

Docket No. 09-2187

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Fraternal Order Of Police Lodge No. 89, et al., .....Appellees,

v.

Prince George's County, Maryland ..... Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

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**OPENING BRIEF OF APPELLANT**

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## **JURISDICTIONAL STATEMENT**

This action concerns the validity, under the Contract Clause of the United States Constitution, U.S. Const. art. I, § 10, cl. 1, of an employee furlough implemented by Appellant Prince George's County, Maryland. The district court possessed federal question jurisdiction. *See* 28 U.S.C. § 1331.

On August 18, 2009, the district court entered an order granting in part and denying in part the parties' cross-motions for summary judgment and directing the parties to reach an agreement concerning the amount of wages to be repaid to furloughed employees. The district court entered a final order on October 7, 2009. Prince George's County timely filed its notice of appeal on October 9, 2009. Jurisdiction in this Court is proper pursuant to 28 U.S.C. § 1291.

**STATEMENT OF ISSUES PRESENTED FOR REVIEW**

- I. DID THE FURLOUGH PLAN IMPAIR THE COUNTY'S CONTRACTUAL OBLIGATIONS WHEN THE FURLOUGH PROVISION OF THE COUNTY PERSONNEL LAW IS A TERM OF THE UNIONS' COLLECTIVE BARGAINING AGREEMENTS?
  
- II. DID THE DISTRICT COURT ERR IN SUBSTITUTING ITS JUDGMENT FOR THAT OF THE COUNTY IN ITS DETERMINATION THAT A FURLOUGH WAS NOT REASONABLY NECESSARY TO ADDRESS THE COUNTY'S FISCAL CRISIS?

## STATEMENT OF THE CASE

Responding to a fiscal crisis brought on by the precipitously falling housing market, Appellant Prince George's County, Maryland ("the County"), on September 16, 2008, adopted a plan to furlough county employees in order to balance its budget. Two days later, several public safety unions and individual employees<sup>1</sup> (collectively, "Fraternal Order of Police" or "FOP") filed an action in state court alleging that the furlough violated two provisions of the Prince George's County Personnel Law and the Contract Clause of the United States Constitution. The following day, the County removed the action to federal court on the basis of federal question jurisdiction. Subsequently, several local chapters of the American Federation of State, County, and Municipal Employees (collectively, "AFSCME") filed a complaint in intervention, raising the same claims.<sup>2</sup>

The parties cross-moved for summary judgment. The district court conducted a hearing on February 13, 2009, at which it ruled that the parties could conduct limited discovery. The Unions then deposed Jonathan R. Seeman, Director of the Office of Management and Budget for the County. The Unions and the County

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<sup>1</sup> The public safety unions are Fraternal Order of Police Lodge No. 89, International Fire Fighters Association Local 1619, Inc., Deputy Sheriff's Association, Prince George's County Correctional Officers Association, and Police Civilian Employees Association. The individuals are Ismael V. Canales, Douglas Bartholomew, Robert A. Cease, Curtis Knowles, and Arthur C. Emery.

<sup>2</sup> The County refers to FOP and AFSCME collectively as "the Unions."

thereafter filed supplemental briefs.

The district court issued a memorandum opinion on August 18, 2009. *Fraternal Order of Police v. Prince George's County*, 645 F. Supp. 2d 492 (D. Md. 2009). The court granted summary judgment to the County on the Unions' claims that the furlough violated the Personnel Law. On the Contract Clause claim, the court granted summary judgment to the Unions, concluding that the furlough substantially impaired the County's obligations under its collective bargaining agreements with the Unions and that the impairment was not reasonable and necessary under the circumstances. The court directed the parties to negotiate concerning the "means and manner" of refunding any money owed to Union employees as a result of the furlough.

The County noted an appeal, which it withdrew after the district court clarified that its order of August 18 was not a final one. Following resolution of the outstanding issue of the amount owed to Union employees and the terms of payment, the district court entered a final order on October 7, 2009. The County noted its appeal on October 9, 2009.

## STATEMENT OF FACTS

### I. Background Facts

#### A. Prince George's County Budgetary Process

Prince George's County is organized pursuant to a Charter specifying a Council-Executive form of government. The County Executive must submit a proposed operating budget to the County Council no later than March 15 of each year. *See* Prince George's County Charter § 804 [hereinafter "Charter"], J.A. 199.<sup>3</sup> The Charter requires that the budget "be balanced as to proposed income and expenditures." Charter § 811, J.A. 202. Simultaneously, however, the Charter limits the County's ability to increase revenues by prohibiting any increase in property taxes above the 1979 rate of \$0.96 per \$100 of assessed value, *see* Charter § 812, J.A. 202, and by requiring any tax increase or levy to be approved by the voters during a congressional election year, *see* Charter § 813, J.A. 203. The County's ability to increase revenues is thus severely, and uniquely, limited.

In pursuit of the County's obligation to maintain a balanced budget, the Office of Management and Budget (OMB) calculates projected revenues in January or February and bases the proposed budget on these projections. J.A. 411. Additionally, the Spending Affordability Committee (SAC), a group of private citizens who advise the OMB on spending issues and make revenue projections,

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<sup>3</sup> References to the Joint Appendix will be in the form "J.A. \_\_\_\_."

provides its own analysis and recommendations. J.A. 429-30.

**B. Reserve Accounts**

The County maintains three “reserve” accounts. The County Charter mandates that five percent of general fund expenditures be maintained in the General Fund Contingency Reserve (“the Contingency Reserve”). *See* Charter § 806(a)(6), J.A. 200. These funds may be expended only “[t]o meet a public emergency, which constitutes a sudden, unexpected or unforeseen condition or occurrence, creating an imminent hazard to life, health or property and requiring an immediate action.” Charter § 816, J.A. 204.

