Circuit Court for Baltimore City
Case No. 24-C-22-003989

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2070

September Term, 2022

Trustees of the Walters Art Gallery, Inc., et al.

v.

Walters Workers United, Council 67,
AFSCME, AFL-CIO, et al.

Graeff,
Leahy,
Getty, Joseph M.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Leahy, J.
Dissenting Opinion by Getty, J.

Filed: October 16, 2024

*This is an unreported opinion. It may not be cited as precedent within the rule of stare decisis. It may be cited as persuasive authority only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

Henry Walters, who died in 1931, bequeathed his "Art Gallery" as well as his home on 5 West Mount Vernon Place and the building connected thereto by a bridge at 100 Center Street, and "all of the contents thereof," to the Mayor and City Council of Baltimore (the "City") "for the benefit of the public." The Will established an endowment to help the City maintain the gallery. To manage these gifts and ensure that the gallery remained available to the public, the City enacted Ordinance 33-440 which, among other things, created "a body to be known as the Trustees of the Walters Art Gallery[.]" Shortly thereafter, by special act in 1933, the General Assembly incorporated the "Trustees of Walters Art Gallery" (the "Trustees" or "Board of Trustees") which operate the Walters Art Museum (together, "WAM").[1] A subsequent act expanded the City's authority to unilaterally set the number of *ex-officio* and elected Trustees, and today, WAM is governed under Article 18, Subtitle 14, of the Baltimore City Code.

In this appeal, we consider whether WAM constitutes a "unit or instrumentality" of the City and is, therefore, subject to the Maryland Public Information Act ("MPIA"), as codified in Maryland Code (2014, 2019 Repl. Vol. & 2023 Supp.), General Provisions

[1] The Maryland Department of Assessments and Taxation ("SDAT") online Business Records Search shows that on September 9, 2016, the Trustees of the Walters Art Gallery, Inc. applied for the trade name "Walters Art Museum." *See Kona Props., LLC v. W.D.B. Corp., Inc.*, 224 Md. App. 517, 524 n.14 (2015) (indicating this Court may take judicial notice of public records on file with the SDAT). *Accord Thomas v. Rowhouses, Inc.*, 206 Md. App. 72, 75 n.3 (2012). Initially, the trade name was "Walters Art Gallery," reflecting the name used in Ordinance 33-440 and Chapter 217 of the 1933 Laws of Maryland (S.B. 242). The acronym "WAM" when used in this opinion refers to the Trustees and the same entity that, in the past, was known as the "Walters Art Gallery."

("GP"), § 4-101 *et seq.*[2]

The spark that set off the underlying litigation was a set of requests for information under the MPIA that Erin Riordan, an employee of American Federation of State, County and Municipal Employees ("AFSCME") International, sent to WAM in May of 2022. Julia Marciari-Alexander, the executive director of WAM, denied the MPIA requests on the ground that "the Walters Art Museum is not subject to the MPIA."[3]

Unsatisfied with this result, Walters Workers United, Council 67, AFSCME, AFL-CIO ("WWU"), and AFSCME International (together, "Appellees" or "the Unions" below), filed a complaint in the Circuit Court for Baltimore City to compel Director Marciari-Alexander; Guy E. Flynn, in his capacity as President of the Trustees;[4] and the

[2] Appellants present the issue in their brief as:

> "[W]hether WAM, which is governed by a self-perpetuating, privately controlled Board of Trustees, is a unit or instrumentality of the State or the City under the MPIA."

[3] In the same letter, Ms. Marciari-Alexander advised that "the most recent 990 for the museum foundation and the museum's financial statements—are publicly available." The Maryland Department of Assessments and Taxation ("SDAT") online Business Entity Search includes records for a non-stock corporation by the name "Walters Art Museum Foundation, Inc." with its principal office located at 600 N. Charles Street, Baltimore, MD. Originally, articles of incorporation for the foundation were filed on July 30, 1979. Md. Dep't of Assessments & Tax'n, Bus. Entity Search, https://egov.maryland.gov/BusinessExpress/EntitySearch (last visited Aug. 5, 2024) (input "Walters Art Museum Foundation" in field labeled "Business Name"), available at https://perma.cc/7K5F-VVNF.

[4] Appellants filed a "Notice of Substitution of Party" (emphasis removed) on July 3, 2023, in this Court to substitute Peter L. Bain for Guy E. Flynn, as Bain is "the recently and newly elected President of the Trustees of the Walters Art Gallery, Inc."

Trustees (together, "Appellants" or "the Walters" below) to respond to the requests for information. The parties filed cross-motions for summary judgment and, following a hearing, the circuit court granted the Unions' motion and ordered the Walters to respond to the requests. The Walters noted a timely appeal to this Court.

As set forth below, we affirm the circuit court's grant of summary judgment on the ground that the "attributes" of WAM's "relationship with" Baltimore City "predominate over those pointing to its private character[] for purposes of" WAM's "inclusion in the scope of the [MPIA]." *Napata v. Univ. of Md. Med. Sys. Corp.*, 417 Md. 724, 736-37 (2011).

BACKGROUND

In May of 2022, AFSCME International sent a series of emails containing requests for information under the MPIA to WAM, seeking, in general, information related to their efforts to unionize WAM employees. The emails included requests for tax documents, financial statements, contracts between WAM and private counsel, contracts related to management of labor relations, minutes of the Trustees' meetings, and communications between Ms. Marciari-Alexander and Baltimore City pertaining to labor relations. Appellant Marciari-Alexander denied the requests on the ground that "[t]he Walters Art Museum is not subject to the MPIA."

Following this denial, the Unions filed a complaint in the Circuit Court for Baltimore City on September 12, 2022, and then amended the complaint shortly thereafter on September 26. The purpose of the suit was to "compel [the Walters] to disclose the

public records described in [Ms. Riordan's] Maryland Public Information Act requests." (Citation omitted). The amended complaint alleged, among other things, that:

- The members of the Trustees include public officials as ex officio members.

- The Mayor and City Council are authorized to appoint the Trustees and set the length of their terms by ordinance.

- The statute creating WAM states: "it being intended that the corporation created by this Act shall be the agency of the Mayor and City Council of Baltimore through which the directions and intent of Henry Walters shall be obeyed, and his objects realized."

- WAM's tax exemption is predicated on its status as an instrumentality of the State of Maryland.

- Pursuant to a City ordinance, the Trustees must submit financial reports to the City.

- WAM received public funding through State bonds in 1994, 1995, 1996, 1997, 1999, 2003, and 2006.

- According to WAM's financial reports available online, the "aggregated amount of public grants listed . . . from 2003 to 2021 is $45,553,881."

- The City owns the WAM buildings and "annually covers for the [WAM] employees benefits and payroll costs."

The Walters filed an answer to the amended complaint on October 17, 2022. Among other things, the Walters denied that WAM constituted an "instrumentality of the State of Maryland" or that they had "denied" any request from the Unions to inspect a "public record[.]"

The parties filed cross-motions for summary judgment. The Unions asserted that the case presented no genuine dispute of any material fact and, therefore, the court should "issue an order for [the Walters] to produce the public records . . .; enjoin [the Walters]

from withholding the documents requested . . .; enter declaratory judgment declaring that [WAM] is a unit or instrumentality of State government under the MPIA; . . . ; and grant all just and further relief as the Court deems proper."

The Walters agreed that the "material facts" were "undisputed[.]" However, the Walters asserted that, by law, WAM is not an instrumentality of Baltimore City. We discuss the parties' contentions in greater detail below, as the arguments made on appeal to this Court closely resemble the arguments that the parties made in support of their respective motions for summary judgment.

On November 30, 2022, the parties appeared before a judge in the Baltimore City Circuit Court to argue their respective motions. By memorandum opinion and separate order entered January 13, 2023, the judge granted the Unions' motion for summary judgment and denied the cross-motion filed by the Walters.

In determining that WAM was an instrumentality of the City, the judge "construe[d] the 'intentionally expansive' language of the [MPIA] broadly" and considered "all aspects" of the relationship between WAM and the City. (Citation omitted). Thus, among other things, he considered: the public purpose of WAM, which by statute and ordinance must "be used for the benefit of the public"; the "significant control [over WAM] . . . vested in the Mayor and City[,]" including that "[n]o amendments to the Act of Incorporation may be made" and no works of art may be sold or disposed of without consent of the City; the financial support provided to WAM from the City, including monies for various employee benefits and WAM's share of payroll taxes; the City's apparent ability to veto amendments

to WAM's charter; and a requirement that WAM submit an annual report to the City. Although the judge also recognized that WAM has characteristics of a private entity,[5] he cited the Supreme Court's decision in *Napata*, 417 Md. at 734, in resolving that,

> the fact that the City is not exercising predominant control is not determinative. *See Napata*, 417 Md. at 734[.] The City Code makes clear that the City retains ultimate control over the Walters as the Trustees are prohibited from amending the charter without the consent of the Mayor and City Council. Baltimore City Code Art. 18, § 14-12. Moreover, the Walters['] argument that it exercises complete control over its budget, expenditures, contracts, and operations without oversight from the City is not accurate. The Walters is required to submit an annual report of its activities and operations to the Board of Estimates and every member of the City Council. Baltimore City Code Art. 18, § 14-9. By requiring the report to be submitted not just to the City Council generally, but to every member individually, it is apparent that more oversight was intended.

For all of these reasons, "and the General Assembly's requirement that the [M]PIA be broadly interpreted," the judge found that "the Walters is subject to the [M]PIA as an instrumentality of the government." He observed that "[r]estricting the public's access to information about the operations of the Walters through a finding that the Walters is not subject to the [M]PIA is contrary to both Mr. Walters' last will and testament and the legislation implementing his wishes." Accordingly, the court ordered that the Walters "respond to [the Unions'] requests for records within thirty (30) days from entry of this

[5] The court recognized certain facts that it found weighed against a finding that WAM was an instrumentality of the City, including that: "[t]he overwhelming majority of the Board of Trustees is comprised of non-government members"; most of WAM's funding comes from private funds; there is no express authority providing for the dissolution of WAM by the City or General Assembly; and WAM was not listed in the definition of "local government" for purposes of the Local Government Tort Claims Act—indicating WAM is not entitled to sovereign immunity protections. (Citations omitted).

Order in accordance with [MPIA] §§ 4-101 to 4-601." The Walters noted an appeal to this Court on January 20, 2023.

Central in the formation of WAM are: 1) the Last Will and Testament of Henry Walters; 2) two acts of the General Assembly that incorporated the Trustees and expanded the ability of Baltimore City to govern the makeup of the Trustees' board of directors (the "Board"); and 3) various Baltimore City ordinances pursuant to which WAM and the Trustees have operated under over the years.

Will of Henry Walters

The story of this case begins with the Last Will and Testament of Henry Walters, who died on November 30, 1931. In his Will, Mr. Walters bequeathed his art gallery to the City to be used for the benefit of the public and, additionally, established an endowment to help maintain the gallery for that purpose. In pertinent part, the Will provided that:

> I, Henry Walters of the City of Baltimore, State of Maryland, do hereby make this my last will and testament.
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> * * *
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> 2. **I give to the Mayor and City Council of Baltimore**, State of Maryland **for the benefit of the public, my Art Gallery** . . . **with all the contents**, also my lot of ground and dwelling in said City known as No 5 West Mount Vernon Place and the contents thereof; these properties being connected by a bridge over the alley-way between them.
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> 3. All the residue of my estate I direct my Executor hereinafter named to value and divide into twenty equal parts, and I give said residue when divided as follows:
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> * * *

> [3.]C. To the Safe Deposit and Trust Company of Baltimore—Five twentieths, in trust the principal to be held by it as **an endowment fund** and the income only **paid** in quarterly instalments **to the Mayor and City Council of Baltimore for the purpose of maintaining the Walters Art Gallery given to the City of Baltimore** by the second item of this will **for the benefit of the public.**

(Emphasis added).

