



TALBOT COUNTY, MARYLAND
OFFICE OF LAW

MICHAEL L. PULLEN, County Attorney
ANTHONY P. KUPERSMITH, Assistant County Attorney

11 N. Washington Street
Easton, MD 21601
Phone: 410-770-8092
Fax: 410-770-8007

March 21, 2016

Open Meetings Compliance Board
c/o Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202

Re: Talbot County Council – Open Meetings Act Complaint
Deborah A Jeon, ACLU and Richard Potter, NAACP, *Complainants*

Dear Members of the Open Meetings Compliance Board:

Please consider the following response by Talbot County, Maryland, and the Talbot County Council to the Complaint filed by the ACLU and the NAACP.

Nature of the dispute – what it is not

This is a Complaint under the Open Meetings Act. It is not, as the ACLU claims, about the “Talbot County Council’s refusal...to confront its past by publicly debating and voting upon the NAACP’s request that the “Talbot Boys” Confederate monument be removed from the County Courthouse lawn as a relic of oppression and racism.” (Complaint, p. 1, ¶ 2). There is nothing in the County Council’s “past” creating anything that the Council is “refusing to confront.”

The ACLU makes up a narrative that is wholly inaccurate and beside the point. It embellishes its narrative with the false claim that, “[a]lthough many more Talbot County men fought for the Union [true], Talbot County leaders refused to memorialize Union soldiers from the community [false], electing instead to honor only those who died for the Confederacy [false].” (Complaint, p.1 ¶ 3). On November 24, 2015, the County Council did just the opposite:

“ ... But this Council believes, as did many citizens in 1913, and as many do here today, that the Talbot Boys monument alone does not tell the complete story of Talbot County’s involvement in the Civil War. It is recorded that over 330 Talbot County young men fought for the Union and their exclusion is neither a fair nor accurate depiction.

Therefore, this Council accepts the recommendation of the NAACP in part, and will permit the erection of a monument commemorating those Union soldiers from Talbot County who fought in the Civil War. (November 24, 2015, attached as Ex “A”.)”

Likewise, the 1914 County Commissioners did not “refus[e] to memorialize Union soldiers from the community” as claimed by the ACLU. The Maryland Historical Trust¹ describes how this monument came to be and its historical significance:

“At the battle of Gettysburg, the Union’s First Eastern Shore Regiment included men of Trappe’s Company H, who were sent to Culp’s Hill [the north end of the Union line] on July 3, 1863. There they fought troops of the First Maryland Confederate Regiment, which also included men from the Trappe area. The color sergeants for each side were cousins, both from Trappe: Robert W. Ross for the Union and P.M. Moore, fatally wounded, for the Confederates.

The monument was sponsored by a committee formed in 1913, chaired by Gen. Joseph B. Stein. After consideration of a statue of local Adm. Franklin Buchanan [Talbot County resident, commander of the Confederate Navy], it was agreed to honor “all the boys in gray.” The base was erected in July 1914; the statue was dedicated in June, 1916. Efforts in 1914 to raise funds for a Union monument were unsuccessful.” (Maryland Historical Trust, *State Historic Sites Inventory Form*, Survey No. T – 93, Ex. “D,” attached)

Union fundraising was unsuccessful – that’s the reason there was no Union monument, not because the 1914 County Commissioners “refused” to permit one. The eventual choice to place a solitary color-bearer and not Admiral Buchanan can certainly be seen as the Maryland Historical Trust explains – childhood schoolmates brought together by the fates of war to fight to the death with each other.² Repulse of the Confederate attack on the northern flank of the Union line at Culp’s Hill on the third day of Gettysburg resulted in Lee’s attack later that day on the Union center, known as Pickett’s Charge,³ which effectively ended the South’s invasion of the North and turned the tide of the War in favor of the Union.

The 1914 County Commissioners accepted this memorial for the same reason they agreed to accept a Union memorial, to commemorate the fiftieth anniversary of the end of the Civil War.

