Isiah Leggett
County Executive

Marc P. Hansen
County Attorney

OFFICE OF THE COUNTY ATTORNEY

MEMORANDUM

TO: Patrick Lacefield, Director
Office of Public Information

FROM: Marc P. Hansen *Marc Hansen*
County Attorney

DATE: September 19, 2012

RE: Government Speech – Effects Bargaining Referendum

You have asked me for written confirmation of oral advice I have provided to you concluding that the County Government may legally engage in efforts to persuade voters to vote "FOR" Bill 18-11. Bill 18-11, which the County Council unanimously enacted and the Executive signed, repealed certain sections of the Montgomery County Code to remove police "effects bargaining" from the County's collective bargaining law. Bill 18-11 has been petitioned to referendum through the efforts of the Montgomery County Fraternal Order of Police, and the voters will be asked to either vote "FOR" or "AGAINST" Bill 18-11 (Question B) on November 6, 2012.

The County has and continues to distribute an editorial authored by the Washington Post in favor of Bill 18-11. A vote in favor of Question B would endorse the repeal of effects bargaining by the County Council. In addition to reproducing the full text of the editorial, the County adds the following at the bottom of the flier: "Vote FOR Question B, It Just Makes Sense," the County's seal, and "Montgomery County Office of Public Information." A copy of the flier is attached.

Distribution of this flier and other similar advocacy efforts by the County Government is legal and appropriate. The County is entitled to engage in speech supporting and explaining its policies, including speech that advocates support of a ballot measure. Applicable case law demonstrates that just as a "government may adopt policies for all of the people, even if a policy is against the wishes of some, it may also advocate in favor of those policies." *Page v. Lexington County School District One*, 531 F.3d 275, 281 (4th Circ. 2008). *See also Johanns v. Livestock Mktg. Ass'n.*, 544 U.S. 550, 553 (2005); *Kidwell v. City of Union*, 462 F.3d 620 (6th Cir. 2006); *Alabama Libertarian Party v. City of Birmingham*, 694 F.Supp. 814 (N.D. Ala. 1988). The

republication of statements made by a third party, such as the editorial from the *Washington Post*, to support a government message is permissible as long as it is clear that the County approves the content of the message. *See Page*, 531 F.3d at 282-83.

I have also reviewed State law that governs the political activities of local government employees. Article 24, §§ 13-101 – 106 of the Maryland Code address the rights and obligations of local government employees in the context of political activity. Section 13-103 permits local government employees to engage in "political activity," while § 13-105 prohibits a local government employee from engaging in "political activity while on the job during work hours." This State law was enacted in 1973, and has sometimes been referred to as the "anti-Hatch Act", because it grants Maryland government employees the right to engage in political activity – unlike the Hatch Act (5 U.S.C. §§ 7321 *et seq.*) which restricts the "political activity" of federal employees. This State law uses language similar to that used in the Hatch Act, including the term "political activity."[1] Under the Hatch Act, "political activity" means engaging in **partisan** political activity, but expressly excludes engaging in activity involving a referendum. (*See* 5 C.F.R. § 734.101). Hence, § 13-105 is targeted at partisan political activity (working for a political party or a candidate) – working in support of the repeal of effects bargaining legislation in the context of a referendum is not partisan political activity.

Moreover, there is nothing in the State law that remotely suggests that the General Assembly intended to restrict the right of local governments to engage in speech in support of its policies. While the placement of the bill repealing effects bargaining on the ballot through referendum suspends the operation of the law, it is still a validly enacted law and represents the policy of the County Government. Moreover, the referendum process impinges on the rights of the majority. *See City of Takoma Park v. Citizens for Decent Gov't,* 301 Md. 439, 448 (1984). A mere 5% of registered County voters, by signing a referendum petition, cannot and does not effect the repeal of a policy determination made by elected County officials who represent a majority of the entire body politic. The government can only exercise its right to speak through its employees. Thus, I further conclude that § 13-105 is only aimed at conduct engaged in by employees for personal reasons, not conduct sanctioned or required by the government employer to carry out government policy.