Baltimore City Ordinance No. 33-400

Baltimore City enacted Ordinance No. 33-400 in 1933 to comply with the Will. In pertinent part, the ordinance provided that:

> WHEREAS, Henry Walters . . . by his last will and testament made the City . . . the beneficiary of the Walters Art Gallery . . . and has made the City . . . the beneficiary of an endowment fund with which to maintain the Walters Art Gallery; and
>
> WHEREAS, it is the desire and purpose of the Mayor and City Council of Baltimore to comply with every direction contained in said last will and testament;
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> SECTION 1. *Be it ordained by the Mayor and City Council of Baltimore*, That the Mayor . . . is . . . authorized and directed to accept from the Safe Deposit and Trust Company . . . all property and funds which the . . . executor is required to convey, transfer, and pay over to the Mayor and City . . . under the terms [of the Will] . . . .
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> SECTION 2. *And be it further ordained*, That the Walters Art Gallery . . . and the contents of the buildings, be used for the benefit of the public, as directed by [the Will]; and the income from the endowment fund created [by the Will] be used for the purpose of maintaining the Walters Art Gallery for the benefit of the public.
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> SECTION 3. *And be it further ordained*, That [the] Mayor of Baltimore, [the] President of the City Council, John J. Nelligan as representative of the Safe Deposit and Trust Company, Trustee under [the Will], and [six other named individuals], are hereby appointed and designated as members of a body to be known as the Trustees of the Walters

> Art Gallery, which body is hereby created. The said trustees shall have full and complete control over the real properties and contents given to the City . . . as the agency through which the directions and intent of the donor shall be obeyed, and his objects realized. Income from the endowment . . . of the [Will] shall be paid, upon receipt [by the City] from the Safe Deposit and Trust Company . . . to the Trustees . . . and their successors, to be administered and expended . . . for the purpose of maintaining the Walters Art Gallery.
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> SECTION 4. *And be it further ordained*, That the present Mayor . . . and the president of the City Council shall remain members of the Trustees . . . so long as they are in office and shall be succeeded as trustees by their successors . . . so that the Mayor . . . and the President of the City Council . . . will always be members of the Trustees . . .; and a representative of the Safe Deposit and Trust Company shall remain a member . . . so that a representative of [that Company] shall always be a member of the Trustees . . . . The Trustees shall make such rules and regulations as shall be appropriate for the election of new members, provided . . . that no trustee . . . other than the Mayor[,] the President of the City Council and the representative of the Safe Deposit & Trust Company, shall at any time, after five (5) years from the date of . . . this ordinance be a trustee or director or a member of any managing board of any other art [institute, gallery, or museum] in Baltimore City, and provided that no trustee, except the Mayor . . . the President of the City Council and the representative of the Safe Deposit & Trust Company [and other select named individuals] shall be eligible to serve in such capacity for . . . greater than nine (9) years . . . .

Ord. 33-400 §§ 1-4. Section 4 of Ordinance 33-400 empowered the Trustees to fill vacancies by majority vote of the remaining members, and to generally limit the terms of elected trustees to two terms of nine years each, with at least two years in between those terms.

In Section 5, Ordinance 33-400 stipulated that the Trustees could not receive either "pay or compensation of any kind" for their service, and stipulated that it was the "duty" of the Trustees to adopt rules and regulations to manage and maintain WAM "for the benefit of the public." *Id.* § 5. Section 5 also provided for the election of officers by the

Trustees and required that the Trustees "make a report of the activities" of WAM each year to be "filed with the Board of Estimates" and "each member of the City Council." *Id.*

In Section 6, Ordinance 33-400 directed that WAM be "known in perpetuity as Walters Art Gallery" and prohibited WAM from "merg[ing] or consolidat[ing] with any other institution. *Id.* § 6. Finally, Section 6 also prohibited any "art owned by" WAM from being "loaned to or exhibited in any other institution in the City . . . without the approval of the Mayor and City Council." *Id.*

Chapter 217 of the 1933 Laws of Maryland

As anticipated by Ordinance 33-400, the General Assembly passed Chapter 217 of the 1933 Laws of Maryland (S.B. 242) ("Chapter 217") in April 1933 "to incorporate the Trustees of Walters Art Gallery, to provide for the management by said Corporation of the real properties and art treasures and income given to the Mayor and City Council of Baltimore under the last will and testament of Henry Walters, and to confer upon the Mayor and City Council of Baltimore and said Corporation certain powers with respect thereto." Ch. 217 (preamble). In pertinent part, Chapter 217 provides:

> WHEREAS, Henry Walters . . . has made the City of Baltimore the beneficiary of an endowment fund with which to maintain the Walters Art Gallery.
>
> SECTION 1. *Be it enacted by the General Assembly of Maryland*, That Howard W. Jackson, Mayor of Baltimore; E. Lester Muller, President of the City Council; [and seven named others], and their successors, be and they are hereby constituted and created a body corporate under the laws of the State of Maryland under the name of the Trustees of Walters Art Gallery.
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> SEC. 2. *And be it further enacted,* That the purpose of the corporation shall be to have and exercise full and complete control over the real

properties and contents given to the Mayor and City Council of Baltimore by Henry Walters . . . for the benefit of the public; and to have and exercise full and complete control over the expenditure of the income from the endowment fund . . . for the purpose of maintaining the Walters Art Gallery . . . for the benefit of the public; it being intended that the corporation created by this Act shall be the agency of the Mayor and City Council of Baltimore through which the directions and intent of Henry Walters shall be obeyed, and his objects realized.

SEC. 3. *And be it further enacted,* That the said Corporation shall have the power to agree with the Mayor and City Council and Baltimore as to the terms, conditions, and provisions under which the real properties, art treasures and income will be managed and administered by said Corporation for the benefit of the public, and the Mayor and City Council of Baltimore is hereby authorized and empowered to enter into such an agreement as it may deem advisable. [T]he said Corporation is hereby authorized and empowered to exercise any of the powers which may have been and which may hereafter be conferred upon it by any ordinance of the Mayor and City Council of Baltimore, and especially the powers granted in Ordinance [No. 33-400].

SEC. 4. *And be it further enacted,* That the said Corporation shall be governed by a board of nine trustees, of which one shall always be the Mayor of Baltimore, for the time being; one shall be the President of the City Council, for the time being . . . . Until their successors are elected the board of trustees shall be those named as incorporators herein.

The Board shall have power to make, alter and repeal by-laws; to fill vacancies in the membership of the Board, and to provide, in such by-laws, for terms for its members, except those named ex-officio; provided that such terms shall conform with any ordinance of the Mayor and City Council of Baltimore . . . .

The Board shall have power to elect or appoint a president . . .; [and] a secretary and a treasurer . . . .

The Board shall have full and exclusive power to appoint a director . . . and to appoint or provide for the appointment of . . . other employees . . . .

The Board shall, generally, have all the powers with respect to the affairs of said corporation which are conferred by the Public General Laws of Maryland upon the directors or managing bodies of Maryland corporations. And the powers of the corporation shall include the power to acquire, hold, manage, sell, exchange, encumber or otherwise dispose of any property, real, personal or mixed; and to accept any grant, gifts, devises or bequests . . . . Any payment of income made by the Safe Deposit and Trust

> Company, trustee under the last will and testament of Henry Walters to the Trustees of Walters Art Gallery, a body corporate, provided said Corporation is authorized by ordinance of the Mayor and City Council of Baltimore to receive such payment or payments on behalf of the Mayor and City Council of Baltimore, shall have the same effect as a payment to the Mayor and City Council of Baltimore . . . .
>
> SEC. 5. *And be it further enacted*, That said Corporation shall be classed as an educational corporation, but shall not be required to file any reports or accounting with any agency of the State. It shall file such reports with the Mayor and City Council of Baltimore as may be agreed upon and directed by ordinance.
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> * * *
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> Approved April 5, 1933.

Ch. 217 §§ 1-5.

Baltimore City Ordinance No. 33-468

The Baltimore City Council responded to Chapter 217 by adopting a second ordinance pertaining to WAM, specifically, Baltimore City Ordinance No. 33-468. In pertinent part, Ordinance 33-468 provided that:

> SECTION 1. *Be it ordained by the Mayor and City Council of Baltimore*, That the duties, powers and authority heretofore vested in the Trustees of Walters Art Gallery under and by virtue of the provisions of . . . Ordinance . . . No. [33-]400 . . . are hereby transferred to and vested in the corporation known as the Trustees of Walters Art Gallery, incorporated under the provisions of Chapter 217 of the Acts of the General Assembly of Maryland of 1933 . . . .
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> SECTION 2. *And be it further ordained*, That the Trustees . . . shall have power to receive and expend the income from the trust fund created [by the Will] . . . for the benefit of the public . . . and shall have power to expend for the same purpose any funds coming . . . from the disposition of . . . the contents of Walters Art Gallery, and the contents of . . . 5 West Mount Vernon Place, found not to be of museum value or interest; provided that no work of art shall be disposed of by the Trustees of Walters Art Gallery, a body corporate, without the consent of the Mayor and City Council of Baltimore. The income from the trust fund shall be paid by the Safe Deposit and Trust Company, trustee, to the Trustees . . . .

SECTION 3. *And be it further ordained*, That the provisions of Section 1 and Section 2 of this ordinance shall become effective upon the filing with the Board of Estimates . . . [by] the Trustees . . . a written statement . . . agreeing that:

I. The trustees . . . shall receive no compensation . . . .

II. No amendment to the act of incorporation shall be accepted or observed by the Trustees . . . without the consent of the Mayor and City Council of Baltimore.

III. The terms of members of the Trustees . . . shall be limited . . . as provided for . . . by . . . Ordinance . . . No. [33-]400, approved March 8th, 1933.

IV. A copy of the by-laws . . . shall be filed with the Bureau of Legislative Reference, and shall be accessible at all times to the public.

V. The gallery shall be known in perpetuity as the Walters Art Gallery, and shall not . . . be merged or consolidated with any other institution; the objects of art in the custody of the Trustees . . . shall not be loaned to or exhibited in any other institution without the approval of the Mayor and City Council.

SECTION 4. *And be it further ordained*, That the Trustees . . . shall . . . [annually] make a report of the activities and operations of Walters Art Gallery, which report shall be . . . filed with the Board of Estimates and with each member of the City Council.

* * *

Approved June 16, 1933.

Ord. 33-468 §§ 1-4.

1959 Md. Laws, ch. 457 (H.B. 364)

In 1959, the General Assembly passed a law to expand Baltimore City's control over WAM. Specifically, Chapter 457, 1959 Laws of Maryland (H.B. 364) (hereinafter, "Chapter 457"), provides:

> Section 1. *Be it enacted by the General Assembly of Maryland*, That, in addition to the nine trustees of the Walters Art Gallery, Baltimore, MD., provided for by Section 4 of Chapter 217 of the Acts of the General Assembly of Maryland of 1933, of whom three are ex-officio, there shall be such ex-officio and elected trustees as may be authorized from time to time by ordinance of the Mayor and City Council of Baltimore.
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> Sec. 2. *And be it further enacted,* That this Act shall take effect June 1, 1959.
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> Approved April 8, 1959.

Chapter 457.

The "Walters Ordinance"

Today, WAM is governed by Article 18, Subtitle 14, of the Baltimore City Code (the "Walters Ordinance").[6] The Walters Ordinance provides for the acceptance of property and funds from the Safe Deposit and Trust Company of Baltimore, directs that WAM be used "for the benefit of the public, as directed by" the Will, and acknowledges that the General Assembly established the Trustees "as a body corporate" through Chapter 217. Walters Ord. §§ 14-1, 14-2, 14-6.

Section 14-7 of the Walters Ordinance limits the number of elected Board members ("elected members") to between six and forty and requires that the Mayor and President of the City Council of Baltimore be *ex-officio* members. *Id.* § 14-7(a). Elected members are elected by surviving members of the Board, including the *ex-officio* members, when there is a vacancy or the term of an elected member expires. *Id.* § 14-7(b)(3). The term of an elected member is 3 years. *Id.* § 14-7(b)(1).