¹ The Maryland Historical Trust *State Historic Sites Inventory Form* for the statue is attached as Ex. “B” and can also be found at:

http://msa.maryland.gov/megafile/msa/stagsere/se1/se5/010000/010000/010037/pdf/msa_se5_10037.pdf

² P.M. Moore, the Confederate color-bearer killed at Gettysburg, is listed on the monument. Color-bearers were unarmed. Flags were used to communicate the unit’s position both to other soldiers in the unit so that units could maintain cohesion and to commanders so that commanders could know where they were amid the smoke and chaos of battle. The color-bearer’s role in the Civil War is described in contemporary accounts at:

<http://civilwarsources.blogspot.com/2008/05/civil-war-color-bearer-toughest-job.html#0>

³ “On the final day, July 3rd, fighting raged at Culp’s Hill with the Union regaining its lost ground. After being cut down by a massive artillery bombardment in the afternoon, Lee attacked the Union center on Cemetery Ridge and was repulsed in what is now known as Pickett’s Charge.” <http://www.civilwar.org/battlefields/gettysburg.html>

Monuments and Statues on Public Property

The Supreme Court's discussion of monuments and statues on public property is useful here. *Pleasant Grove City v. Summum*, 555 U.S. 460, 477 129 S.Ct. 1129, 172 L. Ed. 2d 853 (2009)

“Contrary to respondent’s apparent belief, it frequently is not possible to identify a single “message” that is conveyed by an object or structure, and consequently, the thoughts or sentiments expressed by a government entity that accepts and displays such an object may be quite different from those of either its creator or its donor. By accepting a privately donated monument and placing it on city property, a city engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument’s donor or creator. Indeed when a privately donated memorial is funded by many small donations, the donors themselves may differ in their interpretation of the monument’s significance.

By accepting such a monument, a government entity does not necessarily endorse the specific meaning that any particular donor sees in the monument.

The message that a government entity conveys by allowing a monument to remain on its property may also be altered by the subsequent addition of other monuments in the same vicinity.⁴ For example, following controversy over the original design of the Vietnam Veterans Memorial, a compromise was reached that called for the nearby addition of the flagstaff and bronze Three Soldiers Statue, which many believed changed the overall effect of the memorial.

The “message” conveyed by a monument may change over time.⁵ A study of war memorials found that “people reinterpret” the meaning of these memorials as “historical interpretations” and the “the society around them changes.”

A striking example of how the interpretation of a monument can evolve is provided by one of the most famous and beloved public monuments in the United States, the Statue of Liberty. The statue was given to this country by the Third French Republic to express republican solidarity and friendship between the two countries. At the inaugural ceremony, President Cleveland saw the statue as an emblem of international friendship and the widespread influence of American ideals. Only later did the statue come to be viewed as a beacon welcoming immigrants to a land at freedom.” (cit.om) *Pleasant Grove City v. Summum*, 555 U.S. 460, 477; 129 S.Ct. 1129, 172 L. Ed. 2d 853 (2009)

Symbols necessarily stand for something else; they are interpretive and mean different things to different observers. It is pointless to argue with the ACLU about the statue’s symbolism or for this Board to decide what the statue means, an impossible task in any event. The County does not accept the ACLU’s narrative and rejects their unfortunate but all-too-frequent use of hyperbole, innuendo, and false associations throughout the Complaint.

⁴ The symbolism of the Frederick Douglass statue erected on the Courthouse lawn in 2011 and its relationship to the Confederate statue was discussed during the work session of July 29, 2015. See Tr., Ex. “C,” at pgs. 42-53.

⁵ This certainly seems to have been the case with this statue.

The Open Meetings Act

Last year in early July, the NAACP requested a meeting with the County Council to discuss removal of the Confederate statue from the Courthouse lawn and placement of a new Union/Confederate statue.

The County advertised and held a work session on Wednesday, July 29, 2015.⁶ The Council prepared and came ready to listen, to learn about the request, to question and to engage in an open and honest dialogue to discuss NAACP's request on its merits. The exchange was candid, honest, open, respectful, and substantive.

The existing statue includes a 10-ton granite base supporting the copper figure of a Confederate color-bearer that the County's Facilities Manager reported to be "fragile." Private parties donated it to the County and placed the granite base in 1914 and erected and unveiled the statue in 1916 to commemorate the fiftieth anniversary of the end of the Civil War. At the work session the NAACP said that the existing monument told only one side of the County's involvement in the Civil War and did not properly represent the larger numbers of Talbot County citizens who fought for the Union.