The General Fund Operating Reserve (the “Operating Reserve”) amounts to two percent of general fund expenditures and is mandated as a matter of County policy. J.A. 482-83. The Operating Reserve exists “[t]o ensure a reasonable degree of stability in [county] programs over the long run” by creating “budgetary flexibility to deal with events such as economic fluctuations, State and Federal policy changes and varying service needs.” J.A. 482.

Maintenance of the Operating Reserve is critical because of the unique limitations on the County’s ability to increase taxes as a means of raising revenue. J.A. 423. First, the County Charter prohibits the County from raising property taxes above 1979 rates. *See* Charter § 812 & ed. note, J.A. 202. Second, with limited exceptions any other tax increase or levy must be submitted for voter approval by

referendum; referenda can only be put before the voters in years when elections for the United States House of Representatives are conducted (*i.e.*, in even-numbered years). *See* Charter § 813, J.A. 203. For these reasons, the County must be “particularly careful” about its reserves. J.A. 423.

Finally, the County maintains an Undesignated Fund Balance (UFB) which consists of “revenue surpluses from the housing market boom in the past years.” J.A. 483. Because the UFB is a non-recurring revenue source, it is used only to fund capital expenditures on a pay-as-you-go basis; each year, some portion of the Fund is designated in the budget for such projects.<sup>4</sup> J.A. 352-53 (“[W]e have ... developed a policy that there are uses of fund balance that will balance the budget and they are used essentially as with all reserves to pay for one-time expenditures.”). Although the UFB “balances” the budget in the sense that it is allocated for capital expenditures included in the operating budget, J.A. 352, the UFB is not used to balance the budget with respect to ongoing expenditures such as compensation costs, as it is “a basic principle of financial management” that non-recurring fund balances should not be employed for ongoing expenditures, J.A. 342; *id.* at 43 (“And so our policy is as with any jurisdiction that I know of, is not to use fund balance to pay for ongoing expenditures, because ... it’s one time in nature, it

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<sup>4</sup> For example, the 2009 budget allocated \$600,000 “Pay-go money” for a new homeless shelter. J.A. 278.

goes away.”). Use of the UFB for ongoing expenditures merely defers the problem of a structural imbalance between ongoing revenues and ongoing expenditures. J.A. 355.

### **C. Collective Bargaining Agreements**

The Unions represent 85-90 percent of County employees. J.A. 82. Relations between the County and union employees are governed by a series of collective bargaining agreements (CBAs) between each union and the County. CBAs are negotiated by the County Executive and ratified by the County Council. The CBAs in effect at the time of the fiscal year 2009 furlough became effective on July 1, 2007 and expired June 30, 2009. The terms of the CBAs were settled in September 2007, and the CBAs were ratified without change during the spring of 2008. Although the specific terms of the CBAs vary, generally the agreements provide for certain wages, merit increases, and cost of living adjustments (COLAs).

## **II. Fiscal Year 2009 Budget, Bond Rating, and Employee Furlough Plan**

### **A. Creation and Adoption of Fiscal Year 2009 Operating Budget**

The process of creating the fiscal year 2009 budget began in the fall of 2007. The County’s budgeting process includes preliminary and final reports from the SAC. The SAC issues its final report, projecting revenues and making recommendations regarding the operating budget for the upcoming fiscal year, on January 1. *See* P.G. County Code § 10-112.22(c). The OMB is not bound to adopt

the SAC's projections and recommendations, and in fact projected revenue figures always change between the issuance of the report in January and the drafting of the budget in February because information becomes available regarding allocations of state funding. J.A. 429-31. The OMB also updates its revenue projections in February before the proposed budget is completed. J.A. 431.

In its final report for fiscal year 2009, issued January 1, 2008, the SAC projected that the County would experience a deficit of \$80.1 million in fiscal year 2009 and cautioned that the gap could be greater if state funds were reduced, a recession occurred, or the housing market did not recover. J.A. 517. The SAC recommended that general fund appropriations for fiscal year 2009 remain the same as in 2008, namely, \$6.26 billion. J.A. 518. Subsequent projections by the OMB indicated that the deficit would actually be \$95 million. J.A. 275. The anticipated loss in revenue was a result of the declining housing market, a consequence of which was a shortfall in income taxes and in transfer and recordation taxes. J.A. 249, 394.

On March 14, 2008, County Executive Jack Johnson submitted the proposed operating budget for fiscal year 2009 to the County Council. J.A. 275-80. The proposed budget increased appropriations by 1.3 percent, or \$34.3 million. Nevertheless, the proposed budget accounted for the projected revenue gap and was balanced. The budget incorporated the following measures to maintain a balance

between revenues and expenditures:

- Increased county income tax from 3.1 percent to the maximum of 3.2 percent;<sup>5</sup>
- Increased county recordation taxes by 30 cents per \$500;<sup>6</sup>
- Continued a hiring freeze for “non-sworn” positions;
- Reduced the budgets of some agencies to below-maintenance levels;
- Deferred of capital projects;
- Reduced contributions to outside, quasi-governmental and non-profit agencies;
- Provided for a lower bond sale, resulting in decreased debt service obligations;
- Reduced in overtime;
- Maintained current funding levels for grants and contributions; and
- Increased efficiencies.

J.A. 275-76, 285. Finally, the County took the unprecedented measure of drawing down \$10.1 million from the UFB that was not tied to specific capital expenditures.

J.A. 40-41. The proposed budget fully funded the County’s obligations under the CBAs, including merit raises and COLAs.

In his letter submitting the proposed budget to the County Council, Johnson noted that the administration had “considered several options for increasing

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<sup>5</sup> Md. Code Ann., Tax-General § 10-106 (permitting Maryland counties to set income tax rates of no more than 3.2 percent).