[6] Article 18, as published online by Baltimore City as of August 5, 2024, is available at: https://perma.cc/3FVJ-UKVF.

The "powers and duties" of the Trustees are as "provided in Chapter 217, Laws of Maryland 1933" and Section 14-8 of the Walters Ordinance. *Id.* § 14-8(a). The Trustees "shall have full and complete control over the property and funds given to the City . . . by Henry Walters, as the agency through which" Walter's "intent" and "objects" are to be realized. *Id.* § 14-8(b). The Trustees may use the Walters Art Gallery "only for the benefit of the public" as directed by the Will. Walters Ord. § 14-8(c). Income from the trust established by the Will is payable to the Trustees as the "appointed agent of the Mayor and City Council of Baltimore[.]" *Id.* § 14-8(d)(1). The Trustees may expend these monies "for the purpose of maintaining the Walters Art Gallery for the benefit of the public[.]" *Id.* § 14-8(d)(3).

The Trustees are directed to annually "submit a report" of the "activities and operations of Walters Art Gallery to the Board of Estimates and each member of the City Council." *Id.* § 14-9. Additionally, the Walters Ordinance requires the Trustees to file WAM's bylaws with the City, to be "accessible at all times to the public." *Id.* § 14-12(b).

The Walters Ordinance prohibits the Trustees from "merg[ing] or consolidat[ing]" the gallery with another institution. *Id.* § 14-10. Moreover, the Ordinance expressly prohibits the Trustees from "sell[ing] or otherwise dispos[ing] of any work of art without the consent of the Mayor and City Council of Baltimore." *Id.* § 14-11(a). The Trustees *may* "loan[]" or "exhibit[]" art "owned by the Walters Art Gallery . . . in any other institution without the approval of the Mayor and City Council" if notice is provided to the Mayor and Board of Estimates of Baltimore City. Walters Ord. § 14-11(b).

Finally, the Walters Ordinance states that "[n]o amendment to the Act of Incorporation (Chapter 217, Laws of Maryland 1922) may be accepted or observed by the Trustees . . . without the consent of the Mayor and City Council of Baltimore." *Id.* § 14-12(a).

We supplement these facts in our discussion of the issues.

DISCUSSION

I.

Unit or Instrumentality of a Political Subdivision

a. Parties' Contentions

In their brief, Appellants assert that the circuit court erred by granting Appellees' motion for summary judgment and that, as a result, this Court must remand the matter with instructions for the circuit court to grant their cross-motion for summary judgment—effectively finding that WAM is not subject to the MPIA.

More specifically, Appellants indicate that the circuit court incorrectly applied the multi-factor test as set forth by *Moberly v. Herboldsheimer*, 276 Md. 211 (1975), and its progeny, discussed *infra*. Appellants acknowledge that, although there is no single factor for determining whether a statutorily-created entity is an agency or instrumentality of the State or the City, "all aspects of the interrelationship" between the government and the statutorily-established entity "must be examined in order to determine its status." (Quoting *A.S. Abell Pub. Co. v. Mezzanote*, 297 Md. 26, 35 (1983) (emphasis supplied by Appellants' brief removed).

Beginning with factors related to the City's control over WAM, Appellants acknowledge that WAM was created by law; however, they emphasize that Chapter 217 and the related ordinances of Baltimore City give the Trustees "full and complete control" over WAM's property.[7] (Citing Ch. 217 & Ord. 33-400). Under Chapter 217, the General Assembly provided the Trustees "all the powers . . . which are conferred by the Public General Laws of Maryland upon" Maryland corporations. (Quoting Ch. 217 § 4). These grants of authority, Appellants say, distinguish WAM from the cases in which entities have been held to be subject to the MPIA. Additionally, there is no express reservation of power in Chapter 217 or Baltimore City Code that provides the City or State the authority to dissolve the Trustees.

As pertains to governance, Appellants emphasize that the Walters Ordinance requires just two *ex-officio* members of the Board of Trustees—the Mayor and President

[7] Appellants assert in the factual background portion of their brief that "[t]hrough acquisitions and donations, WAM (not the City) now owns one-third of the total collection of 36,000 objects of art, with the original 22,000 objects owned by the City in accordance with the Will," and that "[f]ifty-four percent of the total square footage of the approximately 200,000 square foot campus is owned by WAM, with the remainder owned by the City but under the 'full and complete control' of WAM." Appellants cite, in support of these contentions, to an affidavit submitted in the underlying case by Appellant, WAM Director Marciari-Alexander. However, neither the affidavit nor Appellants' brief explain how the division of property ownership supports their contention that WAM is not an instrumentality of the City, given that all of the artwork and the properties are managed together and treated as one organization as reflected in the documents contained in the record. For example, the address of the "Trustees of the Walters Art Gallery, Inc." is 600 N Charles Street according to, among other things, the docket entry for "Defendant Party No. 1"; and the SDAT Real Property Data Search document in the record extract at page 65 lists the owner of the property at 600 N Charles as "Mayor & City Council." *See also*, record extract pp. 63-64 (SDAT Real Property documents for 1 W Mount Vernon Place and 5 W Mount Vernon Place showing "Mayor and City Council" as owner).

of the City Council of Baltimore—and that the Board is self-perpetuating. Although the Trustees must file WAM's by-laws with the City (Walters Ord., at § 14-12), the Board need not obtain City approval to amend its bylaws. Appellants claim that the requirement that the Trustees file a "retrospective" annual report with the City is also of no consequence, but merely "ministerial." Appellants provide examples of other private entities that are required by statute to file annual reports or their by-laws with the State, including public service companies, health benefit plans, and credit unions. Also "ministerial" are the requirements that WAM give the City notice before loaning art to other institutions.

Appellants state that the Trustees have "complete control" over WAM's budget and any expenditures; that the Trustees require no approval to enter contracts; and that WAM—not the City—is the employer of WAM's employees.

Moving onto considerations related to WAM's finances, Appellants emphasize that most of WAM's funding comes from endowments they say that WAM owns and from other private sources, rather than from the City or State. Moreover, the City is not required to bail out WAM if its finances become unstable.

Appellants also note that the Trustees, in managing WAM, do not perform a "traditionally governmental function."[8] (Citation omitted). Additionally, they claim that

[8] Appellants assert that the circuit court committed "an error of law in concluding that WAM serves a traditional governmental function by equating the requirement in Henry Walters' Will (and the City and State Laws) that the Museum be operated 'for the benefit of the public' with performing a governmental function and purpose." However, the circuit court did *not* make *that* finding. The court noted that a finding that an entity performs a "traditional public function" is a factor in considering whether that entity is the [Footnote Continued]

the City and State had "no choice" but to comply with the directive, as contained in the Will, that WAM and the endowment be used for the "benefit of the public[.]"

Finally, Appellants point out that neither Chapter 217 nor Maryland Code (1973, 2020 Repl. Vol), Courts and Judicial Proceedings Article ("CJP"), § 5-301, confer sovereign immunity upon the Trustees; that the City does not provide the Trustees legal counsel; and that WAM existed before the Trustees were incorporated by the General Assembly in 1933.

Appellees, of course, urge us to affirm the judgment of the circuit court. In their view, the fact that the Trustees were incorporated by a special act of the General Assembly is indicative of their status as an instrumentality of the City, as are the express requirements that WAM be used for the public's benefit. They assert that "no entity created by special enabling legislation has been held not to be a unit or instrumentality of the government under the [M]PIA."

The Appellees assert that the City has a large degree of control over WAM. For example, Section 14-10 of the Walters Ordinance prevents WAM from changing its name or merging with another institution. Chapter 217 refers to WAM as the "agency" of

instrumentality of the State or political subdivision. But the court also stated that "whether museums serve traditional public functions is immaterial here as Mr. Walters specifically designated that it was his will for the Walters to carry out a public function[,]" and the City "expressly implement[ed]" that purpose and function by requiring that WAM and its property "be used for the benefit of the public." (Citing Walters Ord., at § 14-2). In other words, in the view of the circuit court, just as a finding that an entity exercises a traditional governmental function may countenance a finding that the entity is an agency or instrumentality of the government, so too may an express directive from the government that the entity must operate for the benefit of the public.

Baltimore City, and provides that the Trustees may "agree" with the City as to the terms, conditions, and provisions by which the Trustees will "manage[] and administer[]" WAM and related assets. (Citing Chapter 217, at § 3). Appellees underscore that, unlike private cultural institutions, WAM must obtain City approval before it may sell or alienate any artwork. Additional considerations are that WAM must file annual and certain interim reports with the City, two *ex-officio* government officials serve on the Board, and the General Assembly has granted the City power to alter the makeup of the Board. Further, Appellees state that the City has provided "substantial resources" to WAM over the years. Recognizing, however, that the City does not have complete control over WAM and its day-to-day operations, Appellees, citing *Mezzanote*, 297 Md. at 35, reject the supremacy of the "control test" which Appellants argue is dispositive.

Appellees highlight WAM's tax exempt status and other benefits that WAM (and its employees) enjoy due to the fact that the Internal Revenue Service ("IRS") and United States Department of Education treat the "Trustees of the Walters Art Gallery" as a government instrumentality or agency.[9] It would be illogical, Appellees contend, to argue

[9] Appellees cite to several documents in the record on appeal in support of their contention that WAM has represented itself as a unit, agency, or instrumentality of the State or the City of Baltimore, including:

> 1) A letter from the Pensions and Exempt Organizations Branch of the IRS dated October 6, 1954, to the "Trustees of Walters Art Gallery" stating, in relevant part, "It is shown that you are a corporation created by an act of the Maryland State Legislature and operate as an agency of the Mayor and City Council of Baltimore . . . [s]ince you are an instrumentality of the State of Maryland you are not subject to Federal income tax returns."

[Footnote Continued]

that WAM is not a government unit or instrumentality "for the purposes of the broader definitions of the [M]PIA" when WAM "is a government unit or instrumentality for purposes of the strict and precisely defined Internal Revenue Code[.]"

Finally, the Appellees assert that the Trustees were incorporated for "municipal purposes" under Article III, Section 48, of the Maryland Constitution, and that—under *Moberly*, *supra*—this weighs in favor of finding the Trustees are subject to the MPIA.

b. Standard of Review

In reviewing a trial court's grant of a motion for summary judgment, the Supreme Court of Maryland has described the applicable standard of review as follows:

> Maryland Rule 2-501 states that, in reviewing a pre-trial motion for summary judgment, the court "shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). "With respect to the trial court's grant of a motion for summary judgment, the standard of review is *de novo*." *Daishiell v. Meeks*, 396 Md. 149, 163[] (2006). "Only when there is an absence of a genuine dispute of material fact will the appellate court determine whether the trial court was correct as a matter of

2) A letter from the Individual Income Tax Branch of the IRS dated May 7, 1965, to the Trustees ruling that, based on City Ordinance 33-400 and Chapter 217 passed in 1933, gifts made to the Trustees constitute contributions made to an organization described as a "governmental unit" under 26 U.S.C. §§ 170(b)(1)(A)(v).

3) A grant application submitted on behalf of WAM to the National Endowment for the Humanities indicating the type of applicant as a "Unit of State/Local Government."

4) Notes to WAM's financial statements for "June 30, 2017 and 2016[,]" "June 30, 2020 and 2019[,]" and "June 30, 2021 and 2020[,]" prepared by Ellen & Tucker, each stating that "As an instrumentality of the Mayor and City Council of Baltimore, the Museum is exempt from federal income taxes under sections of the Internal Revenue Code (IRC)."

> law." *Id.* A trial court does not have any discretionary power in granting a motion for summary judgment when there are no disputes of material fact. *Id.* at 164[.]

Webb v. Giant of Md., LLC., 477 Md. 121, 135 (2021). We "conduct an independent review of the record to determine whether a genuine dispute of material fact exists and whether the moving party is entitled to judgment as a matter of law." *Md. Cas. Co. v. Blackstone Int'l Ltd.*, 442 Md. 685, 694 (2015) (citation omitted). In so doing, "[w]e review the record in the light most favorable to the nonmoving party and construe any reasonable inferences that may be drawn from the facts against the moving party." *United Servs. Auto. Ass'n v. Riley*, 393 Md. 55, 67 (2006) (internal quotations omitted).