As the United States Fourth Circuit Court of Appeals has made clear in *Page*, the County has every legal right to distribute information explaining the reasons why the County repealed the effects bargaining for police. Moreover, the County may legally advocate in favor of one of its laws, under the case law cited above, through the dissemination of opinions voiced in favor of the County's law by third parties. Finally, the County has more at stake in this matter than defending its duly enacted law (as compelling as that interest may be), because Bill 18-11 affects

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[1] The Maryland Office of the Attorney General has opined that, "[i]n light of the fact that the State law [the "anti-Hatch Act"] uses the same phrase employed in the Hatch Act, it is safe to assume that the State prohibition would be given the same interpretation as has been given to the federal law." 60 Op. Att'y Gen. 215, 219 (1975).

the County as an employer. In the case of Bill 18-11, the County Government has a unique stake in the outcome of the vote on Question B. No one is better situated to articulate the reasons for the law and its affect upon the County as an employer than the County. Depriving the County of a voice in the debate would unfairly stifle the County's voice and defense of its policy, as reflected by the law.

Please let me know if you have any additional questions regarding this matter.

The Washington Post

AN INDEPENDENT NEWSPAPER

EDITORIALS

WEDNESDAY SEPTEMBER 12, 2012

Unshackling Montgomery's police

County voters have a chance to end union interference.

MOST UNIFORMED POLICE forces function with a clear chain of command. Montgomery County's police department functions more like a new-age collective, where management's most workaday directives can be challenged by the police union, endlessly debated and negotiated into oblivion.

That arrangement has given rise to such abuse — notoriously, the union disputed and delayed even departmental rules requiring that officers read their e-mail — that politicians finally intervened. Last year, the all-Democratic County Council, traditionally pro-union, voted unanimously to scrap the 30-year-old law empowering the Fraternal Order of Police (FOP) to negotiate over the effects of practically any management decision.

The FOP, determined to preserve the status quo, is pushing back. It has forced the issue onto the county ballot this fall and is lobbying Democratic officials to urge voters to overturn the council's sensible law. It is vital that the law be upheld to ensure Montgomery's police force is professionally managed. Voters should mark "yes" on Question B.

The FOP has launched an expensive and misleading public relations campaign, alleging that the law would roll back collective-bargaining rights for the police. This is false. Like every other union that represents public employees in Montgomery County, including firefighters and general government workers, the FOP would continue to negotiate salary, benefits and basic working conditions such as hours and holidays.

What would be eliminated is an additional power, known as "effects bargaining," that gives the union practically unlimited power to substitute its druthers for management's prerogatives. No other police force in Maryland has such arrangement, and for good reason: It makes the force all but ungovernable.

The FOP delayed for years the installation of cameras in police cruisers, insisting that the department be barred from using footage to hold police officers accountable for their actions in most situations. The union has objected to and forced changes in the deployment of basic equipment such as electronic ticketing device and semi-automatic weapons, insisting they be distributed according to seniority rather than operational need. Amazingly, it tried to obstruct efforts to beef up patrols in Silver Spring last year to address a spike in crime; that move, to the FOP, was a "prohibited practice" subject to negotiation. (Some officers simply ignored the union and volunteered for the temporary assignment anyway.)

The FOP has even challenged the introduction of new technology intended to ensure officers' security. A case in point: It insisted on assurances that tracking devices to monitor the location of police cruisers could not be used in disciplinary proceedings.

Police chiefs elsewhere react with stunned amazement when they learn of the rules under which the department functions, or doesn't, in Montgomery. The effect of those rules is to handcuff management, subjecting basic directives to protracted bargaining. County voters have a chance to end these abuses, and they should.

Vote **FOR** Question **B**

It Just Makes Sense

Montgomery County Office of Public Information