<sup>6</sup> See Md. Code Ann., Tax-Property § 12-103 (permitting Maryland counties to set

revenues and reducing expenditures” and had decided that “a modest tax increase [was] preferable to the alternative of furloughing county employees or deferring the hiring of additional public safety personnel.” J.A. 276. Johnson cautioned, however, that without the anticipated revenue from the proposed tax increases, it might be necessary to furlough employees or defer hiring of public safety personnel. *Id.* The proposed budget was adopted by the County Council in May 2008. J.A. 223-48.

## **B. Bond Rating**

The County issues bonds annually as a means of financing capital projects. J.A. 445. Each May, the County meets with bond rating agencies and makes a presentation to each agency regarding the financial state of the County. J.A. 444-46. The financial data used for the presentation is the same data used for formulation of the budget; the OMB does not run new revenue projections until early June, after the budget has been adopted.<sup>7</sup> J.A. 447-48. Each rating agency then issues a bond rating, which reflects that agency’s assessment of the County’s credit-worthiness. J.A. 446. The bond rating also tells the County whether it is

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recordation tax rates).

<sup>7</sup> OMB Director Seeman testified that he is aware of no jurisdiction that re-projects revenues while budget approval is pending. J.A. 451. He also noted that the period of time between submission of the budget and completion of the report for the bond agencies is “pretty concentrated” because of the length of the report and the limited amount of time to prepare it. J.A. 448.

managing its financial affairs appropriately. J.A. 420-21 (“[The bond ratings are] how we know we’re managing financially as we should be. And when those rating agencies tell us what are their ... principles of financial management, we generally follow those because those are the experts.”). In making their ratings, the bond agencies focus heavily on the amount of reserve funds; declining fund balances raise a “red flag” for the agencies. J.A. 415.

The County made its annual presentation to the bond agencies in early May 2008. The presentation detailed the financial state of the County, noting specifically that the County was “facing fiscal challenges” due to the declining housing market and reductions in state aid and that the County could not expect to match historic growth rates of 8-10 percent. J.A. 453-56. The County and the agencies also discussed the potential for further revenue deterioration due to increased foreclosure rates. J.A. 456. The County assured the agencies, however, that it would keep its budget in balance and maintain its reserves, taking “strong action to reduce expenditures” if necessary to compensate for reduced revenues. J.A. 457. This assurance was important because the rating agencies had previously indicated concern regarding the County’s consistently declining reserve balances. J.A. 378.

On June 3, 2008, Standard & Poor’s rated the County’s bonds AAA, its

highest rating.<sup>8</sup> J.A. 599. This rating reflected Standard & Poor's conclusion that the County was engaging in sound financial management as demonstrated by its maintenance of appropriate reserve funds and commitment to a balanced budget. An AAA bond rating allowed the County to issue bonds with a lower rate of interest, resulting in a savings of "multiple millions of dollars" in debt service over the 20-year life of the bonds. J.A. 420; J.A. 599 (noting that 2008 bond issue will refinance \$110.3 million of previously issued bonds).

### **C. Amendment of Budget and Implementation of Furlough Plan**

Following approval of the fiscal year 2009 budget, the OMB conducted new revenue projections, which revealed an additional revenue shortfall of \$48 million. J.A. 249. Thus, further cuts in expenditures were required in order to keep the budget in balance. To address the shortfall, the County Council amended the budget by enacting County Bill 51-2008. J.A. 255-69. The bill implemented the following measures to increase revenue and reduce expenditures:

- Negotiated an additional \$2 million reimbursement from the Maryland-National Capital Park Planning Commission ("Planning Commission");
- Negotiated \$1 million Revenue Authority reimbursement;
- Further reduced public safety overtime;
- Reduced by one percent the budget of every county agency;

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<sup>8</sup> Fitch Ratings awarded the County an AA+ rating, its second-highest. J.A. 607. Moody's awarded an Aa1 rating, also its second-highest. *Id.*

- Substantially reduced the County's contribution to the Board of Education;
- Deferred of public safety hiring;
- Reduced expenditures by the County Council;
- Deferred capital projects;
- Reduced by 20 percent grants to nonprofit agencies;
- Reduced other grants and transfers; and
- Identified miscellaneous other savings

J.A. 249, 286. The \$2 million reimbursement from the Planning Commission was in addition to an \$8 million reimbursement included in the original budget. J.A. 335. The \$8 million reimbursement was itself a 400 percent increase from the 2008 reimbursement of \$2 million. *Id.* The Planning Commission must consent to any increase in its reimbursement obligation; the County cannot just unilaterally make a demand. J.A. 340. The OMB also considered a reduction in appropriations for the Prince George's County Community College and a reduction in appropriations for the Prince George's County Hospital. The OMB rejected the option of cutting funds to the community college because the college was chronically underfunded. J.A. 329. Cutting the hospital budget was not possible because that appropriation is the subject of an agreement with the state. J.A. 357.

Together, these adjustments accounted for \$34.2 million of the projected shortfall. To close the remaining gap, County Bill 51-2008 proposed the elimination

of COLAs for all County employees, resulting in a savings of approximately \$13.8 million. Because elimination of COLAs for union employees required modification of the CBAs between the County and the Unions, on June 26, 2008, the County met with the Unions and presented information regarding the revenue shortfall. The County asked the Unions to consider reducing or eliminating COLAs, reducing or eliminating merit pay increases, or agreeing to some other modification that would close the remaining budgetary shortfall. J.A. 492. The Unions refused the County's request to re-open contract negotiations.

