causes of epidemics"); *id.* § 18-101(2) & (3) (referring to "causes of mortality" and the influence of locality, employment, habitat, and other conditions on health). This distinction between "cause of disease" and other health issues suggests that the ordinary signification of the

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[22] *See also Potomac River Ass'n, Inc.* v. *Lundeberg Maryland Seamanship School, Inc.,* 402 F. Supp. 344, 359 (D. Md. 1975) ("Once uses of the common property have been authorized, they cannot be nuisances because they have been condoned by the government."); *Urie* v. *Franconia Paper Corp.,* 218 A.2d 360, 362 (N.H. 1966) (noting "weight of authority that what is authorized by law cannot be a public nuisance").

phrase refers to diseases transmitted by viral or bacteriological agents rather than other circumstances or conditions that may affect a person's health. *See* HEALTH-GEN. § 18-102 ("Infectious and contagious diseases"); *id.* § 18-103 ("Communicable diseases"). Further corroboration that environmental tobacco smoke is not within the ordinary signification of "cause of disease" is found in the placement within the Health-General Article of the provisions restricting smoking in public places. The smoking restrictions appear in Health-General Article § 24-502, in the Title addressing "Miscellaneous Provisions." The placement of smoking restrictions in this title rather than in the title involving causes of disease illustrates that while smoking is a public health issue, the General Assembly does not consider it a "cause of disease" within the ordinary use of that phrase.

The Board's far broader construction would again lead to the absurd results discussed in connection with sanitation. Indeed, the Board's approach could very likely eliminate bacon from every restaurant and diner given that frying bacon creates an airborne concentration of certain carcinogens over twenty times that found in a smoky bar.[23] And lest we forget that the Board's authority extends to all buildings – not just bars and restaurants – the Board's asserted authority would also include the power to ban smoking even in private homes. The absurdity of the results indicts the definition.

A final reason to read "nuisance or cause of disease" narrowly is that to hold otherwise would expand the delegated authority to all aspects of public health and render the choice of language meaningless as compared to a county's general legislative authority over public health and welfare. *Compare* HEALTH-GEN. § 3-202(d) (authority to regulate any "nuisance or cause of disease") *with* MD. ANN. CODE OF 1957, art. 25A § 5(J) (county power to "prevent, abate and remove nuisances"), *id.* § 5(S) (county power to pass "such ordinances as may be deemed expedient in maintaining the peace, good government, health and welfare of the county"), *id.* § 5(T) (county power to enact "ordinances and amendments thereof for the protection and promotion of public safety, health,

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[23] Nilsson, "Is environmental tobacco smoke a risk factor for lung cancer?," *in* What Risk": Science, Politics & Public Health, 97-98 (Roger Bate, ed.) (1998).

morals, comfort and welfare, relating to … [the] use of buildings and other structures"), *and* MONTG. CO. CHARTER § 101 ("power to legislate for the peace, good government, health, safety or welfare of the county"). Construing the phrase "cause of disease" to encompass only communicable diseases avoids the absurd results of a broader definition, is consistent with the way the phrase is functionally interpreted in state laws, and avoids raising troubling separation of powers issues. *See Anderson* v. *State*, 328 Md. 426, 438 (1992) ("construction of a statute which would cast doubt on its constitutional validity should be avoided.").

IV. DELEGATION OF UNCHECKED ADMINISTRATIVE AUTHORITY TO LEGISLATIVE COUNCIL VIOLATES THE COUNTY CHARTER.

The Montgomery County Charter, § 101, establishes that "[a]ll legislative powers which may be exercised by Montgomery County * * * shall be vested in the County Council." Section 201 of the Charter establishes that the "executive power vested in Montgomery County by the Constitution and laws of Maryland and by this Charter shall be vested in a County Executive." As this Court has recognized, Montgomery County's current Charter "provide[s] for the separation of the legislative and executive powers." *Eggert* v. *County Council*, 263 Md. 243, 256 (1971).