Council questioned whether the NAACP had an alternative location for the existing statue and whether they had considered removal and relocation costs.⁷ Council also questioned why the existing Confederate statue should be removed and replaced with a new Union/Confederate statue rather than simply adding a new statue commemorating the County's Union soldiers.⁸

After attending additional public meetings sponsored by private groups and taking public comment at its own public hearing, the Council decided to leave the Confederate statue in place and to accept the recommendation of the NAACP in part to allow a new statue to represent the Union side.⁹

The question before the Board is whether the Open Meetings Act (the "Act") applies to the Council's decision regarding the NAACP's request. The County believes that control of County-owned property is an administrative function that is exempt from the Act.

⁶ Work sessions are non-legislative sessions open to the public. The work session was videotaped and can be viewed (38.06 min.) at https://www.youtube.com/watch?v=4d5h_RkLltg. The County submits this video as part of its response, as Ex. "D."

⁷ Ex. "C" Transcript of July 29, 2015 Work Session, p. 17, line 14 thru p. 18, line 2.

⁸ Ex. "C" Transcript of July 29, 2015 Work Session, p. 35 thru p. 43.

⁹ County Council decision, Ex. "A."

Administrative function analysis

General Provisions § 3-101 (b), Md. Ann. Code defines an administrative function:

- (b) Administrative function. --
 - (1) “Administrative function” means the administration of:
 - (i) a law of the State;
 - (ii) a law of a political subdivision of the State; or
 - (iii) a rule, regulation, or bylaw of a public body.
 - (2) “Administrative function” does not include:
 - (i) an advisory function;
 - (ii) a judicial function;
 - (iii) a legislative function;
 - (iv) a quasi-judicial function; or
 - (v) a quasi-legislative function.

The Board has explained the administrative function exemption many times:

“...[i]f a discussion qualifies as an administrative function, the Open Meetings Act does not apply. § 10-503 (a) (1) (i). Thus, the initial question is whether the... matter involves an administrative function. We recognize that, under a governmental structure such as Worcester County^[10] in which a public body serves both as a legislative body and administrative head of government, the exact role in which the public body is acting can sometimes seem blurred. However, in applying the Open Meetings Act, we must evaluate a meeting of the public body within the context of the various functions as the Legislature has defined them for purposes of the Act.[fn.om]

We have adopted a two-step analysis in evaluating whether a matter qualifies as an “administrative function” as defined by the Act. § 10-502 (b). We first inquire whether the topic of discussion falls within any of the Act’s alternative defined functions. If so, our analysis ends because, by definition, the topic could not qualify as an administrative function. If the topic does not fall within an alternative function, we consider whether the public body was involved in the “administration of” an existing law, rule, or policy. If not, the topic cannot be considered an administrative function. *See, e.g., 6 OMCB Opinions 23, 25-26 (2008); 6 OMCB Opinions 180-183 (2009).*

¹⁰ The Talbot County Council performs both legislative and administrative functions under the County Charter §§ 102, 202, 212 (b), and 215.

Council was performing no alternative defined function

Control of County-owned property does not fall within any of the Act's alternative defined functions:

- (i) advisory function¹¹ - the Council was not acting in an advisory role but acting in its own capacity, exercising its own administrative authority as the chief executive for Talbot County. There was no delegation of responsibility to "study" the NAACP's request; the request was made directly to the Council for action by the Council.
- (ii) judicial function – inapplicable.
- (iii) legislative function – inapplicable. There was no need, no request, no proposed, and no consideration of any legislation.
- (iv) quasi-judicial function – inapplicable.
- (v) quasi-legislative function¹² – inapplicable; the Council was not adopting a rule or regulation that would have the force of law or approving a contract.

Because control of County-owned property does not fall within an alternative function, the next question is whether the Council was involved in the "administration of" an existing law, rule, or policy. The short answer is "yes," they were.