In this case, the parties do not dispute the material facts pertinent to our determination of whether WAM is an instrumentality of Baltimore City for the purpose of the MPIA. Therefore, our "sole task" is to determine whether the circuit court "was correct as a matter of law" in holding the MPIA applies to the WAM. *City of Balt. Dev. Corp. v. Carmel Realty Assocs.*, 395 Md. 299, 315 (2006).

c. Statement of Law

The MPIA governs access to public records. This access is intended to effectuate the policy, as set forth by the General Assembly, that "[a]ll persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees." GP § 4-101(a). Under Section 4-201(a):

In general

> (a)(1) Except as otherwise provided by law, a custodian shall allow a person or governmental unit to inspect any public record at any reasonable time.

> (2) Inspection or copying of a public record may be denied only to the extent provided under this title.

GP § 4-201(a). The MPIA defines "public record[,]" in pertinent part, as follows:

> (k)(1) "Public record" means the original or any copy of any documentary material that:
>
> (i) is *made by a unit or an instrumentality of the State or of a political subdivision or received by the unit or instrumentality* in connection with the transaction of public business[.]

GP § 4-101(k)(1) (italic emphasis added). The term "instrumentality" is not defined by the Act.[10] However, a municipality falls under the definition of a "political subdivision" as defined in subsection (j):

> (j) "Political subdivision" means:
>
> (1) a county;
> (2) a municipal corporation;
> (3) an unincorporated town;
> (4) a school district; or
> (5) a special district.

[10] The word "instrumentality" first appeared in the definition of "public record" in 1973 through amendments to what was then Article 76A of the Maryland Code. Specifically, as stated by the chapter law amending the language of Article 76A, § 1:

> (B) "PUBLIC records" when not otherwise specified shall include any . . . document . . . that have been made by . . . ANY BRANCH OF THE State . . . GOVERNMENT, INCLUDING THE LEGISLATIVE, JUDICIAL, AND EXECUTIVE BRANCHES, BY ANY BRANCH OF A political [subdivisions] SUBDIVISION, [thereof] and by any [agencies] AGENCY OR INSTRUMENTALITY of the State[, counties, municipalities, and] OR A political [subdivisions thereof] SUBDIVISION . . . .

1978 Md. Laws, ch. 1006 (H.B. 1326). In the above quote, language added to the statute by the chapter law is in all-caps, while language stricken from the statute is bracketed. The bill file accompanying this chapter law does not explain the reason the General Assembly substituted "agency or instrumentality" for the previous language, "agencies[.]"

GP § 4-101(j). We note that the MPIA contains various exceptions and restrictions on the disclosure of public records; however, because those provisions are not at issue in this case, we do not list them. *See generally*, GP §§ 4-201 *et seq.*

In general, "whenever a person . . . is denied inspection of a public record or is not provided with a copy . . . of a public record as requested, the person . . . may file a complaint with the circuit court." GP § 4-362(a)(1). The burden is on the defendant to sustain a decision to "deny inspection of a public record" or "deny the person . . . a copy" of the record. GP § 4-362(b)(2). A party who is aggrieved by a final judgment of the circuit court may appeal to the Appellate Court of Maryland. CJP § 12-301.[11]

The Maryland Supreme Court has established that "there is no single test for determining whether a statutorily-established entity is an agency or instrumentality of the State for a particular purpose[,]" and that "[a]ll aspects of the interrelationship between the State and the statutorily-established entity must be examined in order to determine its status." *A.S. Abell Pub. Co. v. Mezzanote*, 297 Md. 26, 35 (1983) (citations omitted); *see also Napata v. Univ. of Md. Med. Sys. Corp.*, 417 Md. 724, 734 (2011) ("[W]e favor[] a more comprehensive analysis.") (citation omitted). An entity will be found to be an instrumentality of the State or political subdivision if the "attributes" of the entity's "relationship with the State [or political subdivision] that point to its being an

[11] When a complaint is first filed with the State Public Information Act Compliance Board instead of a circuit court, appellate review of the circuit court's decision is available pursuant to GP § 4-362(g).

instrumentality . . . predominate over those pointing to its private character, for the purposes of the [entity's] inclusion in the scope of the [MPIA]." *Napata*, 417 Md. at 736-37. To discern the meaning of the term "instrumentality," the Supreme Court of Maryland has looked to its "ordinary and popular" meaning:

> The ordinary and popular meaning of the plain language of the [MPIA] statute does not require that an entity be established by a statute for it to be subject to the provisions of the MPIA. The statute only requires that the entity be a "unit or instrumentality" of the City for its provisions to apply.[] Instrumentality is defined as "the quality or state of being instrumental" and instrumental is defined as "serving as a means, agent, or tool." *Merriam Webster's Collegiate Dictionary* 607 (10th ed. 1998). Instrumentality is also defined as: "1. A thing used to achieve an end or purpose. 2. A means or agency through which a function of another entity is accomplished, such as a branch of a governing body." *Black's Law Dictionary* 814 (8th ed. 2004).

City of Balt. Dev. Corp., 395 Md. at 333 (footnote omitted).

Although there is "no single test" to determine whether an entity is an instrumentality of the State for a particular purpose, the Court has recognized that:

> [S]ome of the relevant factors include: the purpose of the entity (public or private); the degree of control exercised by the government over the membership and decision-making of the entity; and any special immunities from tax or tort liability granted the entity. Neither a disclaimer of agency status nor funding outside the budget process necessarily precludes status as a State agency or instrumentality. The goal of the analysis is to examine the relationship between the State and the entity, so these factors are not necessarily exhaustive.

Reliable Contracting Co., Inc. v. Md. Underground Facilities Damage Prevention Auth., 446 Md. 707, 724 (2016); *see also Napata*, 417 Md. at 734 ("[C]omplete control—control over all aspects of an entity's operation—is not a determinative factor in characterizing a

statutorily-established entity as an agency or instrumentality of the State." (quoting *Mezzanote*, 297 Md. at 35)).

The Supreme Court of Maryland has repeatedly asserted that the MPIA must be "liberally construed" to give effect to its "broad remedial purpose." *City of Balt. Dev. Corp.*, 395 Md. at 333 (quotation omitted). *See also, e.g.*, *Balt. Police Dep't v. Open Justice Balt.*, 485 Md. 605, 621 (2023) ("Consistent with this broad remedial purpose, the General Assembly requires that we construe the MPIA 'in favor of allowing inspection of a public record, with the least cost and least delay to the person or governmental unit that requests the inspection.'" (quoting GP § 4-103(b))). This general principle applies to the threshold question of whether the MPIA applies to a given entity because it is alleged to be the instrumentality of the State or a political subdivision. *See City of Balt. Dev. Corp.*, 395 Md. at 333.[12] Indeed, the Supreme Court instructed in *Mezzanote*, that "in determining

[12] In their opening brief, Appellants assert that the "liberal construction required by [GP] § 4-103(b) does not, by its terms, extend to the threshold question of whether an entity is a 'unit or instrumentality of the state or political subdivision[.]'" (Emphasis removed). The Supreme Court of Maryland's analysis in *City of Baltimore Development Corporation v. Carmel Realty Associates*, however, directs the *opposite* conclusion. 395 Md. 299, 331-233 (2006). In that case, the Court considered the predecessor to GP § 4-103(b), which provided that:

> *General Construction*. To carry out the right set forth in subsection (a) of this section, unless unwarranted invasion of the privacy of a person in interest would result, this Part III of this subtitle shall be construed in favor of permitting inspection of a public record, with the least cost and least delay to the person or governmental unit that requests inspection.

Id. at 332 (quoting Maryland Code (1984, 2004 Repl. Vol.), State Government Article, § 10-612(b)). Today, the text of GP § 4-103(b) is nearly identical to that language. The [Footnote Continued]

whether [an entity] is an agency or instrumentality of the State within the scope of the [MPIA], the language of [former Art. 76A] § 1(b) [which defined a public record as including a record made or received by "an agency or instrumentality of the State"] must be liberally construed in favor of inclusion in order to effectuate the [MPIA's] broad remedial purpose." *Mezzanote*, 297 Md. at 30, 32.

We note that Maryland's interpretation of what constitutes an "instrumentality" of the State or a political subdivision thereof subject to the MPIA is different from the considerations under federal law for what constitutes an "agency" of the executive branch subject to the Freedom of Information Act ("FOIA"). Generally, our decisional law recognizes that "the MPIA 'was to some extent modeled after the [Freedom of Information Act ("FOIA")], and the purpose of the MPIA is virtually identical to that of the FOIA." *Amster v. Baker*, 453 Md. 68, 79 (2017) (quoting *Immanuel v. Comptroller of Md.*, 449 Md. 76, 89 (2016)). Consequently, "when interpreting the MPIA, we generally give significant weight to the federal courts' interpretation of *similar* FOIA provisions." *Id.* (emphasis added) (citations omitted). We observe that none of the Maryland cases that have addressed the application of the term "instrumentality" on appeal cite to cases decided

Court in *City of Baltimore Development Corporation* observed that "holding that the [Baltimore City Development Corp. "BDC"] is an instrumentality of the City in consistent with our interpretation of the General Assembly's intent when it enacted the MPIA[,]" and that on "several occasions," the Court had "explained" the statute "must be liberally construed … in order to effectuate the MPIA's broad remedial purpose." *Balt. City Dev. Corp.*, 359 Md. at 332-33 (quotation and citations omitted). "Therefore, finding that the MPIA is applicable to the BDC is consistent with the stated purpose and intent of the statute[.]" *Id.* at 333.

under FOIA, most likely because the relevant statutory definitions, and the caselaw developed around them, are distinct.[13]

We now turn to examine five cases that steer our analysis, beginning with the earliest: *Moberly v. Herboldsheimer*, 276 Md. 211 (1975); *A.S. Abell Publishing Co. v. Mezzanote*, 297 Md. 26 (1983); *Andy's Ice Cream, Inc. v. City of Salisbury*, 125 Md. App. 125 (1999); *City of Baltimore Development Corporation v. Carmel Realty Associates*, 395 Md. 299 (2006); and *Napata v. University of Maryland Medical System Corporation*, 417 Md. 724 (2011).

[13] FOIA, which is codified at 5 U.S.C. § 552, imposes extensive requirements on federal "agenc[ies]" to make certain information available to the public. *See, e.g.*, 5 U.S.C. § 552(a)(1) (Each agency shall make available to the public information as follows . . . ."). FOIA defines "agency" as:

> (1) "agency" as defined in section 551(1) of this title includes any executive department, . . . Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency[.]

5 U.S.C. § 552(f)(1) (emphasis removed). The MPIA does not contain a definition of "agency," and the modern statute no longer refers to "agency" in the relevant definitions; rather, the MPIA defines "[p]ublic record" to include documents "made by a unit or an instrumentality of the State or of a political subdivision[.]" GP § 4-101(k)(1)(i). In turn, the federal analogue under FOIA does not refer to "instrumentality." Accordingly, Maryland appellate courts construing the breadth of the phrase "unit or . . . instrumentality" have developed a multi-factor test that is dissimilar from those applied in the federal context. *See e.g.*, *Dong v. Smithsonian Inst.*, 125 F.3d 877 (D.C. Cir. 1997) (considering whether the Smithsonian fell within the definition of "agency" as applied to the Privacy Act (5 U.S.C. § 552a), using the same definitions applicable in the FOIA context). *See also O'Rourke v. Smithsonian Inst. Press*, 399 F.3d 113, 120 (2d Cir. 2005) (construing *Dong*).

In *Moberly*, the Supreme Court of Maryland considered whether the Board of Governors of the Memorial Hospital (the "Hospital") of Cumberland was an "agency of the City of Cumberland and thus covered by the" the public information laws. *Moberly*, 276 Md. at 213. Several factors were important to the Court's determination that the Hospital was subject to our public information laws.