Data for July and August 2008 (the first two months of fiscal year 2009) revealed that the revenue shortfall would in fact be \$57 million. In combination with the Unions' refusal to renegotiate their contracts, the County was thus required to identify almost \$23 million in additional expenditure savings in order to maintain the required balance between revenues and expenditures. At this point, the County was left with the choice between a furlough and terminating employees through a reduction in force. J.A. 357. Rather than fire county employees during a difficult economy, the County elected instead to implement a two-week furlough.

On September 16, 2008, the County Council adopted County Resolution 81-2008, the Employee Furlough Plan (Furlough Plan). J.A. 270-74. The Plan provided for an 80-hour furlough for all of the County Executive's senior staff, all management level employees, and all other employees entitled to annual leave

whose compensation was funded by the General Fund. J.A. 273. As authority for the Plan, the County relied on section 16-229 of the County Personnel Law, which provides in relevant part that the County Council may adopt a furlough plan when “the County Executive determines that an ascertained shortfall in revenue ... requires the compensation level of a department, agency, or office to be reduced.” P.G. County Code § 16-229(a)(1).

### **III. The Instant Litigation**

The Fraternal Order of Police filed this action in state court on September 18, 2008. The County removed the action to federal court, and the AFSCME thereafter filed a complaint in intervention. Both complaints alleged three claims: (1) that the Furlough Plan violated P.G. County Code § 16-233(e) (providing that a collective bargaining agreement shall have the effect of amending any Code provision that is contrary to its terms) because implementation of a furlough was contrary to the wage and hour provisions of the CBAs; (2) that the Furlough Plan violated P.G. County Code § 16-229 because it was not “required”; and (3) that the Furlough Plan violated the Contract Clause of the United States Constitution because it substantially impaired the County’s obligations under the CBAs.

Ruling on the parties’ cross-motions for summary judgment, the district court concluded that the Furlough Plan violated neither § 16-233(e) nor § 16-229. With respect to § 16-233(e), the district court concluded, based on Maryland case law

interpreting the provision, that the terms of a CBA override the Personnel Law only to the extent that a specific provision of the CBA conflicts with a general provision of the County Code. *See Fraternal Order of Police*, 645 F. Supp. 2d at 504-05 (citing *Prince George's County v. Fraternal Order of Police*, 914 A.2d 199, 210-11 (Md. Ct. Spec. App. 2007)). The CBAs at issue did not contain a provision prohibiting furloughs, in contrast to CBAs negotiated in the early 1990s, which did contain such a provision. *Id.* at 505. Therefore, the court concluded that the Furlough Plan was not prohibited by § 16-233(e).

The district court also rejected the Unions' claim that the Furlough Plan violated § 16-229 because the furlough was not "required" within the meaning of the ordinance. The district court reasoned that § 16-229 granted the County Executive broad discretion in determining whether the County's financial circumstances justified a furlough and concluded that the County Executive had not abused that discretion in determining that a furlough was "required." J.A. 507-08.

The district court granted summary judgment to the Unions on their claim that the Furlough Plan violated the Contract Clause of the Constitution. The court concluded that the Furlough Plan impaired the County's obligations under the CBAs, that the impairment was substantial, and that this substantial impairment was not reasonably necessary to serve an important public purpose. The County appeals this judgment.

## **SUMMARY OF ARGUMENT**

Under the explicit terms of the Prince George's County Personnel Law and well-established Maryland case law, all provisions of the Personnel Law are incorporated into the collective bargaining agreements between the County and the Unions unless explicitly excluded. As the district court correctly determined, the CBAs at issue here do not explicitly preclude furloughs, nor do the wage and hour provisions of the CBAs implicitly do so. Because § 16-229 is therefore a term of the CBAs, the implementation of the Furlough Plan pursuant to § 16-229 is not an impairment of the County's obligations. Consequently, there has been no violation of the Contract Clause.

Alternatively, the district court should be reversed because it accorded insufficient deference to the policy judgments of the County that resulted in the Furlough Plan. The district court improperly substituted its judgment for that of the County in a manner specifically prohibited by governing precedent. The simple fact is that the County took numerous actions to raise revenues and cut expenditures before resorting to furloughs as an alternative to terminating county employees. The district court's disagreement with the County's policy judgment is not a sufficient basis for a finding of a violation of the Contract Clause.

## **ARGUMENT**

### **I. Applicable Law**

### A. Standard of Review

This court reviews the grant of summary judgment de novo. *See Toll Bros., Inc. v. Dryvit Sys., Inc.*, 432 F.3d 564, 568 (4th Cir. 2005). Summary judgment is appropriate when the facts are undisputed and the only issues before the court are questions of law. *See Fed. R. Civ. P. 56(c); Smith v. Ozmint*, 578 F.3d 246, 250 (4th Cir. 2009). In ruling on a motion for summary judgment, the district court, and this court on review, must view the facts and all reasonable inferences from the facts in the light most favorable to the non-moving party—here, the County. *See Pueschel v. Peters*, 577 F.3d 558, 563 (4th Cir. 2009).

### B. Contract Clause

The United States Constitution provides that “[n]o state shall ... pass any ... Law impairing the Obligation of Contracts.” U.S. Const. art. I, § 10, cl. 1.<sup>9</sup> “The Supreme Court, however, has long held that this seemingly absolute prohibition is not absolute at all.” *City of Charleston v. Pub. Serv. Comm’n*, 57 F.3d 385, 390 (4th Cir. 1995); *see Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410 (1983) (“Although the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the

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<sup>9</sup> The parties do not dispute that the term “state” as used in the Contract Clause includes political subdivisions such as the County. Hereinafter, use of the general term “state” should be construed as including political subdivisions such as county and municipal governments.