Council was involved in the "administration of" an existing law, rule, or policy

Talbot County has no separate office of county executive and the County Council performs both legislative and administrative functions. *Talbot County Charter* §§ 101, 102, 202.¹³ The Council

¹¹ (c) Advisory function. -- "Advisory function" means the study of a matter of public concern, or the making of recommendations on the matter, under a delegation of responsibility by:

- (1) law;
- (2) the Governor or an official who is subject to the policy direction of the Governor;
- (3) the chief executive officer of a political subdivision of the State or an official who is subject to the policy direction of the chief executive officer; or
- (4) formal action by or for a public body that exercises an administrative function, judicial function, legislative function, quasi-judicial function, or quasi-legislative function.

¹² *General Provisions* § 3-101 (j) defines a quasi-legislative function. -- "Quasi-legislative function" means the process or act of:

- (1) adopting, disapproving, amending, or repealing a rule, regulation, or bylaw that has the force of law, including a rule of a court;
- (2) approving, disapproving, or amending a budget; or
- (3) approving, disapproving, or amending a contract.

¹³ Charter § 101: "Talbot County constitutes a body corporate and politic. Under this Charter it has all rights and powers of local self-government and home rule provided by this Charter and by the Constitution and laws of the State of Maryland. The County has these rights and powers as

was administering the following laws, rules, and policies:¹⁴

- (1) The governing body of the county controls county-owned property. *Local Government* § 9-104 (c).¹⁵
- (2) The Talbot County Charter vests control of County property in the County Council.

freely and completely as if they were specifically enumerated in this Charter...”

Charter § 102: “The powers mentioned in Section 101 of this Charter may be exercised only by the County Council or other agents, officers and employees of the County acting under their respective authorities or under other authority provided by this Charter or the laws of this State....”

Charter § 202: “All powers which may be exercised by Talbot County under the Constitution and laws of Maryland, including all law-making powers heretofore exercised by the General Assembly of Maryland but transferred to the people of the County by adoption of this Charter, are vested in the Council subject to those powers retained by the people... The County Council is responsible for the enforcement of this Charter and the laws passed under its terms, which responsibility may be delegated and the officials and employees so charged shall have the authority conferred upon them by the laws of Talbot County.”

¹⁴ “The test to determine when action is legislative and when executive or administrative was spelled out in *Scull v. Montgomery Citizens League*, 249 Md. 271, 282, in considering the Montgomery County Charter which continued the system of dual capacities that existed in the county commissioners by making the County Council both the legislative body and the executive. We said:

“The distinction made and the compartmentalization insured by the Charter between legislation on the one hand and administration and execution on the other is a distinction that has been acknowledged and acted upon by legislative bodies and the courts of other States. A recognized test for determining whether a municipal ordinance is legislative and so subject to referendum, or whether it is executive or administrative and is not, is whether the ordinance is one making a new law -- an enactment of general application prescribing a new plan or policy -- or is one which merely looks to or facilitates the administration, execution or implementation of a law already in force and effect. (cit.om)” *Bowie v. County Comm’rs for Prince George’s County*, 258 Md. 454, 463-464, 267 A.2d 172, 177 (1970)

¹⁵ *Local Government Article* § 9-104 Powers of governing body...

(c) Authority over county property. -- The governing body of a county controls property owned by the county.

The “governing body” in a charter county without a county executive (like Talbot) is the county council. *Local Govt.* § 1-101 (f)

Talbot County Charter §§ 101, 102, 202.¹⁶

- (3) Control of the county courthouse has long been recognized as an executive function of county government. *Prince George's County Comm'rs v. Mitchell*, 97 Md. 330, 55 Atl. 673 (1903); *Town Comm'rs of Centreville v. County Comm'rs of Queen Anne's County*, 199 Md. 652, 654-655, 87 A.2d 599, 600 (1952) (“[t]he law of Maryland provides that the county commissioners of each county in the State shall have charge of and control over the property owned by the county...”); *County Comm'rs of Harford County v. Love*, 173 Md. 429, 433, 196 A. 122, 124 (1938) (“[t]he maintenance of a court house is a distinctive function of government.”)
- (4) The Administrative Resolution of March 16, 2004, that established the existing policy governing statues, monuments and memorials on the Courthouse grounds.¹⁷
- (5) Laws and regulations governing Town of Easton Historic District Zoning and the jurisdiction of the Easton Historic District Commission (the “Easton HDC”).¹⁸ *Annapolis v. Anne Arundel County*, 271 Md. 265, 316 A.2d 807 (1974) (County-owned properties lying within a municipal historic district are subject to municipal historic district zoning requirements).