At length, the Court considered whether the Hospital had been created for a "municipal purpose[]" under Article III, Section 48 of the Maryland Constitution. *See id.* at 214-23, 225. The Maryland Constitution provides, in pertinent part:

§ 48. Formation of corporations.

> Corporations may be formed under general laws, but shall not be created by special Act, except for municipal purposes and except in cases where no general laws exist, providing for the creation of corporations of the same general character, as the corporation proposed to be created; and any act of incorporation passed in violation of this section shall be void.

MD. CONST., Art. III, § 48. Because the Hospital was created by special act, the Court reasoned that—lest the act be a nullity—the Hospital must either serve a municipal purpose or there must not have been any general law providing for the creation of a corporation of the same general character. *See Moberly*, 276 Md. at 225. The Court found that "the legislative charter of the [Hospital] contain[ed] no power that could not have been provided a private corporation under the general corporation laws of the State, and, therefore, under

Article III, Section 48 the charter can only be valid if it is one for municipal purposes[.]"[14] *Id.*

Looking beyond the municipal purposes provision of art. III, Sec. 48, the *Moberly* Court also considered whether the Hospital was subject to tort liability. *Id.* at 223-24. Through a 1929 amendment to the act creating the Hospital, "[a] change was made . . . so

[14] The Court explained:

> Maryland Constitution (1851) Art. III, s 47 provided that '(c)orporations m(ight) be formed under general laws, but sh(ould) not be created by special act, except for municipal purposes, and in cases where, in the judgment of the Legislature, the object of the corporation c(ould) not be attained under general laws.' Constitution (1864) Art. III, s 51 was to the same effect. However, Constitution (1867) Art. III, s 48, in addition to the language we quoted earlier in this opinion, as originally adopted provided that 'as soon as practicable, after the adoption of th(at) Constitution, it sh(ould) be the duty of the Governor to appoint three persons learned in the Law, whose duty it sh(ould) be, to prepare drafts of general Laws, providing for the creation of corporations, in such cases as m(ight) be proper, and for all other cases, where a general Law c(could) be made . . ..' *See* the history of the Maryland general law as to corporations set forth in J. France, Principles of Corporation Law (2d ed. 1914) 27.

Moberly, 276 Md. at 216 (alterations in original). The Court then examined the history of the State's efforts to pass general laws that greatly expanded the purposes for which persons may incorporate under the general laws. *See id.* at 216-23. The Court resolved that,

> We perceive and have been cited to no provision in the legislative charter of the Hospital here under consideration (including the provision for ex officio membership on the Board of Governors) that could not have been placed in the charter or bylaws or both of a corporation established under the general corporation laws.

Moberly, 276 Md. at 221-23.

that the Board of Governors [of the Hospital] was added to the exemption from tort liability." *Id.* at 216.

Another consideration was the degree to which the Hospital was subject to government control. *Moberly*, 276 Md. at 224. The Court noted that, among other things, although the Hospital's board of governors was self-perpetuating in that it was authorized to fill its own vacancies, it could not "make any addition" to the Hospital or "increase [its] capital account" without "the consent of the Mayor and City Council of Cumberland" "unless such addition or increase . . . be by donation of individuals[.]" *Id.* at 215, 224 (quotation omitted). Additionally, the board was required to "furnish to the Mayor and City Council at the end of each six months a statement showing the receipts, disbursements and general financial condition of said Hospital." *Id.* at 224 (quotation omitted).

The Court also considered the financial relationship between the Hospital and the City of Cumberland. For example, the State statute and the Cumberland City Code enabled "the Mayor and City Council of Cumberland" to "appropriate . . . such amount so deemed necessary" "in the event that a deficit sh(ould) be found to exist in [the] operation and maintenance" of the Hospital. *Id.*[15]

When combining the fact that the hospital was created for municipal purposes with these other factors, the Court asserted, "the conclusion is inescapable that this Hospital is

[15] We note that the *Moberly* Court also considered how the General Assembly had taken "specific action" to "repeal all parts of the charter of the City of Cumberland inconsistent with" its enactments related to the Hospital. *Moberly*, 276 Md. at 225.

an agency of the City of Cumberland and, therefore, subject to the public information law." *Id.* at 225.

In *Mezzanote*, the Court held that the Maryland Insurance Guaranty Association ("MIGA") was an agency or instrumentality of the State within the scope of the MPIA. 297 Md. 26 (1983). We summarized the facts of *Mezzanote* in *Daughton v. Maryland Auto Insurance Fund*:

> MIGA was established in 1971 by the General Assembly as a "nonprofit unincorporated legal entity" to "protect the public by avoiding financial loss to policyholders and claimants resulting from the insolvency of insurers and by preventing insurer insolvencies." [*Mezzanote*, 297 Md. at] 32[.] The case arose after a newspaper reporter submitted a [MPIA] request to the Chairman of MIGA's Board of Directors. The request was denied on the basis that MIGA was not an agency or instrumentality of the State and, as such, was not subject to the [MPIA]. The newspaper publisher filed suit against MIGA. MIGA moved for summary judgment, asserting that it was "not sufficiently controlled by the State to be characterized as an agency or instrumentality of the State." *Id.* at 30[.] The circuit court granted judgment in favor of MIGA and the publisher appealed.
>
> Before the appeal could be heard in [the Appellate Court of Maryland], the [Supreme] Court of [Maryland] granted *certiorari*.

198 Md. App. 524, 539 (2011) (footnote omitted).

As previously mentioned, the *Mezzanote* Court began its analysis of "whether MIGA is an agency or instrumentality of the State within the scope of the Public Information Act," by noting that the MPIA "'shall be broadly construed in every instance with the view toward public access[.]'" *Mezzanote*, 297 Md. at 32, 34 (quoting Maryland Code (1957, 1980 Repl. Vol. & 1982 Cum. Supp.), Art. 76A, § 1A). The Court "liberally

construed" the Act's provisions in favor of finding that MIGA was an agency or instrumentality of the State. *See id.* at 39.

The Court then turned to the factor of government control. The Court rejected MIGA's contention that "the true test of whether an entity is a State instrumentality is whether that entity is under the complete control of the State." *Id.* at 34. Instead, citing to cases that arose in the sovereign immunity and equal protection contexts, the Court clarified that a "statutorily-established entity" may be "an agency or instrumentality of the State[] notwithstanding the fact that the State did not exercise control over all aspects of the entity's operation."[16] *Id.* at 35 (citations omitted). Thus, "complete control . . . is not a determinative factor" and, instead, "[a]ll aspects of the interrelationship between the State

[16] The Court observed that "MIGA is vested with broad authority." *Mezzanote*, 297 Md. at 33. Among MIGA's powers and duties, the Court noted that it was required to, among other things, to pay claimants for covered claims; levy assessments on member insurers; hire staff to process claims. *Id.* at 33. MIGA could sue and be sued, enter contracts, and perform other necessary acts. *Id.* It was exempt from State and local tax (except property tax), and exempt from liability for actions taken in the execution of its duties. *Id.* MIGA's board of directors could delegate its powers and approve and revoke member insurers' status as a servicing facility for the handling of claims. *Id.* The State Insurance Commissioner of Maryland ("Commissioner") was also "vested with broad authority[,] including the duty to approve plans of operation and amendments proffered by the board and the ability to—in certain circumstances—promulgate rules. *Id.* The Commissioner was also empowered to hear and decide appeals from member insurers aggrieved by MIGA's final actions and revoke the ability of a member insurer to operate in Maryland. *Id.* at 34. Member insurers were required to comply with the plan of operation submitted by MIGA's board and approved by the Commissioner. *Id.* MIGA was required to submit annual financial reports to the Commissioner and was subject to "examination and regulation" by the Commissioner. *Id.*

and the statutorily-established entity must be examined[.]" *Id.* (citations omitted). Indeed, the Court recounted that, in *Moberly*:

> this Court did not regard the City's lack of complete control over the Hospital's operation as dispositive. Rather, it took into account all aspects of the interrelationship between the City and the Hospital, including the Hospital's public purpose, the degree of control exercised by the City, and the Hospital's immunity from tort liability. The Court there held that, although the City did not exercise complete control over the Hospital's operation, the Hospital was nonetheless an agency of the City.

Id. at 37 (construing *Moberly*).

Turning to the facts of the case at hand, the Court emphasized that the General Assembly afforded MIGA a "special status by exempting it from State and local taxes other than property taxes" as well as "from liability for actions taken in the performance of its duties." *Mezzanote*, 297 Md. at 38. MIGA also "serve[d] a public purpose," namely, the protection of insurance claimants, policyholders, and the larger public "by preventing member insurer insolvency and paying claimants" for certain covered claims. *Id.* at 37-38. Moreover, the fact that the General Assembly had not "expressly characterized MIGA as an agency or instrumentality of the State" was "not determinative of MIGA's status." *Id.* at 39. The Court summarized:

> MIGA's existence depends upon the General Assembly; it serves a public purpose, its management is selected by the Commissioner, and is not self-perpetuating; it does not independently manage its affairs or enforce its regulations; its decisions may be reversed by the Commissioner; and it enjoys a special tax and liability status. We recognize that the State does not exercise control over all aspects of MIGA's operation. Nevertheless, the degree of control exercised by the State over MIGA's operation exceeds the degree of control exercised by the City over the Hospital's operation in *Moberly*.

Id. at 38-39. The Court held, "[a]fter examining all aspects of the interrelationship between the State and MIGA," that "MIGA is an agency or instrumentality of the State within the scope of the [Maryland] Public Information Act." *Id.* at 39. The Court reversed the judgment of the circuit court and remanded the matter for further proceedings. *Id.* at 41.

In *Andy's Ice Cream, Inc.*, this Court held that the Salisbury Zoo Commission, Inc. ("Zoo Commission"), was an instrumentality of the City of Salisbury and, thus, was subject to the MPIA as it then-existed. 125 Md. App. 125 (1999). In that case, Andy's Ice Cream, Inc., which had been denied a contract to sell food in a park near the Salisbury Zoo, complained that the Zoo Commission failed to comply with the MPIA during the contract bidding process. *Id.* at 130-31. After the Circuit Court for Wicomico County ruled in favor of Andy's Ice Cream on the MPIA issue, the Zoo Commission appealed. *Id.* at 131.

We determined that the "dispositive issue" in determining the MPIA's applicability to the Zoo Commission was whether the Commission was a "unit or instrumentality . . . of a political subdivision" under then-Maryland Code (1984, 1997 Cum. Supp.), State Government Article ("SG"), § 10-611(g)(1)(i). *Id.* at 139. As in *Mezzanote* and *Moberly*, we undertook to examine "[a]ll aspects of the interrelationship" between the Zoo Commission and Salisbury. *Id.* (quoting *Mezzanote*, 297 Md. at 35).[17] In conducting this analysis, we compared the Zoo Commission to the entities at issue in *Mezzanote* and *Moberly*:

[17] Although the Zoo Commission was not a "statutorily established entity[,]" we stated that the *Mezzanote* analysis was "instructive[.]" *Andy's Ice Cream*, at 140.

> Although the Zoo Commission differs in some ways from MIGA, the two entities share similar attributes, and the interrelationship of the Zoo Commission with the City satisfies the standard that the [*Mezzanote*] Court set for the application of the [MPIA]. Like MIGA, the Zoo Commission "is not authorized to manage its affairs independent of government control," [*Mezzanote*], 297 Md. at 38[,] in that the Mayor and City Council have veto power over the Zoo Commission's proposals. The Zoo Commission has to submit its budget to the Mayor and City Council, and the Mayor and City Council have to approve any major departures from that budget. The Zoo Commission, like MIGA, is composed of members appointed by a governmental body or executive. Just as MIGA's "plan of operation" is "subject to approval and amendment by the Commissioner," the Zoo Commission's By–Laws can be changed unilaterally by the Mayor and City Council, whereas any change the Zoo Commission's members propose for the By–Laws requires the approval of the Mayor and City Council. The Mayor and City Council may dissolve the Zoo Commission.
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> Unlike the Board of Governors in *Moberly*, the Zoo Commission is not self-perpetuating. The Mayor and City Council of Salisbury appoint the Zoo Commission's members, and can dissolve the Zoo Commission at will. The Zoo Commission must receive the City's approval before altering its own By–Laws or making "major departures" from its budget. If anything, the *Moberly* Board of Governors had greater autonomy than the Zoo Commission.