State to safeguard the vital interests of its people.” (internal quotation marks omitted)). Rather, a violation of the Contract Clause exists only when there is a “substantial” impairment of a contractual obligation that is not “reasonable and necessary to serve an important public purpose.” *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977). “[T]he remedying of a broad and general social or economic problem,” such as the fiscal crisis at issue here, is one such purpose. *Energy Reserves Group*, 459 U.S. at 412. The determination of whether the Contract Clause has been violated requires a three-part inquiry: (1) is there an impairment of the contract; (2) is that impairment substantial; and (3) if there is a substantial impairment, is that impairment nevertheless justified as an exercise of the state’s sovereign power. *See Baltimore Teachers Union v. Mayor of Baltimore*, 6 F.3d 1012, 1015 (4th Cir. 1993).

**II. Because collective bargaining agreements negotiated with the County are subject to general provisions of county law, adoption of the Furlough Plan did not impair the County’s obligations under the contracts.**

Relying on *Baltimore Teachers Union*, the district court concluded that the Furlough Plan impaired the Unions’ contracts with the County by reducing union employees’ wages and hours. *See Fraternal Order of Police*, 645 F. Supp. 2d at 509-10. Incorrectly describing the pay reduction at issue in *Baltimore Teachers Union* as a “furlough,” the district court held that the Unions’ contracts were

impaired because “[t]he contracts were not subject to unilateral adjustment by the County.” *Id.* at 510 (citing *Baltimore Teachers Union*, 6 F.3d at 1017-18). This holding is incorrect. There has been no impairment of the County’s contractual obligations—nor any modification—because the provisions of the Personnel Law are part of the terms of the collective bargaining agreements.

The County’s Personnel Law is found in Subtitle 16 of the County Code. Section 16-103 provides that the provisions of the Personnel Law “shall apply” to employees covered by collective bargaining agreements “except as specifically provided otherwise under the provisions of Section 16-233.” P.G. County Code § 16-103(a)(3); *see* P.G. County Code § 16-101(b)(2)(F) (“[T]he provisions of this Subtitle shall be presumed to be County-wide in nature and, as such, shall be uniform in their application to all employees ....”). Section 16-233 reiterates this rule: “As stipulated in Section 16-103(a)(3), the provisions of this Subtitle shall apply to any employee who is governed by a collective bargaining agreement ... except as specifically provided otherwise in such collective bargaining agreements.” P.G. County Code § 16-233(a). The only exception to this rule is found in § 16-233(e), which provides that “any provision in the applicable agreement contrary to the provisions of this Subtitle shall have the effect of amending any such provision

and enacting the provision into law applicable to that collective bargaining unit.”<sup>10</sup>

Because the Personnel Law explicitly renders the Unions’ CBAs subject to its generally applicable provisions, the agreements were, from their outset, subject to the possibility of a furlough under § 16-229. Well-established Maryland law provides that the parties to a contract “are presumed to know the law when entering into contracts, and thus, all applicable or relevant laws must be read into the agreement of the parties just as if expressly provided by them, except where a contrary intention is evident.” *Lema v. Bank of Am.*, 826 A.2d 504, 516 (Md. 2003) (internal quotation marks omitted); see *John Deere Constr. & Forestry Co. v. Reliable Tractor, Inc.*, 957 A.2d 595, 599 (Md. 2008); *Dennis v. Mayor of Rockville*, 406 A.2d 284, 287 (Md. 1979). Therefore, § 16-229 is a provision of the CBAs unless those agreements expressly provide to the contrary.

The CBAs contain no provision expressly forbidding furloughs of union employees. This is in marked contrast to CBAs entered in the early 1990s, which did contain such provisions. See *Fraternal Order of Police*, 645 F. Supp. 2d at 505.

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<sup>10</sup> These clear and unambiguous provisions distinguish this case from *Baltimore Teachers Union*, in which this Court concluded that it was not sufficiently clear that the City possessed the authority to unilaterally reduce salaries. See *Baltimore Teachers Union*, 6 F.3d at 1015-16. In contrast to the provision of the Charter relied upon by Baltimore City, which generally allowed the Board of Estimates to reduce appropriations, § 16-229 specifically authorizes the County to implement furloughs, and §§ 16-103(a)(3) and 233(a) explicitly subject collective bargaining agreements to generally applicable provisions of the Personnel Law, including § 16-

Additionally, as the district court correctly held, the wage and hour provisions of the CBAs are not contrary to § 16-229. *See id.* Therefore, § 16-229 is a term of the CBAs, rendering those agreements subject to a properly implemented furlough plan. The district court's unchallenged rejection of the Unions' argument that the County violated § 16-229 establishes that the Furlough Plan was properly implemented. Therefore, there has been no impairment of the CBAs within the meaning of the Contract Clause.

It is no answer to suggest that it is the Furlough Plan, and not § 16-229, that impaired the Unions' contracts. The authority to adopt a furlough plan for county employees derives solely from § 16-229, and the County implemented the Plan according to the specific terms of that provision. If the County cannot implement a furlough plan without impairing collective bargaining agreements that are, without question, subject to § 16-229, then the incorporation of the statute into the CBAs is meaningless. Moreover, such a holding would imply that the state may *never* implement or enforce statutes affecting a contract, whether its own or one between private parties. This cannot be a proper reading of the Contract Clause. In this vein, the County notes that courts have repeatedly held that there is no impairment under the Contract Clause when the challenged law pre-existed the contract. *See, e.g., Glen Falls Ins. Co. v. Irion*, 323 F. Supp. 1164, 1177 (D. Mont. 1970) (“[I]t

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cannot be said that a state statute ... impairs the obligation of a contract made subsequent to the enactment of the statute.”); *Winn Dixie Stores, Inc. v. Schenck Co.*, 662 So.2d 1021, 1023 (Fla. Dist. Ct. App. 1995) (same); *Tri-Financial Corp. v. Dep’t of Revenue*, 495 P.2d 690, 694 (Wash. Ct. App. 1972) (same). *Accord World Wide Video of Wash. v. City of Spokane*, 103 P.3d 1265, 1276 (Wash. Ct. App. 2005) (holding that a contract involving a subject that is already regulated by statute is not impaired by subsequent legislation in the same area).