The “Talbot Boys” statue is a historical monument registered by the Maryland Historical Trust.¹⁹ Removal would require permission from the Easton HDC, which exercises final decision-making authority over any such request.²⁰

¹⁶ See Fn. 13, *supra*.

¹⁷ A copy is attached as Exhibit “E”. That same day the County approved “...the establishment of a memorial in honor of Frederick Douglass in Talbot County that embodies his life-long dedication to literacy, education, and self-determination.”

¹⁸ In *OMCB Opinion* 00-12, fn 5 at 56, the Board said, “[t]he Open Meetings Act does “apply to a public body when it is meeting to consider ... a special exception, variance, conditional use, zoning classification, the enforcement of any zoning law or regulation, or any other zoning matter.” §10-503(b)(2). Although the meeting at issue involved a regulation limiting the height of a barrier wall on the developer’s property absent a variance, any land-use decision rested with the City of Hagerstown, not the County Board. The County Board’s role was limited to considering the effect of the proposed development on school property and the children attending the school.” The same analysis applies here. Although the process for placement of the new statue involved permission from the Easton HDC, that land-use decision rested with the Easton HDC, not the County Council.

¹⁹ See Ex. “B.”

²⁰ Town of Easton Zoning Ordinance, § 701 E. provides: “Before the construction, alteration, reconstruction, moving, or demolition is undertaken of a designated landmark, site, or structure, or site or structure within designated district, if an exterior change is involved which would affect the historic, archeological, or architectural significance of a designated landmark, site, or

The Talbot County Courthouse is listed on the Maryland Historical Trust *Inventory of Historic Properties*²¹ and is also located within the Easton Historic District.²² Placement of any new monument or statue on the Courthouse grounds would require review and approval by the Easton HDC.²³

The NAACP's request expressly invoked the Council's administrative authority to control County property. *Local Government* § 9-104 (c); *Charter* §§ 101, 102, 202. The NAACP's request also expressly invoked administration of the County policy regarding monuments on the Courthouse grounds.²⁴ Finally, the NAACP's request expressly invoked the application of the Town of Easton's existing historic district zoning laws that subject any proposed removal of the "Talbot Boys" statue and placement of any new statue to Easton Historic District regulations as applied by the Easton HDC.

In exercising control over County-owned property the Council was performing an administrative function, § 3-101 (b).²⁵ The Act does not apply to a public body when it is carrying out an administrative function, § 3-103 (a) (1) (i), and therefore does not apply in this matter.

structure, or structure within a designated district, any portion of which is visible or intended to be visible from a public way, the person, individual, firm, or corporation proposing to make the construction or change shall file an application for a Certificate of Appropriateness with the Commission for permission to construct, alter, reconstruct, move, or demolish the landmark, site, or structure..”

²¹ The MHT listing is attached as Ex. "F" can be found at:

http://mdihp.net/dsp_county.cfm?search=county&id=16270&viewer=true&updated=N&criteria1=T&criteria2=TA

It includes the following description of the grounds: "The siting and landscaping contributes greatly to the beauty and dignity of the building. Setting on a brick platform, the structure is approached by a wide walk with white wooden benches. Enclosed by a cast iron fence, the lawns bloom throughout much of the season with crêpe myrtle and magnolia. In the South lawn, there stands a statue of a Confederate soldier."

²² Attached as Ex. "G," The United States Department of the Interior, *National Register of Historic Places Inventory – Nomination Form*, T-410 provides: "Several individual buildings in the Easton Historic or District are of particular merit for historical and/or architectural reasons. The most prominent one is the Talbot County Courthouse on North Washington Street between Federal and Court Streets. The original portion of the seven bay brick structure with an octagonal tower was erected about 1789. It was expanded in 1898 and again in 1958." The entire Nomination Form may be found at

http://msa.maryland.gov/megafile/msa/stagsere/se1/se5/027000/027700/027724/pdf/msa_se5_27724.pdf

²³ See FN 20, *supra*.

²⁴ See Ex. "E."

²⁵ All references are to the General Provisions Article unless otherwise noted.