Andy's Ice Cream, 125 Md. App. at 141-42. As indicated, our discussion focused heavily on the degree to which Salisbury could control the Zoo Commission. *See id.* Based on that analysis, we held that the Zoo Commission was "obligated to adhere to the [MPIA]." *Id.* at 142 (citation omitted).

In *City of Baltimore Development Corporation*, the Supreme Court of Maryland held that the City of Baltimore Development Corporation ("BDC"), a not-for-profit real-estate development corporation that had not been statutorily created, was subject to the MPIA as an instrumentality of Baltimore City. 395 Md. 299 (2006). The BDC was formed in 1991 with three members and the initial board was composed of four individuals. *Id.* at

308. In 1999, a City ordinance gave the BDC, "'acting pursuant to its contract with the Mayor and City Council,' certain responsibilities with respect to" a project in the Westside section of Downtown Baltimore. *Id.* at 311 (footnote omitted). Pursuant to that authority, the BDC "solicited requests for proposals . . . to develop" what is commonly referred to as the "Superblock[.]" *Id.* at 313.

Subsequently, on two occasions, Carmel Realty Associates and other entities who "submitted development proposals to the BDC" submitted requests, under the MPIA, for access or to be provided various information related to the BDC's consideration of those proposals. *Id.* The BDC asserted that it was not subject to the MPIA. *Id.* Carmel Realty and others filed a complaint in the Circuit Court of Baltimore City that alleged, among other things, that the BDC was subject to the Act. *Id.* at 314.

The parties filed cross-motions for summary judgment and, following a hearing, the circuit court granted BDC's motion. *Id.* This Court reversed the judgment of the circuit court in an unreported opinion, finding that the MPIA applied to the BDC. *Id.* The Supreme Court of Maryland granted writ of certiorari. *See City of Balt. Dev. Corp.*, 395 Md. at 314.

Once again, the "dispositive issue" to determine the applicability of the MPIA was "whether the BDC [was] an 'instrumentality' of Baltimore City." *Id.* at 332. The BDC argued that the determining factor was whether the BDC was created by law. *Id.* The Court reconfirmed precedent establishing that "[t]here is no one factor" that is dispositive,

id. at 334, and held that the BDC was an instrumentality of Baltimore City for the following reasons:

> The BDC's Board of Directors, to include the Chairman of the Board, are nominated or appointed by the Mayor of Baltimore; he [or she] has the power to remove members of the Board before their four year terms are up; the Mayor also has the power to fill vacancies; the City's Commissioner of the Department of Housing and Community Development and the City's Director of Finance are permanent members of the Board; the BDC receives a substantial portion of its budget from the City; the BDC has a tax exempt status under the Internal Revenue Code; pursuant to the City's contract with the BDC, if it should cease to exist, the City would control the disposition of the BDC's assets; BDC is also authorized to prepare and adopt Urban Renewal Plans, Planned Unit Developments, Industrial Retention Zones, and Free Enterprise Zones which are traditionally governmental functions. We also note that the City Solicitor represented the BDC in this matter. Thus, even though the BDC was not created by a legislative act, the factors listed above demonstrate that the BDC is subject to substantial control by the City because of how closely the two are intertwined. Therefore, even if the statute is ambiguous, which it is not, and the test applied in *Moberly* and *Mezzanote* was controlling—even under that test—the BDC is, in essence, an instrumentality of the City.

Id. at 335 (footnotes omitted). Following a familiar tread, the Court's analysis focused on the degree to which Baltimore City could control the BDC; the degree to which BDC was publicly funded; BDC's tax exempt status; its public-oriented purpose; and the governmental nature of its functions. *See id.*

Finally, in *Napata*, the Supreme Court of Maryland determined that the University of Maryland Medical System Corp. ("UMMS") was an instrumentality of the State for the purposes of the MPIA because "the attributes of UMMS's relationship with the State that point to its being an instrumentality of the State predominate over those pointing to its private character, for purposes of the corporation's inclusion in the scope of the [MPIA]."

417 Md. 724, 736-37 (2011). Ultimately, however, UMMS was not subject to the MPIA for an unrelated reason, as we note below. *See id.* at 739-40.

Napata arose after the racketeering conviction of former State Senator Thomas Bromwell. *Id.* at 731. The appellant, Napata, attempted to use the MPIA to obtain information related to Bromwell's "role in influencing the awarding of a UMMS construction contract[.]" *See id.* UMMS denied Napata's request and asserted that it was not subject to the MPIA. *See id.* Napata filed an action in the Circuit Court for Baltimore City but, on both a motion for summary judgment filed by Napata and a motion to dismiss filed by UMMS, the court ruled in favor of UMMS, finding that UMMS was not subject to the MPIA. *Id.*

On appeal, this Court affirmed the circuit court's judgment. *Napata*, 417 Md. at 731-32. We "agreed with Napata that UMMS was an instrumentality of the State," but "concluded UMMS was exempt from the [MPIA] because [UMMS's] enacting statute expressly provided that [it] was not subject to laws affecting only governmental or public entities." *Id.* at 732. (construing *Napata v. Univ. of Md. Med. Sys. Corp.*, 188 Md. App. 732 (2009), *aff'd*, 417 Md. 724 (2011)). Napata appealed to the Supreme Court of Maryland, and the Court affirmed our judgment. *Id.* at 739-40. Although UMMS was "a unit or instrumentality of the State[,]" it was "otherwise exempt from the [MPIA] by law." *Id.* at 733-40.

Here relevant is the Supreme Court's analysis of whether UMMS was an instrumentality of the State. *Id.* at 733-37. After summarizing pertinent portions of *City*

of Baltimore Development Corporation, *Moberly*, *Andy's Ice Cream*, and *Mezzanote*—all discussed *supra*—the Court stated that:

> [W]e agree with the [Appellate Court of Maryland] that "the attributes of UMMS's relationship with the State that point to its being an instrumentality of the State predominate over those pointing to its private character, for purposes of the corporation's inclusion in the scope of the [MPIA]." UMMS did not exist until the State assets were transferred to the corporation. Its aim of providing health care to the local community, as well as a teaching hospital to University students, and Maryland residents serves a public purpose. Moreover, the State remains a visible and compelling force in UMMS's operations. All voting members on UMMS's Board of Directors are appointed by the Governor, and two of these flow from nominations by the respective leaders of each legislative chamber. Additionally, unlike an independent hospital, UMMS is not free to compete with the University for private gifts or private or federal grants, and its annual contracts must be approved by the Regents of the University. Should UMMS become financially unstable, the Treasurer may loan State funds to UMMS as necessary. Finally, the Regents and the Board of Public Works have the power to dissolve UMMS if they determine that it is not fulfilling its purpose. In that event, UMMS's assets will revert to the State. These facts compel the conclusion that UMMS is an instrumentality of the State.

Id. at 737 (footnotes omitted). Despite finding that UMMS was an instrumentality of the State, the Court ultimately held that UMMS was not subject to the MPIA because the Education Article of the Maryland Code expressly provided that UMMS "shall not be a State agency, political subdivision, public body, public corporation or municipal corporation and is not subject to any provisions of law affecting only governmental or public entities." *Napata*, 417 Md. at 737-40 (quotation omitted).

d. Analysis

At the outset, we accept that it is undisputed that WAM was created by law in 1933 by a special act of the General Assembly and the related ordinances of Baltimore City.

Although the art gallery itself predated the incorporation of the Trustees, WAM "did not exist until" assets that the Will left to the City "were transferred to the corporation."[18] *Napata*, 417 Md. at 737. These facts alone, of course, do not make the WAM subject to the MPIA. *See Mezzanote*, 297 Md. at 35. For the reasons set forth below, however, we find that the "attributes" of WAM's "relationship with" Baltimore City "predominate over those pointing to its private character[] for purposes of" WAM's "inclusion in the scope of the [MPIA]." *Napata*, 417 Md. at 736-37. We will therefore affirm the judgment of the Circuit Court for Baltimore City.

Public Purpose

The Trustees were created to serve a public purpose, as is made abundantly clear by the Will, the ordinances of Baltimore City, and Chapter 217.

The Will states that Walters gave his art gallery and all of the contents of 5 West Mount Vernon Place and 100 Center Street to the City for the "benefit of the public[.]" To support the City in that endeavor, the Will established an "endowment fund" to make

[18] Appellants assert that in previous cases, entities that were found subject to the MPIA owed their "*entire* existence to the State or local government and the property owned by the entity was not previously owned by a private individual." (Citing *Napata*, 417 Md. at 728-29; *City of Balt. Dev. Corp.*, 395 Md. at 308 n.6; *Andy's Ice Cream, Inc.*, 125 Md. App. at 131-32; *Mezzanote*, 297 Md. at 32-33; and *Moberly*, 276 Md. at 214-16). Even if true, we are unpersuaded that this distinction should impact our analysis; we note, however, that the BDC was incorporated by four individuals, not the Mayor and City Council, and that it is not uncommon that private corporations and individuals donate land and buildings to the public.

quarterly distributions to "the Mayor and City Council of Baltimore for the purpose of maintaining the Walters Art Gallery given to the City . . . for the benefit of the public."[19]

Ordinance 33-400 also reflects the Trustees' public purpose. The City stipulated that the Walters Art Gallery and the endowment be used "for the benefit of the public."

[19] In contrast, for example, the Metropolitan Museum of Art in New York City was not expressly incorporated for a public purpose. *See Metropolitan Museum Historic Dist. Coalition v. De Montebello*, 796 N.Y.S. 2d 64, 65 (N.Y. App. Div. 2005). In *De Montebello*, the court held the museum was not subject to New York's freedom of information law. *Id.* at 70-71. The law applied to "agenc[ies,]" defined as: "Any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature." *Id.* at 71 (citation omitted). Applying this definition, the court noted that:

> The record herein reveals that the Museum is a not-for-profit educational corporation controlled by a Board of Trustees consisting of 40 self-elected individuals. The City retains no authority to hire or fire the Museum's Director or President, and no City representatives sit on the Executive Committee of the Board, although five of seven ex-officio Trustees are City officials. Moreover, the Museum's operating and capital budgets are primarily privately funded, and its budgets are not subject to City approval or public hearings.
>
> Since, as Supreme Court correctly held, the Museum is not controlled by municipal officials, there is no danger that they can act through the Museum in order to shield their actions from public scrutiny, and [the Freedom of Information Law's] overriding purpose of promoting "open and accessible government . . . a hallmark of a free society" [citation omitted] is not implicated.

Id. The Court noted that the museum, originally founded by private citizens, was later incorporated by the State in 1871 "for the purpose of establishing and maintaining in [the] city a museum and library of art, of encouraging and developing the study of the fine arts, and the application of arts to manufacture and practical life[,]" and that for many years, "most of the public could not gain admittance." *Id.* at 65-66 and n.1.

Ord. 33-400 § 2. To effectuate that intent, the City established the Trustees "as the *agency* through which the directions and intent of [Walters] shall be obeyed, and his objects realized." *Id.* § 3 (emphasis added). [20] The City also made it "the duty of the trustees to adopt rules and regulations for the management and maintenance" of the Walters Art Gallery "for the benefit of the public." *Id.* § 5.

Chapter 217 is in accord. As in *Moberly*, the Trustees were created by a special act of the General Assembly and thus, under Article III, Section 48, of the Maryland Constitution, that act of incorporation is valid only if the Trustees were formed "for municipal purposes" or, alternatively, if in 1933 "no general laws exist[ed], providing for the creation of corporations of the same general character[.]" MD. CONST., Art. III, § 48.