**III. The district court erred in holding that the Furlough Plan was not reasonable and necessary to further an important government interest.**

Even if this Court concludes that the Furlough Plan impaired the Unions’ contracts, the district court should nevertheless be reversed because the County’s actions survive the third prong of the Contract Clause inquiry.<sup>11</sup> The district court’s analysis is flawed by its failure to grant an appropriate measure of deference to the reasoned policy choices of the County and by its dismissal of the substantial measures taken by the County to avoid furloughs.

A conclusion that the state has substantially impaired a contract requires the court to “attempt to reconcile the strictures of the Contract Clause with the essential

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<sup>11</sup> The County does not dispute that, if there is an impairment, the impairment is a substantial one in that it reduced the work hours contemplated in the CBAs. *See Baltimore Teachers Union*, 6 F.3d at 1018.

attributes of sovereign power necessarily reserved by the States to safeguard the welfare of their citizens.” *United States Trust*, 431 U.S. at 21 (internal quotation marks omitted). The state properly exercises its sovereign power, and thus does not violate the Contract Clause, when the impairment of the contract is “reasonable and necessary to serve an important public purpose.” *Id.* at 25. This requirement “guarantees that the State is exercising its police power, rather than providing a benefit to special interests.” *Energy Reserves Group*, 459 U.S. at 412.

States are entitled to a measure of deference in determining what is “reasonable and necessary.” Substantial deference is appropriate when a state law impairs private contracts. *See id.* at 412-13. However, when the state is a party to the impaired contract, as is the case in this litigation, the presence of the state’s self-interest requires that the reasons for the impairment be more carefully examined. *See Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 & n.15 (1978). In such circumstances, “complete deference to a legislative assessment of reasonableness and necessity is not appropriate.” *United States Trust*, 431 U.S. at 26 (emphasis added). This is not to say that the state is entitled to no deference at all. Rather, the state’s policy judgments are entitled to “some deference.” *Baltimore Teachers Union*, 6 F.3d at 1019; *see, e.g., Local 589, Amalgamated Transit Union v. Massachusetts*, 666 F.2d 618, 643 (1st Cir. 1981). As this Court has previously made clear, the task of the reviewing court is not to substitute its

judgment for that of the state, but “rather to ensure ... that states neither ‘consider impairing the obligations of [their] own contracts on a par with other policy alternatives’ or ‘impose a drastic impairment when an evident and more moderate course would serve its purposes equally well.’” *Baltimore Teachers Union*, 6 F.3d at 1020 (quoting *United States Trust*, 431 U.S. at 30-31).

The standard applied by the district court is far more stringent than the one articulated in *Baltimore Teachers Union*. For example, using the language of strict scrutiny analysis, the district court required that the impairment be “narrowly tailored” to the problem faced by the County. *Fraternal Order of Police*, 654 F. Supp. 2d at 512. Further, as discussed in detail below, the district court improperly failed to defer to the County’s well-considered reasons for rejecting the very few alternatives to furloughs that remained in September 2008. The district court’s approach is thus inconsistent with this Court’s admonition that the role of a court is not to second-guess the policy choices made by the state.

In addition to being inconsistent with the law of the Fourth Circuit, the analysis employed by the district court ignores the substantial measures the County took to balance the budget before resorting to the Furlough Plan. In May 2008, the County increased the County income tax from 3.1 percent to the maximum of 3.2 percent and increased the recordation tax rate by 30 cents for every \$500. In addition to its usual designation of the UFB for upcoming capital projects, the

County withdrew an additional \$10.1 million from the Fund as a source of revenue. And, the County employed a substantial number of cost-saving measures, including but not limited to a hiring freeze, reduction of agencies' operating budgets, reduction and/or deferral of capital projects, reduction in debt service, and savings in health benefits costs. The County then attempted to avoid furloughs by re-opening with the Unions certain terms of the CBAs, an effort that proved unsuccessful. Only then, and in an effort to avoid the far more drastic solution of layoffs, did the County resort to the Furlough Plan. Furthermore, the Furlough Plan was reasonably limited and accounted for only 13 percent of the total revenue shortfall of \$152 million—the \$95 million addressed by the County in the original operating budget and the further shortfall of \$57 million subsequently ascertained.

This history reveals that the County simply did not consider impairment of the CBAs on a par with other policy choices. To the contrary, the County took numerous steps to avoid furloughs and adopted the Furlough Plan only when necessary to avoid termination of employees or endangerment of the County's fiscal stability.

In addition to disregarding the extensive measures taken by the County to bridge the revenue gap before resorting to furloughs, the district court ruled that the furlough was not reasonable and necessary because other avenues were available to

the County.<sup>12</sup> In identifying these alternatives to the Furlough Plan, the district court engaged in precisely the kind of second-guessing that this Court explicitly prohibited in *Baltimore Teachers Union*:

It is not enough to reason, as did the district court, that “[t]he city *could have* shifted the burden from another governmental program,” or that it “*could have* raised taxes.” Were these the proper criteria, no impairment of a governmental contract could ever survive constitutional scrutiny, for these courses are always open, no matter how unwise they may be.

*Baltimore Teachers Union*, 6 F.3d at 1019-20 (citations omitted); *see id.* at 1019 (holding that the ruling of the district court that “[a]lternatives always exist” was erroneous because it “afforded essentially no deference whatsoever” to the city’s policy choices).

Moreover, as detailed below, the “alternatives” identified by the district court were not “alternatives” at all.