OMCB Opinion 00-12, at 55-56, illustrates the OMCB's application of the administrative function to government control of public property:

...We now consider whether the County Board [of Education] was engaged in an executive [now administrative] function when it met with a developer concerning the placement of a barrier to minimize the effect of a retail development on a neighboring school.

Under the State education law, “[a]ll property granted, conveyed, devised, or bequeathed for the use of a particular public school or school system [is] held in trust for the benefit of the school or school system by the ... county board ...” §4-114(a)(1) of the Education Article. As the Attorney General has explained, “[i]n carrying out this trusteeship, the [County Board has] broad authority to operate the school system, *including managing school property.*” 76 *Opinions of the Attorney General* 190, 191 (1991) (emphasis supplied). Furthermore, the County Board is charged under State law with providing a healthful school environment. §7-401 of the Education Article.

When meeting with the developer concerning construction of a barrier, the County Board was engaged in an executive function. During this meeting, the County Board was not engaged in legislative or quasi-legislative function or otherwise establishing policy.²⁶ Rather, it was managing school property by seeking to minimize the impact of a neighboring development on operation of the school. The County Board was carrying out its existing administrative responsibilities pursuant to State law. Therefore, the Open Meetings Act did not apply. *OMCB Opinion* 00-12 at 56

The Board's reasoning in *OMCB Opinion* 00-12 at 56 applies equally to the present Complaint. The County Council was exercising control over County-owned property and applying the existing County policy concerning monuments and statues on the Courthouse lawn, an administrative function. It was “carrying out its existing administrative responsibilities pursuant to State law” and the County's own existing policy, just like the Board of Education in *OMCB Opinion* 00-12.

The Council's decision authorized the NAACP to begin a process that, if followed successfully to conclusion, would entail the following steps:²⁷

²⁶ [Footnote in original] “Had the County Board discussed the possible sale of the property, it might have been engaged, depending on the circumstances, in an early phase of a quasi-legislative function, the approval of a contract. See §10-502(j)(3). There is, however, no indication whatever that the County Board engaged in such a discussion.”

²⁷ Although the Council did not approve the NAACP's request to remove the existing statue, the process outlined here would have been equally applicable to any request to remove the existing statue and alter the Courthouse grounds as they currently exist.

1. NAACP private fundraising, consideration and selection of a preliminary design and selection of a proposed location for the new Union statue;
2. NAACP presentation of the proposed appearance, dimensions, content, and location of the statue to the County Council for review in accordance with the Administrative Resolution of March 16, 2004;²⁸ possible iterative redesigns, relocation, modifications and changes as deemed necessary based on public review and comment and the Council's discretionary approval authority under the County's existing policy.
3. Council approval of the proposed Union statue would be subject to final approval by the Easton HDC.
4. Joint NAACP/County application to the Easton HDC for permission to place the proposed Union statue on the Courthouse grounds.²⁹
5. Public hearing(s) before the Easton HDC and public comment on the application. Easton HDC's review under applicable historic district zoning laws and regulations in the Easton Historic District governing the appearance, dimensions, content, and location of the proposed new statue. Possible iterative redesigns, changes, etc. based on Easton's Historic District regulations, standards, and guidelines, public comment, and Easton HDC findings.
6. Final agreement between the NAACP, the County, and the Easton HDC on the appearance, dimensions, content, and location of the proposed new Union statue.
7. Final approval by the Easton HDC.
8. Placement and unveiling of the new Union statue on the Courthouse grounds.

This is the same process that the Frederick Douglass Honor Society followed when requesting and obtaining approval for the placement of a statue honoring Frederick Douglass on the

²⁸ Ex. "E."

²⁹ Town of Easton, Zoning Ordinance, § 7.01 E. (1) *Application for Certificate of Appropriateness and Commission Review*, provides:

Application for Certificate of Appropriateness. Before the construction, alteration, reconstruction, moving, or demolition is undertaken of a designated landmark, site, or structure, or site or structure within designated district, if an exterior change is involved which would affect the historic, archeological, or architectural significance of a designated landmark, site, or structure, or structure within a designated district, any portion of which is visible or intended to be visible from a public way, the person, individual, firm, or corporation proposing to make the construction or change shall file an application for a Certificate of Appropriateness with the Commission for permission to construct, alter, reconstruct, move, or demolish the landmark, site, or structure. Every application shall be referred to and considered by the Commission and accepted or rejected by the Commission...