The *Moberly* Court noted that, in 1908, the General Assembly significantly expanded the public's ability to form a corporation under the general laws and that, since that expansion, it will only "rarely" be possible for the General Assembly to form a corporation by special act under the 'no general laws' exception to Article III, Section 48, of the Maryland Constitution. *Moberly*, 276 Md. at 217 (quoting J. FRANCE, PRINCIPLES

[20] The Dissent states: "The facts in this case are pellucid that the City received a bequest but determined that it did not want to operate an art museum as a city agency." Dis. op., *infra*, at 12**.** We read the record differently. We view the primary purpose of the City ordinances discussed above as to establish the Trustees to manage and operate the museum on behalf of the City. As evidence of this purpose, Ordinance No. 33-400 refers to the "Walters Art Gallery" as an "agency" of the City. *See* Ord. 33-400 § 3. And in Chapter 217, the General Assembly states its intent "that the corporation created by this Act shall be the **agency *of* the Mayor and City Council of Baltimore**[.]" Ch. 217 § 2 (emphasis added).

OF CORPORATION LAW 29 (2d ed. 1914)). Put simply, nearly every flavor of corporation could be formed under the general laws after 1908 and thus, it would not have been necessary to resort to a special act to confer upon a corporation "special powers . . . [which would] make[] a special charter valid." *Id.* (quoting J. FRANCE, *supra*, at 28). *See also,* James J. Hanks, *Maryland Corporation Law* (2d ed. 2020) (2022 Supp.)*,* § 1.03 (the problem that too many special charters were being passed by the General Assembly to address corporate provisions not contained in the general laws "was not corrected until 1908 when the General Assembly authorized a corporation created under general law to exercise all proper powers, thus making special powers unnecessary for this purpose.")

In this case, as in *Moberly*, "[w]e perceive and have been cited to no provision in the legislative charter of [WAM] here under consideration (*including the provision for ex officio membership* on the Board of Governors) that could not have been placed in the charter or bylaws or both of a corporation established under the general corporation laws." *Id.* at 223 (emphasis added). Thus, we "construe [WAM's charter] so as to render it effective . . . so as to avoid conflict with the Constitution whenever that course is reasonably possible." *Id.* at 217 (citations omitted). In other words, under the circumstances here, to avoid the conclusion that the Trustees were incorporated in violation of Article III, Sec. 48, of the Maryland Constitution, we construe Chapter 217 as having incorporated the Trustees for a "municipal purpose[.]" MD. CONST., Art. III, § 48. And, as in *Moberly*, the conclusion that WAM was incorporated by special act for a municipal

purpose weighs strongly in favor of our ultimate conclusion that WAM is subject to the MPIA.[21] *See Moberly*, 276 Md. at 225.

[21] Much of the Dissent rests on the contention that "[n]o provision existed in the general law for the appointment of . . . governmental officers as ex-officio board members." Dis. op., *infra*, at 8 (quoting *Moberly*, 276 Md. at 228 (Murphy, C.J., dissenting)). In the Dissent's view, this "provide[s] the rationale for the General Assembly exercising its judgment to create the Trustees by special Act." *Id.* However, the five-judge majority in *Moberly* explicitly held that a corporation with such a bylaw could be established under the general laws during this period. 276 Md. at 223. Based on our own review of the 1924 corporation laws, we perceive no reason to contravene this binding authority.

The Dissent also argues that the classes of corporations able to be formed in 1908 did not include "charitable organizations for educational and cultural purposes." Dis. op. *infra*, at 20. Although the 1908 statute lists some classes of corporations to which more specific provisions apply—such as bridge companies, mining companies, and railroad companies—it provides that a corporation can be formed "for any one or more lawful purposes, except such as are excluded from the operation of a general law by the constitution of this State." Maryland Code (1924) Art. 23, § 3. Indeed, in *Moberly*, the Supreme Court of Maryland held that a hospital could have been incorporated under the general laws despite the lack of any specific provision for hospitals. 276 Md. at 222-23. And various portions of the statute clearly contemplate the formation of a charitable corporation under the general laws. For example, Section 132 states:

> When the value of the property owned by any **charitable or benevolent society or corporation, incorporated under any *general* or special law of this State**, or the income of such charitable or benevolent society from such property was, when the said property was acquired within the limit or limits prescribed by law for the tenure and enjoyment of such property or income, but has hereafter increased in value, such benevolent or charitable association or corporation may lawfully hold, enjoy, use and deal with the increased value of said property or property derived therefrom, or with the increased income derived therefrom, for its said charitable and benevolent purposes in the same manner and to as full an extent as it might have enjoyed, used or dealt with said property or income, if the value of said property, or the amount of income derived therefrom, had not so increased.

Maryland Code (1924) Art. 23, § 132 (emphasis added). In sum, there is no doubt that a charitable organization for educational, cultural, or any other benevolent purpose could have been incorporated under the general laws in 1933.

Here, the General Assembly recognized that, via the Will, Walters gave the Walters Art Gallery and the endowment income to the City. Ch. 217 (preamble). The Act expressly stated that, in incorporating the Trustees, it was the General Assembly's intent that the Trustees be "*the **agency of** the Mayor and City Council of Baltimore* through which the directions and intent of Henry Walters shall be obeyed, and his objects realized." *Id.* § 2 (emphasis added). As already discussed, Walters intended that the Walters Art Gallery be used for the "benefit of the public." The Act further recognized that any "payment of income made by the Safe Deposit and Trust Company" from the endowment to the Trustees "*shall have the same effect as a payment to the Mayor and City Council of Baltimore*," provided "said Corporation is authorized by ordinance of the Mayor and City Council of Baltimore to receive such payment or payments on behalf of the Mayor and City Council of Baltimore[.]" *Id.* § 4 (emphasis added).

Ordinance 33-468 then "transferred" the powers and duties conferred by Ordinance 33-400 to the newly incorporated Trustees following the passage of Chapter 217 and reiterated that the endowment be used "for the purpose of maintaining" the Walters Art Gallery "for the benefit of the public[.]" Ord. 33-468 § 2.

To this day, the Walters Ordinance provides that the Trustees have control of WAM and its assets "as the agency through which the directions and intent of [Walters] are to be obeyed and his objects realized[,]" that WAM must be used "only for the benefit of the public," and that, likewise, the endowment must be used "for the purpose of maintaining [WAM] for the benefit of the public[.]" Walters Ord. § 14-8(b)-(d).

We are not persuaded by Appellants' argument that WAM does not serve a public purpose because the City and General Assembly were merely complying with Walters' Will. For example, in their opening brief, Appellants state:

> [T]he requirement to operate the museum for the benefit of the public originated with Henry Walters . . . [and] not with the City or State. . . . [T]he fact that Chapter 217 and Ordinance 33-400 incorporate the same requirement to operate the Museum for the benefit of the public does not demonstrate that WAM performs a traditional governmental function. This requirement simply conforms to the terms of the bequest from Henry Walters, which left the City and State with no choice in the matter.

Similarly, in their memorandum in support of their cross-motion for summary judgment, and in opposition to Appellees' motion for summary judgment, Appellants stated that:

> WAM was incorporated by State law, but not at the initiative of the State or City to carry out a public purpose conceived by the State or City, but solely in order to comply with Henry Walters' Will, who made the decision to donate his art gallery to the City on the condition that it be used only "for the benefit of the public."

Appellants fail to appreciate that an individual—even if influential or popular—cannot, by operation of their will, compel the government to take legislative action. And even if the operation of a museum does not constitute a traditional government function, the Supreme Court of Maryland previously "ha[d] no hesitation in holding" that a "public use" was served by condemning property to construct an addition to the Star Spangled Banner Flag House in Baltimore, stating that "whether the property is operated by a private patriotic association or not, does not affect the use, which is public, and can be of great educational value and inspiration." *Flaccomio v. Mayor & City Council of Balt.*, 194 Md. 275, 280-81 (1950). In this case, WAM also clearly serves a public use and purpose. *See*

also Reliable Contracting, 446 Md. at 724 (indicating that "the purpose of the entity (public or private)" is a factor in whether the entity is a government instrumentality for a particular purpose).[22]

[22] The Dissent discusses the General Assembly's practice of creating private corporations for a charitable "public" purpose prior to 1908. *See* Dis. op., *infra*, at 2-3 (citing *Regents of the Univ. of Md. v. Williams*, 9 G. & J. 365 (1838)). The Dissent gives the example of the Washington County Hospital Association, which was incorporated as a private corporation by legislative charter in 1904**.** *See* Dis. op., *infra*, at 2. We do not dispute that the General Assembly had the power to create such a private corporation in 1904. Nor do we dispute that the General Assembly had the power to amend the Washington County Hospital Association's charter to make it a public corporation in 1933. *See id.* at 3.

The Dissent points out that a corporation may be private, and still be incorporated to provide a public benefit. Dis. op., *infra*, at 3. We do not disagree. However, the *General Assembly*'s authority to incorporate a private corporation for a charitable purpose was reduced drastically after Article III, Sec. 48 was added to the Constitution in 1851, and after the general laws were expanded in 1908.

The Dissent misunderstands our argument as turning on the ratification of the amended Section 48 in 1891. Dis. op., *infra*, at 10 n.5. In fact, the critical year is 1908, when the general laws were expanded. As explained in note 21 above, the General Assembly greatly expanded the general laws in 1908 to allow anyone—not just the State—to form a private corporation for a charitable public purpose. Therefore, after 1908, any such private corporation created by the General Assembly could run afoul of Article III, Sec. 48, unless it were formed "for municipal purposes." Although the General Assembly may have ignored Section 48 in some instances—as described in note 6 of the Dissent—that does not change our obligation to "avoid conflict with the Constitution whenever that course is reasonably possible." *Moberly*, 276 Md. at 217.

We are not convinced by the Dissent's interpretation of Judge Friedman's treatise on the State Constitution. Dan Friedman, *The Maryland State Constitution* (2011). As we understand it, Judge Friedman's conclusion that the first sentence of Article III, Sec. 48 is now obsolete makes perfect sense because, as explained above, private corporations no longer need the General Assembly to establish their charters. Municipalities, as well, no longer require the General Assembly to adopt special charters because they have the power to charter corporations for municipal purposes under Article XI-E, rather than by a special charter passed by the General Assembly. Article XI-E was enacted in 1954, *id.* at 331, and therefore did not apply in 1933 when WAM was incorporated by the General Assembly. The third sentence in Section 48, which was not adopted until 1891, concerns a different

[Footnote Continued]

Control

The City has, in some respects, exercised less direct control over WAM than the government had over the entities at issue in the cases that we discussed above. For example, unlike in *Napata*, where UMMS's "annual contracts must be approved by the Regents of the University[,]" there is no similar requirement in this case. *Napata*, 417 Md. at 737. Unlike in *Andy's Ice Cream*, the City is not required to approve WAM's budget. *Andy's Ice Cream*, 125 Md. App. at 142 ("The Zoo Commission must receive the City's approval before . . . making 'major departures' from its budget[.]"). Unlike in *Mezzanote* and *Andy's Ice Cream*, there is no requirement that the City routinely approve WAM's regulations (namely, its by-laws). *Mezzanote*, 297 Md. at 38 ("[MIGA's] plan of operation, consisting of various rules and regulations establishing all of its procedures, is subject to approval and amendment[.]"); *Andy's Ice Cream*, 125 Md. App. at 142 ("[A]ny change the Zoo Commission's members propose for the By-Laws requires the approval of the Mayor and City Council."). We also note that neither Chapter 217 nor the Baltimore City Code expressly provide that the City (or General Assembly) retains the ability to unilaterally dissolve the Trustees. *Compare Napata*, 417 Md. at 730 (noting statutory authority for the

issue; namely, that some old corporate charters—including those belonging to railroad companies—contained permanent tax exemptions. The third sentence was added so that those old charters could expire if the corporations made any other changes. That third sentence is also obsolete today because there are no more railroad charters containing permanent tax exemptions. In any case, the fact that Article III, sec. 48 is obsolete today does not mean that it was not relevant in 1933 when the General Assembly passed Chapter 217 to charter WAM for municipal purposes.