*1. Bond Rating*

OMB Director Seeman testified at length during his deposition regarding the importance of a favorable bond rating. General obligation bonds provide fully 40

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<sup>12</sup> The district court also criticized the County for increasing the fiscal year 2009 budget over the contrary recommendation of the SAC. *Fraternal Order of Police*, 645 F. Supp. 2d at 513. As the district court acknowledged, however, the County is not bound by the SAC’s recommendations. More importantly, the increase was a mere *1.3 percent* of the County’s total operating budget. And, the increase notwithstanding, the budget was balanced and fully accounted for every penny of the revenue decline forecast by the SAC and the OMB.

percent of the funding for capital improvements for the County—including renovation and construction of schools, transportation infrastructure, public lands, and other community facilities.<sup>13</sup> A favorable bond rating is critical to the County’s ability to attract investors in its bonds. And, an AAA rating allowed the County to sell its bonds at a lower interest rate, resulting in a savings to the County of “multiple millions of dollars” over the life of the bonds. J.A. 420.

Despite the critical importance of the County’s bond rating to its fiscal stability, the district court suggested that the County should have abandoned its efforts to maintain a favorable bond rating rather than implement a furlough. *Fraternal Order of Police*, 645 F. Supp. 2d at 517.<sup>14</sup> Even if the County “could

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<sup>13</sup> See “Capital Budget and Program, Fiscal Years 2009-2014,” at B-1 to B-2. This document is available at [www.princegeorgescountymd.gov](http://www.princegeorgescountymd.gov), on the sub-page for the OMB. The OMB’s page may be accessed by selecting “Management and Budget” from the drop-down list at the “Select an Agency” tab.

<sup>14</sup> The district court’s discussion of the bond ratings issue clearly indicates its disbelief of the County’s factual statements and its unfounded suspicion that the County was less than honest with the bond rating agencies, the Unions, or both. See, e.g., *Fraternal Order of Police*, 645 F. Supp. 2d at 517. The court also refused to accept as true Seeman’s testimony regarding routine procedures common to all jurisdictions, such as the fact that projected revenues are not recalculated while a proposed budget is pending before the County Council. Compare J.A. 451 (“[W]e don’t revise the revenues [while the budget is pending] ... and as far as I know no jurisdiction does while the budget is before the council.”) with *Fraternal Order of Police*, 645 F. Supp. 2d at 514 (“[I]t would seem that wise fiscal policy would dictate that the County reproject its numbers more often.”). More generally, the district court opinion is permeated with refusals to accept as true the facts alleged by the County and to grant inferences from those facts in the County’s favor. For example, the district court’s suggestion that the County adopted the furlough plan in

have” done as the district court suggested, its decision to avoid the potentially dire consequences of abandoning efforts to maintain a favorable bond rating is entitled to deference.

2. *Use of Undesignated Fund Balance or Operating Reserve*

The district court also suggested that the County could have used some or all of the UFB or Operating Reserve instead of resorting to a furlough. *See Fraternal Order of Police*, 645 F. Supp. 2d at 515. In so holding, the court ignored Seeman’s testimony on the following points:

- that maintenance of the Operating Reserve is critical in light of the County’s unique inability to raise taxes on an as-needed basis, J.A. 423-24;
- that basic principles of sound financial management prohibit the use of non-recurring funds (such as the UFB) to pay recurring expenditures (such as compensation);
- that the balance of the UFB had been declining for years, J.A. 363; and
- that use of reserves to fund ongoing liabilities simply masks, and does not remedy, a structural imbalance between ongoing revenues and ongoing expenditures, J.A. 355-56.

Additionally, the district court’s suggestion ignores the fact that the County *did* draw down the UFB by \$10.1 million in the original proposed budget despite the resultant risk to the County’s credit rating—a danger that appears to be coming to pass. On November 19, Fitch Ratings declared that the County’s rating outlook is

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retaliation for the Unions’ refusal to reopen contract negotiations, *see id.* at 511-12, is inconsistent with the court’s duty to view the facts in the light most favorable to

“negative” because of “reductions in reserve levels since fiscal 2007” and the strong possibility that the County will not be able “to maintain reserves and achieve structural balance through *recurring* revenues at levels appropriate for the rating category.”<sup>15</sup>

Underlying the district court’s conclusion that the County could have used a portion of the UFB to bridge the revenue gap seems to be its concern that the County played “fast and loose” with the numbers, which appeared to fluctuate wildly between March and September 2008. When the County made its presentation to the bond agencies in May 2008, the balance of the UFB at the end of fiscal year 2008 was estimated at \$35.8 million and the projected balance for fiscal year 2009 was \$32.7 million. J.A. 503. In the bond offering issued June 1, the estimated balance for the end of fiscal year 2008 was \$70 million and the projected balance for fiscal year 2009 was \$65.1 million. J.A. 506. On June 26, when the County made a presentation to the Unions in support of its request for re-openers, the estimated balance for the end of fiscal year 2008 was \$16.7 million, and the projected balance for fiscal year 2009 was negative \$64.5 million. J.A. 487. On September 30, 2008, when the County issued its Comprehensive Annual Financial

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the County.

<sup>15</sup> Fitch Ratings, “Fitch Rates Prince George’s (Maryland) \$30MM GOs ‘AA+’; Outlook Negative,” Nov. 19, 2009 (emphasis added), *available at* <http://finance.yahoo.com/news/Fitch-Rates-Prince-Georges-bw->

Report (CAFR) for fiscal year 2008, the ending balance of the UFB for 2008 was \$65 million. J.A. 471.