The Board has some difficulty deciding whether it is exercising legislative or administrative authority. *Compare* Board Br. 10 n.11 (legislative power) with *id*. 15 & n. 16 (administrative agency exercising executive authority, not legislating). Either way the Board's conduct violates the Charter. As Judge Harrington correctly held, "[i]f the Council on its own has authority to sit as the local Board of Health, the Council is able to walk the line between legislative and executive action without following the rules for either. This violates the separation of powers principles embodied in the County's Charter." [E507]. If the Board is acting legislatively, then its conduct circumvents the Charter requirement that "any legislation" enacted by the Council be presented to the Executive and subject to veto. MONTG. CO. CHARTER § 208. The check of an executive veto is an essential part of the separation of powers at the federal, state, and county levels. But it

is precisely this aspect of the separation of powers that the Board seeks to usurp by passing a regulation to do what the Council could not do by legislation given the Executive's veto.[24] To allow such a circumvention of the legislative process – enacted with the remarkable claim that it superseded the County Code – would make a mockery of the separation of powers established in the Charter.

If the Board is merely implementing or executing laws otherwise enacted, it is engaging in an executive function subject to executive oversight and has usurped authority granted by the Charter to the County Executive. MONTG. CO. CHARTER § 201; *Eggert*, 263 Md. at 259-60 ("implementation of existing law is executive in character," and that the "County Executive, having been vested with the executive power, has the sole power to" take such action).

The proper characterization of the Board's conduct as either legislative (*i.e.*, lawmaking) or administrative turns on the degree to which the conduct involves fundamental policy choices. If a fundamental policy choice is involved, the decision must be made through the legislative process and embodied in a law. If merely subsidiary discretion is involved – implementing a policy choice already made by the legislature – the decision may be delegated with appropriate guidance and safeguards, but in Montgomery County such conduct is Executive in nature. *See Mayor and City Council of Baltimore* v. *Wollman*, 123 Md. 310, 315 (1914) ("legislative or discretionary powers or trust devolved by law or charter in a council or governing body cannot be delegated to others, but ministerial or administrative function may be delegated to subordinate officials").

In *Boreali* v. *Axelrod,* 517 N.E.2d 1350 (N.Y. 1987), the New York Court of Appeals held that a public health agency that had restricted smoking in restaurants and elsewhere had exceeded constitutional limits on delegated authority by making fundamental policy decisions that "weighed the concerns of nonsmokers, smokers, affected businesses

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[24] Indeed, the Regulation sought to bind incorporated municipalities – something the County could not do by legislation even *with* the concurrence of the Executive.

and the general public and, without any legislative guidance, reached its own conclusions about the proper accommodation among those competing interests." *Id.* at 1351.

The Board, like the agency in *Boreali*, has overstepped the permissible limits of delegated authority. The line between legislative and administrative powers, and the limits upon delegated authority, were recently described in the municipal context by the Court of Special Appeals:

> Any municipal delegation of ministerial authority must contain sufficient guidelines to ensure that the officers carrying out the delegations will act in accordance with the legislative will, and *not employ their own unbounded discretion*.

Andy's Ice Cream, Inc. v. *City of Salisbury*, 125 Md. App. 125, 161 (1999) (emphasis added); *cf. Sugarloaf Citizens Ass'n, Inc*. v. *Gudis*, 319 Md. 558, 572 (1990) (a "best interest of the public" standard is the "sort of unguided discretion, involving, as it does, questions of policy and expediency, [that] is legislative, not judicial, discretion."). In the current case, the Board has asserted the power to exercise "unguided discretion" on "questions of policy and expediency" that, by definition, involve legislative activities. "When the delegated activities have exceeded mere ministerial tasks, however, the delegation is unlawful." *Andy's Ice Cream, Inc.,* 125 Md. App. at 161.

The Board argues that the Charter cannot restrain the General Assembly's legislative authority when it acts through a public general law, and that if a state law and the Charter "conflict," state law prevails. Board Br. 15. Although both statements are generally true, neither is relevant to this case. Appellees do not argue that the Charter restrains the General Assembly. Rather, the argument is that the Charter restrains the governing body of the County regarding the *manner* in which it may delegate its authority. Nothing in state law "conflicts" with this constraint on county government. State law merely delegates board-of-health authority to the County governing body. State law also says that if the governing body establishes a Board of Health other than itself, it need not act in that capacity *ex-officio*. There is simply no conflict as the state law does not *require* such a separate board, does not create some power separate from the Charter for such a

board, and does not discuss the nature of the board, the checks that must be placed on it by the governing body, or the guidelines the governing body ought give it.