Courthouse grounds,³⁰ with one important distinction.

When the sponsors requested permission to erect the Frederick Douglass statue there was no existing written County policy governing statues, monuments, or memorials on the Courthouse grounds. When the previous Council considered (and ultimately approved), that request, they also developed and adopted a written policy governing placement of statues and monuments on the Courthouse grounds.

A previous Council adopted two separate Administrative Resolutions on March 16, 2004. One adopted a future policy to govern free-standing statues, monuments, and memorials on the Courthouse grounds.³¹ This is the now-existing policy the present Council applied when considering the NAACP's request in this matter. The second endorsed the establishment of a memorial in Talbot County to honor Frederick Douglass.³²

In 2004 adoption of the new policy was a quasi-legislative function to which the Act applied. At that time, the County was fully aware that the Open Meetings Act applied and, by the ACLU's own admission (and in fact), the County properly complied with the Act at that time.

The ACLU refers to the County's earlier compliance with the Act to support its claim that the County violated the Act in the present matter but the ACLU's argument is flawed. Consideration in 2004 of a new policy for statues on the Courthouse lawn was a quasi-legislative function that triggered application of the Act. But, when the NAACP submitted the present request in 2015, that policy was already in place. Council was applying that pre-existing policy to the NAACP's request. The Council was performing an administrative function by applying that pre-existing policy and, in doing so, satisfied the second-prong of the administrative function test.

The ACLU also claims that "[i]t is difficult to overstate the public interest and concern this request triggered among those in the community and beyond..." (Complaint, p. 2). To be sure, the Council recognized this topic captured public interest and it requested and obtained public input. But the ACLU's reliance on "public interest" to support its claim that the Act applies is incorrect:

If the matter is an administrative function under this analysis, it is excluded from the Act, no matter how important a matter might be considered or how keen the level of public interest in it. While public interest may well be a useful barometer for a public body's considering whether, as a discretionary matter, it will discuss an administrative matter in a public session rather than a closed session, that is not the test under the Open Meetings Act for evaluating whether a matter is or is not an administrative function. 6 *OMCB Opinion 23, 26* (2008)

³⁰ A statue honoring Frederick Douglass was unveiled on the Courthouse grounds during ceremonies on June 16-19, 2011 by the Frederick Douglass Honor Society in partnership with the Town of Easton and Talbot County. A brochure recounting those events, "Douglass Returns," is attached as Ex. "H."

³¹ Ex. "E".

³² A copy is attached as Ex. "I." The resolution did not, itself, authorize its placement on public property or the Courthouse lawn; that approval would come later (see Ex. "H").

The ACLU also misapplies the language of the OMCB in 9 *OMCB Opinions* 1, 8 (2013) (“discussions about prospective policies and recommendations of future actions on subjects of public concern very seldom, if ever, qualify for the administrative function exclusion.”)³³ (Complaint, p. 6). Either the ACLU wholly failed to understand that excerpt in context, or, if it did, it knowingly omitted that context. There, the Board expressly found the USM standing committees were performing advisory functions³⁴ and thus were subject to the Act.

As previously explained, the Council was not discussing prospective policies or making recommendations (to itself) for future action; it was not performing an advisory function.³⁵ It was exercising its own administrative control of County property. The Council was applying the existing policy regarding statues on the Courthouse lawn. The ACLU’s reliance on 9 *OMCB Opinions* 1, 8 (2013) is plainly misplaced.

The ACLU’s claim that the County’s position has “shifted”³⁶ is also incorrect. From the outset the County’s legal department understood that control of County-owned property is an administrative function that is exempt from the Act. The Board understands the legal distinctions that exist between various functions that are subject to the Act, such as acquisition of real estate, which may be performed in closed meetings subject to certain procedural requirements, and administrative functions, such as control of County-owned property, that are altogether exempt from the Act. Like the Board, lawyers are expected to be familiar with these distinctions but those outside the legal profession are not.