The different numbers are not due to any nefarious conduct by the County, but rather are the result of (1) the different accounting methods used for budgetary and financial analysis purposes, and (2) actions taken by the County in response to the data used in the presentation to the Unions. Seeman testified during his deposition that all of the estimated and projected balances for the UFB are based on the same data. J.A. 408-09. The difference in UFB balances between the bond presentation and the bond offering reflected different accounting methods employed by the OMB (whose calculations were used for the proposed budget and for the bond presentation) and the Office of Finance (whose calculations were used for the bond offering). The difference in the fund balance between June 26 and September 30 resulted from actions by the County in response to data projecting that the UFB would be down to \$16 million at the end of fiscal year 2008 and would have a negative balance of \$64 million by the end of fiscal year 2009. J.A. 412-13. Faced with the data, at the end of fiscal year 2008 the County reduced expenditures, cancelled encumbrances, and deferred projects. As a result, when the financial report for fiscal year 2008 was issued on September 30, it showed that the *actual* balance of the UFB at the end of the fiscal year was \$65 million, instead of the

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[1782464873.html?x=0](http://1782464873.html?x=0) (last accessed December 10, 2009).

*projected* ending balance of \$16 million.

3. *Cancellation of Planned Purchases*

The district court noted that the CAFR designated \$8 million for real estate and equipment purchases for which no contract had yet been signed and concluded that use of these funds was an alternative for the County. *Fraternal Order of Police*, 645 F. Supp. 2d at 516. The record evidence, viewed in the light most favorable to the County, does not support a conclusion that these funds were freely available to the County or that any choice by the County not to use those funds was unsupported by sound policy reasons. Seeman testified that the funds were “committed” to purchases. J.A. 359 (“It’s really like the encumbrances.... [The funds have] to be reserved because it’s going to happen.”). He did not testify that those commitments could be cancelled but rather that he did not know whether or not cancellation was possible. J.A. 361. Moreover, Seeman had no idea what purchases would be made by the \$8 million, *id.*, leaving the district court with no basis for its assumption that the planned purchases were not critical and could simply be cast aside.

4. *Reduction of Funding to the Community College*

Seeman testified that the OMB considered recommending a decrease in funding to the community college but rejected this possibility on the basis that “the community college has been underfunded for years. The community college is

funded lower in Prince George's County than anywhere in the state of Maryland.”

J.A. 329. The district court refused to grant any deference whatsoever to this determination, effectively concluding that the County had no right to decide that further reducing support for an already-underfunded educational institution would place an unacceptable burden on the citizens of the County.

5. *Additional Funds from the Planning Commission*

Part of the County's annual revenue stream includes an agreed-upon payment by the Planning Commission. The County's efforts to close the budget gap for fiscal year 2009 included a negotiated increase in this payment from \$2 million to \$8 million, and then, when further revenue shortfalls were projected, an additional negotiated payment of \$2 million. J.A. 335. The payment was made out of the Planning Commission's reserve funds, which were unusually (and temporarily) high because of uncompleted capital projects. J.A. 343. The County cannot unilaterally declare that it is taking additional funds from the Planning Commission; the Commission must agree to any payment. J.A. 340. Ignoring these facts, the district court declared that the County could have freely used the Planning Commission's funds to solve its own budget problems. *See Fraternal Order of Police*, 645 F. Supp. 2d at 516. This conclusion is self-evidently untenable.

6. *Other Measures*

The district court suggested that the County “could have taken small portions

from a variety of sources” in order to make up the \$20 million revenue shortfall that necessitated the furlough. *Id.* at 517. This suggestion is surprising in light of the fact that the County had *already* taken small—and large—portions from every source available to it. The simple fact of the matter is that employee compensation accounts for 70-80 percent of the County’s budget, J.A. 381, and 90 percent of county employees are unionized.

The district court also criticized the County for not firing employees, shutting down schools, or curtailing essential services, all steps considered or taken by the City of Baltimore before resorting to a pay decrease. That the County did not act in lockstep with another jurisdiction—and did not resort to terminating loyal employees or abandoning its basic obligations to county citizens—by no means establishes that the County considered furloughs “on a par with other policy alternatives.” The County considered the options available to it and made reasoned decisions based on sound policy determinations. In light of the extensive measures taken by the County to avoid furloughs, and the sound policy reasons supporting the County’s rejection of the very limited remaining alternatives, its determination that the Furlough Plan was a reasonable and necessary response to the fiscal crisis is entitled to deference.

Finally, the Furlough Plan meets all of the hallmarks of reasonableness identified by this Court in *Baltimore Teachers Union*: the Plan dealt with a

generalized economic problem in the County; it applied to all County employees; it affected public employees, whose expectations “are necessarily defined, at least in part, by the public interest”; and it effected only a temporary alteration of the parties’ contractual relationships, in that all of the County’s negotiated obligations under the CBAs remained intact before and after the furloughs. *Cf. Baltimore Teachers Union*, 6 F.3d at 1021. The district court’s reasoning that the Contract Clause was violated because the County at no point abandoned or curtailed the Furlough Plan—unlike the City of Baltimore, which abandoned the pay decrease when conditions improved—is incorrect. *See Fraternal Order of Police*, 645 F. Supp. 2d at 518. That the Furlough Plan was fully implemented proves only that conditions in Prince George’s County did not improve, not that the Plan was unreasonable.

### CONCLUSION

For the reasons set forth above, it is clear that the district court erred in holding that the Furlough Plan violated the Contract Clause. The provision of the Personnel Law permitting furloughs is a term of the Unions’ contracts with the County, and therefore the adoption of a furlough plan in conformance with the law is not an impairment of the County’s contractual obligations. Alternatively, any impairment was a reasonable and necessary response to the unprecedented financial crisis facing the County. The judgment of the district court should be reversed.

**STATEMENT REGARDING ORAL ARGUMENT**

The County requests oral argument.

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December 14, 2009

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