Ultimately, even if state law gives counties the choice to delegate authority to councils acting alone, the citizens of Montgomery County have declined that choice by adopting a Charter that requires separation of powers with checks and balances. While the state could perhaps force such an arrangement on the county, it has not done so. The governing body thus is disabled from itself choosing to violate its organic Charter.

V. LACK OF REQUIRED ADMINISTRATIVE PROCEDURES.

The Circuit Court correctly held that the Regulation had not been adopted in compliance with the Montgomery County Administrative Procedures Act ("APA"). [E505-06]. The County APA "applies to all regulations" and requires an issuer to publish detailed notice of and take comments on a proposed regulation, and to submit the regulation and comments to the County Council for approval or disapproval. M.C.C. §§ 2A-12(b), 2A-15(c), 2A-15(f) (Method (2)(A) & (B)), and 2A-15(e). There is no dispute that the Board ignored these procedural requirements. *Cf.* Minutes, Mar. 9, 1999, at 9 (Council Member Praisner noting that "inappropriate" and "uncharacteristic of the Council's previous actions" to act "without providing the opportunity for the municipalities to comment") [E316]. The Board having failed to follow required administrative procedures, the Regulation is invalid. *See Anastasi* v. *Montgomery Co.*, 123 Md. App. 472, 491 (1998) ("if the agency or department fails to follow such [applicable] Administrative Procedures when taking an action, then the agency's action is invalid").

To avoid the plain meaning and consequences of the County APA, the Board asserts the supposed absurdity of requiring it to submit regulations to the Council (in essence, to itself) and argues that it has never followed the APA. Board. Br. 30. Neither

answer excuses it from complying with the County APA when it pretends to act as an administrative agency rather than as a legislative body.[25]

First, the process of submitting proposed regulations from the Board to the Council, while odd, is not absurd. Indeed, it is comparable to the situation that existed prior to 1970 when the Council held both the legislative and the executive power, and hence had to submit laws to itself for potential veto. If the APA process seems absurd now that executive and legislative authority reside in different entities, that merely speaks to the absurdity of the Legislative Council claiming to be an administrative agency – a role more properly within the executive branch.[26]

Second, the reference to Board of Health meetings in the Council's Rules of Procedure does not operate to the exclusion of other procedures required by County law. The Council's self-adopted rules are merely internal procedural guides created by the Council, for the Council. In that regard they are no different than *any* agency's rules of procedure, and cannot supercede legislatively imposed procedural requirements.

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[25] That the County APA has since been amended to exclude the Board from its requirements, it is the previous version that governs the adoption of the Regulation, and the Board has not sought to readopt the Regulation since the amendments to County law. And, while not an issue presented in this case, such amendments likely violate the Charter, due process, and the state constitution for many of the reasons discussed herein.

[26] The absurdity of the Council purporting to check itself could be eliminated by applying a structural inference from the Charter and judicially constructing the APA to require the Board to submit proposed regulations to the *Executive* for approval. That would restore the Charter-mandated balance of power, fulfil the underlying purpose of the APA to provide a check on administrative action, and avoid the constitutional implications of unchecked administrative authority. The Court could impose such a reformed duty as a function of reconciling the Charter and the APA, or as a function of its inherent authority to review administrative action. *State Ins. Comm'nr* v. *National Bureau of Cas. Underwriters*, 248 Md. 292, 300 (1967) ("The courts have been alert to exercise their residual power to restrain improper exercises of administrative powers whether judicial or legislative in nature. If the legislature has not expressly provided for judicial review, a court will ordinarily utilize its inherent powers to prevent illegal, unreasonable, arbitrary or capricious administrative action.").