In an impromptu response to a reporter’s phone call a Council member referred to the Act’s authorization to close a meeting to discuss acquisition of real estate rather than the Act’s exemption for administrative functions. The “real estate acquisition” exemption is inapplicable to the NAACP’s request and the County has never relied on it in this matter. The ACLU has seized on this impromptu comment to claim that the County’s legal position has “shifted.”

³³ The Complaint goes on to claim, “[w]e do not see how Mr. Pullen, or any Talbot County official, could genuinely deny that the discussions at issue here concerned “prospective policies and recommendations of future actions on subjects of public concern.” (Complaint, p. 7). The undisputed facts demonstrate that the Council was not creating prospective policy; their administrative decision applied existing law and policy to County-owned property. They made no recommendations (to themselves) for future action. They were requested to decide themselves and did so.

³⁴ The OMCB found: “Specifically, the Organization Committee, when “conducting strategic reassessments of the organizational structure and leadership were resources of the System and its institutions and centers, reporting on these to the USM Board, and forwarding recommendations for changes as needed or desired, “performs an advisory function subject to the Act.” 9 *OMCB Opinions*, 1, 8, (2013)” and, “However, when performing its assigned duty to ‘recommend to the [USM] Board the selection and scope of the work of an independent external auditor,’ the Audit Committee is likely performing an advisory function, and, if its work is part of the process of approving a contract, the quasi-legislative function.” *Id.*, at 9; and, “The Development Committee, when considering matters so that it can “recommend policies to the [USM] Board” is similarly performing an advisory function, not an administrative function.” *Id.*, at 9.

³⁵ See p. 6, *supra*.

³⁶ Complaint, p. 5-6.

From the outset, the County's legal position has been and remains straightforward and consistent: the Act does not apply to administrative functions, which include Council's control of County-owned property.³⁷ A Council member's impromptu response to a reporter's question does not change that despite the misunderstanding or mischaracterization by the ACLU. Their claim that the County relies on real-estate exemption under the Act is a classic "straw-man."

Conclusion

The NAACP's request, even if completely granted would not – indeed, could not – resolve the long history of racial inequality and prejudice in our country. Their request was much more practical, immediate, and direct. It was one the Council could control and answer, and did.

The video of the meeting of July 29, 2015³⁸ shows exactly what happened at the work session. The November 24 decision³⁹ fully explains the Council's views and the reasons for the decision. Facts and law decided the question before the Council and govern the Board's consideration of this Complaint.

Citizens and elected officials alike share a fundamental expectation that the rule of law will be applied fairly and impartially regardless of tragic and horrific events like the Charleston, South Carolina, murders and their aftermath.⁴⁰ Notwithstanding the emotionally charged nature of the discussion and the horrific events that prompted it, the Council did follow the rule of law under the Open Meetings Act when it considered this matter.

Council was performing an administrative function exempt from the Act

The County Council's consideration of the NAACP's request to remove the existing Confederate statue and place a joint Union/Confederate statue on the Courthouse lawn was exempt from the Open Meetings Act because the Council was performing an administrative function.

The County requests the Board to find that there was no violation of the Act.

³⁷ The ACLU claims that, "Mr. Pullen [the County Attorney] express[ed] displeasure at being challenged by the NAACP..." (Complaint, p. 6) This claim is untrue.

³⁸ Ex. "D"

³⁹ Ex. "A."

⁴⁰ As a young lawyer in 1771, John Adams, later second President of the United States, represented Capt. Thomas Preston and eight British soldiers charged with murder for the "Boston Massacre," and then won their acquittal before a Boston jury. He would later write that our government was "...a government of laws and not of men." (*Massachusetts Constitution*, 1780, Sec. 1 Art. XXX). He epitomized that principle, which has since become part of our Country's core beliefs.

Respectfully,

Talbot County, Maryland



By: Michael L. Pullen
County Attorney

Inscription on the Frederick Douglass statue, Talbot County Courthouse

“In a composite nation like ours, as before the law, there should be no rich, no poor, no high, no low, no white, no black, but common country, common citizenship, equal rights and a common destiny.”

cc: Richard Potter, Pres., Talbot County NAACP
Deborah A. Jeon, Esq., Legal Director, ACLU of Maryland