Third, that the Board has never complied with the County APA in the past is not evidence of legislative intent, but rather evidence of lawlessness. Furthermore, whereas the Council adopted the APA in 1983, the first Board of Health regulation was not adopted until 1987. That the Board failed to follow the law several years – and three new members – after adoption, is a poor indication of what the Council thought years earlier.[27]

Fourth, as part of their procedural objections to the Regulation, appellees also argued that the Regulation was invalid because it was not adopted by an unbiased decision maker. Administrative action, unlike legislative action, is designed for the reasoned application of supposed expertise in an unbiased manner free from political manipulation. Where there is demonstrable bias in the administrative process, the resulting regulation is invalid. Although demonstrating bias can often be difficult, this Court has identified the height of the bar for such a showing: Challengers "have to show that the [agency] acted with 'an unalterably closed mind on matters critical to the disposition of the proceeding.'" *Fogle*, 337 Md. at 462 (quoting *United Steelworkers* v. *Marshall*, 674 F.2d 1189, 1209 (D.C. Cir. 1980)). In this case there is ample and overwhelming evidence that by the time the Board took up consideration of the Regulation its mind was so "unalterably closed" that there was no application of *administrative* judgment, but merely a *pro forma* affirmation of the political and legislative judgment already made by the Legislative Council when it adopted the doomed Bill 2-99.[28]

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[27] That board-of-health authority is delegated initially by state law to the governing body or to that body's designee hardly serves to preempt local procedural requirements imposed by the same governing body on its administrative agents. The Board makes no more than a backhanded suggestion of preemption, Board Br. 28, and with good reason: There is no conflict between the County APA and HEALTH-GENERAL § 3-201(b), which does not discuss administrative procedures at all.

[28] *See, e.g.,* Minutes, Mar. 9, 1999, at 8 (opposing Council Member Krahnke noting that she had not received information she had sought, and expressing "concern that the resolution was before the Council for introduction immediately after the Council enacted Bill 2-99") [E315]; *id.* at 9 (opposing Council Member Praisner noting "inappropriate" and "uncharacteristic" nature of rush to enact Regulation without input from the municipalities) [E316]; *id.* (proponent Council Member Silverman stating that "he would still sup-

The failure to follow basic administrative procedures is, in many ways, just another symptom of the unalterably closed mind with which the Board considered the Regulation. Because there is no sense of separate duty as an agency, and a complete overlap of interest between the Board and the Legislative Council, once the Legislative Council has acted on a legislative matter, it has shown itself incapable of switching hats and acting as an unbiased agency.

VI. DELEGATION TO LEGISLATIVE COUNCIL VIOLATES THE DELEGATION DOCTRINE UNDER THE STATE CONSTITUTION.

As a final matter, this Court should consider the constitutional implications were it to find that the Circuit Court was incorrect on the preceding matters. By the Board's reckoning, it is a state entity exercising non-preemptable state, rather than local, authority; its purview encompasses anything even tangentially related to health or welfare (which is to say everything); it can enact "laws" unchecked by the County Charter, county law, or the County Executive; and it is not subject to either the state or county APA. If the Board were correct regarding the source and scope of its authority and the absence of constraints on the exercise of that authority, then the General Assembly's delegation of such authority to the Board would violate the delegation doctrine that is part of the separation of powers under the state Constitution. In such circumstances, HEALTH-GENERAL §§ 3-201(b) and 3-202(d), as so construed, would be invalid.

The Maryland Constitution provides for the separation of powers by stating "[t]hat the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other." MD. DECL. RTS. art.

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port the resolution as a Board of Health regulation" regardless of whether the municipalities were given additional time to comment); *id.* at 9-10 (opposing Council Member Dacek noting the perception that "the regulation is being acted on as a Board of Health regulation because the County Executive may veto Bill 2-99," and expressing concern that "the Council was unwilling to support any additional amendments to Bill 2-99 other than the three year delayed implementation date") [E316-17].

VIII (1981). A "corollary of the separation of powers doctrine" is the "delegation doctrine, prohibiting a legislative body from delegating its law-making function to any other branch of government or entity." *Department of Transp.* v. *Armacost*, 311 Md. 64, 77 (1987). Although agencies may be given considerable discretion to implement legislative directives, this Court has recognized that the base-line "constitutional test, under the delegation doctrine, is whether the General Assembly provided sufficient legislative guidelines to limit adequately the exercise of discretion by administrative officials." *Id.*; *Sullivan* v. *Board of License Comm'nrs*, 293 Md. 113, 121 (1982) ("there must be sufficient standards for the guidance of the administrative officials"). As this Court has held, "discretion vested in [a county agency,] * * * in the total absence of any legislative safeguards or standards to guide it in exercising its discretion, constitutes an invalid delegation of legislative powers and otherwise violates due process of law requirements." *Investors Funding*, 270 Md. at 441.[29]

While *Investors Funding* "recognize[d], of course, that the trend of cases is toward greater liberality in permitting grants of discretion to administrative officials, particularly in the fields of public health and safety," it nonetheless held that "because of the complete lack of any legislative safeguards or standards, the grant of unlimited discretion" to fix certain penalties was illegal where "[n]o meaningful judicial review of the Commission's assessment of such penalties would appear possible in light of the unrestricted nature of the discretion. 270 Md. at 442. Furthermore, *Investors Funding* explained that the more liberal approach toward certain delegations was a function of three factors: the need for *flexibility* where detailed application of law to facts was beyond legislative capabilities; the need for administrative *expertise* regarding complex subject matter; and the

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[29] *See also Armacost*, 311 Md. at 80 ("legislative standards must enable a court, upon review, to ascertain whether an administrative agency had followed the legislative will," citing *Yakus* v. *United States*, 321 U.S. 414, 426 (1944)); *Christ* v. *Department of Nat. Res.*, 335 Md.427, 440 (1994) (delegation permissible "as long as guidelines or safeguards, sufficient under the circumstances, are contained in the pertinent statute").

rise of an *alternative checks-and-balances* paradigm whereby procedural checks were substituted for impractical substantive checks on administrative action. 270 Md. at 442.[30]

The more liberal approach to delegation does not represent an abandonment of the concerns over delegation to agencies, but rather an evolution of those concerns. While the new view lauds a system emphasizing long-term specialization that "produces an expertise and a superior ability both correctly to evaluate specialized questions and to supply correct answers to these questions," it also recognizes that "the dangers inherent in government by administrative bodies lie not in the blending of powers in a single body but in permitting that body's power to be beyond check or review." *State Ins. Comm'nr* v. *National Bureau of Cas. Underwriters*, 248 Md. 292, 299 (1967). More lenience regarding substantive legislative guidelines was thus made acceptable only because other "checks on administrative power have been supplied." *Id*. As we grew less concerned with administrative exercise of different kinds of power, "'we have had much more concern for avoiding or minimizing unchecked power. * * * [W]e have taken pains to see that the agencies report to and draw their funds from our legislative bodies, that the personnel of the agencies are appointed and reappointed by the executive, and that the residual power of check remains in the judiciary'" *National Bureau*, 248 Md. at 300 (quoting 1 Davis, ADMINISTRATIVE LAW TREATISE § 1.09, at 68-69 (1958)). Any separation of

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[30] *See also*, *Givner* v. *Commissioner of Health*, 207 Md. 184, 190-91 (1955) (field of health "is peculiarly within the realm of expert competence"; "more flexible standards" permitted because "there is a practical necessity for expert interpretation in its application to concrete situations"); *Pressman* v. *Barnes*, 209 Md. 544, 555 (1956) (in public health field, absence of fixed standards permissible if "it is impracticable to fix standards without destroying the flexibility necessary to enable the administrative officials to carry out the legislative will"); *Sullivan*, 293 Md. at 122-23 (flexibility in delegation doctrine where "it is manifestly impractical for the legislature to set specific guidelines to govern the day-to-day exercise of the rule-making power"); *Christ*, 335 Md. at 439 (broad delegations upheld "'particularly where it is impracticable for the legislature to set specific guidelines to govern the day-to-day exercise of the rule-making power'") (quoting *Falik* v. *Prince George's Hosp*., 322 Md. 409, 417 (1991)).

powers lost in a broad initial delegation is thus reclaimed by the separate checks on administrative action available to each of the separate primary branches of government.

Lenience with regard to legislatively fixed substantive standards, therefore, has not meant total abdication to administrative discretion. Where there is a need for the "expert assistance" and flexibility of administrative agencies, this Court has required other limitations to be present and, in some instances, has "found implied limitations on agency discretion when none has been expressed in the statutory language." *Armacost*, 311 Md. at 74 (citing *Truitt* v. *Board of Public Works*, 243 Md. 375, 391 (1966)). This Court's approach to delegation issues thus continues to recognize the essential checking function driving the delegation doctrine. *Armacost*, 311 Md. at 72, 532 A.2d at 1060 ("statutory guidelines serve not only to reduce the possibility of an arbitrary exercise of administrative discretion but also assist a reviewing court in determining the validity of agency action"); *Investors Funding*, 270 Md. at 434-35 (discussing *National Bureau* at length).[31]

Applied to the current case, the General Assembly may not delegate "unlimited discretion" to a board of health without "any legislative safeguards or standards." *Investors Funding*, 270 Md. at 442.[32] And there are no such safeguards or standards in this

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[31] Even the U.S. Supreme Court's most recent decision sustaining a delegation of authority to the EPA fits this paradigm, involving a statutory scheme that but numerous procedural checks on the agency's discretion. *See Whitman* v. *American Trucking Ass'ns*, Slip. Op. at 13 (Feb. 27, 2001) (Nos. 99-1257 and 99-1426) (agreeing with the Solicitor general about the specificity of the guidance given to the EPA); *id*. at 14 ("degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred); *see also* Reply Brief for the [Federal] Petitioners, No. 99-1257, *Browner* v. *American Trucking Ass'ns*, at 3 (Oct. 2000) ("Congress has set out, in extraordinary detail, * * * the factors that EPA must consider, a body of experts that it must consult, and a rigorous set of procedures that EPA must follow in setting the" National Ambient Air Quality Standards being challenged).

[32] And because the State could not make such a delegation, the County likewise may not delegate its derivative state authority to such a board. *Pressman*, 209 Md. at 552 ("same restrictions which rest upon the Legislature as to the delegation of legislative powers conferred upon it by the Constitution rest upon a municipal corporation as to powers granted to it by the Legislature"); *id*. ("a municipal corporation may delegate to subordinate officials the power to carry ordinances into effect * * * *if* such discretion is guided and re-

case. The Board's construction of its substantive authority regarding nuisance, disease, sanitation, and public health in general, is as broad as it gets and provides not an iota of guidance for the Board or for a reviewing court. Neither the Board nor the Attorney General claim otherwise. And while nominally broad substantive delegations have been upheld under some circumstances, those circumstances are not present in this case.

First, the delegation here is not required by or in furtherance of either flexibility or expertise. There is no "expert" agency relieving the legislative body of complex and specialized detail work. Rather, the Board is none other than the Legislative Council itself – wearing a different hat – and possessed of no greater flexibility or expertise than when it acts as part of the governing body to enact county laws.[33] Indeed, prior to adopting the Regulation, the Board had never taken a single action that had not first been taken via County ordinance. Rather, it merely stapled coversheets on existing county laws and called them regulations. Even the Regulation in this case was first attempted through the full legislative process and only written up independently when Bill 2-99 was headed for veto. The special circumstances of flexibility and expertise that have justified lenience toward delegations in other health cases simply do not apply in this case.

Second, if the Board is correct on the other issues in this case, there are no alternative procedural "safeguards" to fill in for the lack of substantive legislative guidelines. In fact, if the Board is correct, there are fewer procedural safeguards over the Board's ex-

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strained by standards sufficient to protect the citizen against arbitrary or unreasonable exercise thereof") (emphasis added). The Attorney General's argument that the delegation doctrine does not apply to local governments, *Amicus* Br. 21 (citing *Investors Funding*, 270 Md. at 436), neglects to mention that *Investors Funding* nonetheless struck down an unconstrained delegation from the County Council to a county agency.

[33] And while the principle that the "Legislature cannot delegate the power to make laws to any other authority" is not violated where "a municipal corporation is vested with powers of legislation as to matters of local concern," *Pressman*, 209 Md. at 552, that is because local governing bodies are constitutionally entitled, within their own localities, to exercise the entirety of the legislative power according to the checks and balances provided for such governance. In this case, however, the required mode of exercising the power to make laws was circumvented by an end-run around the executive veto power.

ercise of power than exist over any other agency imaginable. For example, unlike in *Judy* v. *Schaefer*, 331 Md. 239, 264 (1993), where this Court found that the General Assembly had "provided sufficient safeguards" through the numerous procedural and substantive checks on the Governor's budgetary authority, the Board affirmatively denies the existence of such numerous checks found by the Circuit Court in this case.[34] Similarly, in *Givner*, broad authority was vested in a genuine administrative body subject to numerous checks. 207 Md. at 187-89. Tellingly, the *Givner* decision expressly relied on the construction of the same statutory authority to regulate "filth" in *Petrushansky* v. *State,* where this Court wrote that while "[w]e fail to see how filth can be classified, graduated, or standardized except as filth," there was nonetheless "a standard, which we have thought, and still think, is the better test, and that is that the application shall be to all alike. The only purpose of the ordinance is to protect and preserve the health of the people of Baltimore, and the Commissioner of Health is obliged to treat all alike." 182 Md. 164, 174 (1943). Of course, it is precisely such an alternate check requiring equal application of health criteria that the Board abandons in its empty reading of its equal protection obligations.

Third, the other cases cited by the Attorney General, *Amicus* Br. 21-24, do not support the wholly unchecked delegation present here. Rather, those cases involved either local governing bodies themselves or they involved agents subject to normal administrative or executive checks and safeguards and this Court took pains to identify some substantive touchstone allowing for judicial review. *See e.g.*, *Christ* v. *Department of Nat. Res.*, 335 Md. 427, 443-44 (1994) (restriction on children driving dangerous motor vessel "obviously" reasonable "to promote the statutory purpose of boating safety"; noting multiple procedural "safeguards" both required by law and complied with by agency);

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[34] While appellees disagree with the Circuit Court's summary rejection of the delegation argument, [E507], that ruling might find at least some support in the context of the courts other holdings finding numerous checks on the Board's discretion. But if this Court rejects each of those holdings, then even that slim support would disappear and the Court should reject the delegation holding as well.

Davis v. *Montgomery County*, 267 Md. 456, 465-67 (1972) (noting executive and legislative checks on Board of Trustees, unique situation concerning power of eminent domain, accepting *Yakus* standards, and noting sufficient "guides and standards in the legislation" limiting use of eminent domain power); *Montgomery County* v. *Walsh*, 274 Md. 502, 508, 522-24 (1975) (flexible delegation to agency justified where not possible for legislature or council to deal with details of complex situations; approving delegation to ordinary executive officers – rules and regulations by the County Executive and advisory opinions by the County Attorney – all subject to judicial review), *app. dism'd*, 424 U.S. 901 (1976); *Sullivan*, 293 Md. at 124-25 (finding specific guidelines to be "manifestly impractical" but noting that Board of License Commissioners is barred from adopting *per se* "Board policy" rationales not part of the authorizing Act and remanding to the Board for a new hearing "cleansed" of any improper reliance "on such policy grounds"); *Commission on Medical Discipline* v. *Stillman*, 291 Md. 390, 414 (1981) (noting that "statute sets forth at length" numerous procedural and substantive checks regarding appointment, powers limited to specific acts, investigative procedures, and right of appeal); *Ackerly* v. *Urban Servs. Comm'n*, 223 Md. 196, 198-202 (1960) (setting out in startling detail various substantive constraints on administrative action).

Appellees believe that there are numerous checks on a board of health's authority and that the Board in this case has run afoul of virtually all of them. If this Court were to disagree as to the presence of the various constraints on the Board and find that the state delegation to the Board were as sweeping as the Board claims and trumped each of the potential checks, then such a delegation would be unconstitutional and the Regulation would be invalid.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Circuit Court.

Respectfully Submitted,

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STATEMENT OF COMPLIANCE

The foregoing Brief of Appellees is produced using 13-point Times New Roman font in both the text and footnotes. Body text uses 1.5 spacing; headings, indented quotes, and footnotes use single spacing.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, postage prepaid, this ____ day of _____, 2001, to:

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