"University Regents and the Board of Public Works" to "terminate UMMS" if they "determine that UMMS has failed to realize the purposes set forth in its enacting statute") (citation omitted).[23]

Nonetheless, the City maintains such oversight and authority over WAM that mitigate against a determination that it operates, as Appellants contend, as a private corporation rather than an instrumentality of the City. In 1959, the General Assembly expressly granted the City the authority to determine, by ordinance, the number of *ex-officio* and elected trustees that serve on the Board. Ch. 457 § 1. Thus, although there are currently only two City officials (the Mayor and President of the City Council) who are *ex-officio* members of the Board,[24] the City has the ability to increase its leverage at any time by decreasing the number of elected members and/or adding additional *ex-officio* members. *See id.* Moreover, the cap of 40 elected members of the Board, as provided by the Walters

[23] In this case, the parties contest whether the General Assembly may dissolve the Trustees without running afoul of the Contracts Clause of the United States Constitution. *See* U.S. Const. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts[.]"). Because the issue of the City or State's ability to dissolve the Trustees was not fully briefed, and because our holding would not change even assuming the City and State retained no ability to unilaterally dissolve the Trustees, we do not address the issue further here.

[24] We note that the term "Ex Officio Members" as used in WAM's by-laws has two very different connotations. On the one hand, those *ex-officio* members who are "appointed by the President of the Board by virtue of the governmental office or position that they . . . occupy," "have no vote" on the Board. Conversely, however, the by-laws provide that the *ex-officio* members who serve on the Board by virtue of the Walters Ordinance and Chapter 217, namely the Mayor and President of the Baltimore City Council, are full members of the Board and "have all of the powers entrusted to the [elected] Trustees." In this opinion, we are concerned only with the latter class of board members.

Ordinance, is itself a form of control that, today, is actively exerted on WAM. *See* Walters Ord. § 14-7(a)(4).

A copy of WAM's bylaws is required to be filed with the City and "accessible at all times to the public." *Id.* § 14-12(b). The City has directed that the Trustees amend their by-laws on at least one occasion. Specifically, the record includes the following excerpt from the Baltimore City Code of 1950, as the Code existed on May 21, 1951:

Ord. 208 (1944-45), sec. 2.

> 14. The existing terms of the elected trustees of the Walters Art Gallery shall terminate on the second Monday of June, 1945, and all new terms shall begin on that day. One new term shall begin the second Monday in June in each year thereafter. The provisions of all prior ordinances and agreements as to the election of trustees shall remain in full force and effect, except as modified or repealed by this ordinance, and all inconsistent provisions in prior ordinances and agreements are hereby repealed to the extent of such inconsistency. **The trustees of the Walters Art Gallery are hereby directed to amend their by-laws so as to conform with the provisions of this ordinance.**

(Emphasis added).

The Trustees are prohibited from "merg[ing] or consolidate[ing] [WAM] with any other institution." *Id.* § 14-10(b). The Trustees are also prohibited from "accepting or observing" any amendment of the Act of Incorporation (Chapter 217) "without the consent of the Mayor and City Council of Baltimore." *Id.* § 14-12(a).[25] Additionally, the City continues to require that the Trustees "submit a report of the activities and operations" of

[25] Regardless of the enforceability of this particular provision—which was not fully briefed—the attempt to stop the Trustees from observing an amendment to Chapter 217 is indicative of the degree to which the City believes it may control the Trustees.

WAM "to the Board of Estimates and each member of the City Council" each year. Walters Ord. § 14-9. Accordingly, we agree with the circuit court's conclusion that Appellants' "argument that [WAM] exercises complete control over its budget, expenditures, contracts, and operations without oversight from the City is not accurate."

Finally, and perhaps most incompatible with the powers of a private corporation, the Walters Ordinance provides that "[t]he Trustees may not sell or otherwise dispose of any work of art without the consent of the Mayor and City Council of Baltimore." *Id.* § 14-11(a). In a similar vein, the Trustees must "provide notice" to the City when it loans, or exhibits, artwork owned by WAM "in any other institution[.]" Walters Ord. § 14-11(b).

Taken together, these considerations weigh in favor of finding that WAM is subject to the MPIA. *See Mezzanote*, 297 Md. at 35 ("[C]omplete control—control over all aspects of an entity's operation—is not a determinative factor in characterizing a statutorily-established entity as an agency or instrumentality of the State.").

Considerations Related to Public Funding

The record is replete with data about WAM's finances. Viewed in the light most favorable to the Appellants, the record indicates that the Walters does not receive a majority of its financial support from the City or State[26]; however, we find the *type* of support that the City provides to be particularly relevant in this case.

[26] For example, the affidavit of Julia Marciari-Alexander, the executive director of WAM, states that that "for every $1 contributed by the City, another $7 is required—and raised by the Board of Trustees—in order to fund the operation of the Museum."

For example, the affidavit of Julia Marciari-Alexander—the executive director of WAM—acknowledges that the City contributes funds towards the employee benefit expenses of WAM employees by: "(1) allowing WAM employees to participate in the City's health benefit plan and paying . . . the 'employer' share for WAM employees who elect to participate in the plan, and (2) by reimbursing WAM for the employer share of payroll taxes." Additionally, according to the affidavit, from 1958 to mid-2014, WAM employees were eligible to participate in the City's pension program, and to this day, a quarter of WAM's employees (who were employed by WAM prior to June 30, 2013) remain grandfathered into the program.[27, 28]

[27] Financial statements prepared by the firm Ellin & Tucker for WAM shed some light on the amount of funding that the City spent on WAM employee benefits for years ending "June 30, 2017 and 2016[,]" and "June 30, 2021 and 2020[.]" Specifically, as provided by the report for June 30, 2017 and 2016:

> The City of Baltimore provides direct payments to the Museum for various employee benefits. . . . The total support and related expenses recorded for the years ended June 30, 2017 and 2016 were $1,598,974 and $2,290,708, respectively. These expenses include a portion for the eligible employees who participate in the defined benefit pension plan of the City of Baltimore for the year ended June 30, 2016.

For the same categories of expenses, the report for June 30, 2020 and 2019 provided that:

> The total support and related expenses recorded for the years ended June 30, 2020 and 2019 were $1,660,341 and $1,624,443, respectively.

Likewise, the report for June 30, 2021 and 2020 states that:

> The total support and related expenses recorded for the years ended June 30, 2021 and 2020 were $1,665,350 and $1,660,341, respectively.

[28] The affidavit of Julia Marciari-Alexander states that "WAM employees were eligible to participate in the City's defined benefit pension system from 1958 until the City terminated eligibility effective July 1, 2014[,] but grandfathered existing employees who

[Footnote Continued]

We consider the nature of this funding—that the City is paying expenses traditionally paid for by an *employer*—to be persuasive evidence that WAM is subject to the MPIA. *See Balt. City Dev. Corp.*, 395 Md. at 334 ("[W]e examine[] all aspects of the relationship between the entity and the state or political subdivision.").

Separately, although not "funding" per se, the record indicates that the City owns three of the five buildings that makeup WAM's campus. Appellants also acknowledge that the City continues to own nearly two-thirds of WAM's total collection, or 22,000 out of the 36,000 objects of art.

Taken together, these considerations also weigh in favor of finding that WAM is subject to the MPIA.

Other Notable Considerations Related to Finances

Appellants concede that WAM's employees benefit from the federal Public Student Loan Forgiveness Program and that WAM "check[ed] the box for governmental agency" on unspecified forms to enable their employees to receive that benefit.[29] Similarly, the record shows that, in an application for a grant from the National Endowment for the

were employed by WAM on or before June 30, 2013. *See* Baltimore City Charter Art 22, Sec. 1." We note that Article 22, Sec. 1(2)(i)(E) of the Baltimore City Code defines "Employee" in regard to the Employees' Retirement System of the City of Baltimore as inclusive of "any employee of the Baltimore Museum of Art or of the Walters Art Museum who was employed by either museum on or before June 30, 2014[,]" subject to exclusions not pertinent here.

[29] Appellants emphasize that WAM was "instructed" to "check the box for governmental agency" by the U.S. Department of Education; however, we are not persuaded that this fact should not weigh in favor of a finding that WAM is an instrumentality of Baltimore City.

Humanities for the grant period spanning May 2002 to April 2003, WAM checked the box for "Unit of State/Local Government" in the "TYPE OF APPLICANT" field. Appellants stress that the grant was also "equally available to another type of private nonprofit." Indeed, we observe that the form did contain a separate box for "Private Nonprofit," but WAM did not check that box, choosing instead to check the box for "Unit of State/Local Government." These facts weigh in favor of finding that WAM is subject to the MPIA.

Taxes & Sovereign Immunity

According to financial statements prepared for WAM by the firm Ellin & Tucker, the Trustees are "incorporated as an agency of the Mayor and City Council of Baltimore to provide for the management of the art collections, real property and income from endowment funds." The reports further state that "[a]s an instrumentality of the Mayor and City Council of Baltimore, the Museum is exempt from federal income taxes under sections of the Internal Revenue Code[.]" Relatedly, the record includes a letter dated October 6, 1954, from the "Chief" of the "Pensions and Exempt Organizations Branch" of the Internal Revenue Service ("IRS") of the United States Treasure Department, addressed to the "Trustees of Walters Art Gallery[.]" The IRS advised the Trustees that:

> [Y]ou are a corporation created by an act of the Maryland State Legislature and operate as an agency of the Mayor and City Council of Baltimore in the management and operation of the real properties, art treasures and income given to the Mayor and City Council of Baltimore under the last will and testament of Henry Walters.
>
> Since you are an instrumentality of the State of Maryland you are not subject to Federal income tax. You are not required, therefore, to file Federal income tax returns.

Appellants have not made any attempt to dispute the basis by which they are exempt from federal income tax. Instead, they assert that "[t]he particular type of tax exemption held by the entity has not been considered by the courts." We find, however, that WAM's undisputed tax-exempt status, as an instrumentality of the City for the purpose of calculating federal income tax, is relevant to our analysis.

The record is also clear that gifts to WAM are eligible for the federal charitable deduction due to WAM's status as a "governmental unit" for the purposes of that deduction. In a ruling from the IRS dated May 7, 1965, the IRS stated, among other things, that:

> Under section 170(b)(1)(A)(v) of the 1954 Code . . . individuals are allowed a[] . . . deduction of not exceeding 10 percent of their adjusted gross income for a contribution . . . to a governmental unit referred to in section 170(c)(1) which includes a State, a Territory, a possession of the United States, or any political subdivision of any of the foregoing, etc. A contribution to such governmental unit is deductible only if the contribution or gift is made for exclusively public purposes.

Appellants conceded in their "REPLY MEMORANDUM TO [Appellees'] MOTION FOR SUMMARY JUDGMENT" that gifts to WAM are eligible for the federal charitable deduction under Section 170(b)(1)(A)(v) of the Internal Revenue Code. This statute extends the charitable deduction to charitable contributions to "a *governmental unit* referred to in subsection (c)(1)[.]" IRC § 170(b)(1)(A)(v) (emphasis added). Subsection (c) of the statute provides that the term "charitable contribution" means a "contribution or gift to or for the use of":

> [**c**]**(1)** A State, a possession of the United States, or any political subdivision of any of the foregoing . . . but only if the contribution or gift is made for exclusively public purposes.

I.R.C. § 170(c)(1). WAM's status as a "governmental unit" for the purpose of the federal charitable deduction also weighs in favor of finding that WAM is subject to the MPIA.[30]

Conversely, there is no indication in the record that WAM has been held to enjoy sovereign immunity, which weighs against finding that WAM is subject to the MPIA. *See Moberly*, 276 Md. at 223; *Mezzanote*, 297 Md. at 37 (construing *Moberly*).

CONCLUSION

For all of the above reasons, we hold that the "attributes" of WAM's "relationship with" Baltimore City "predominate over those pointing to its private character[] for purposes of" WAM's "inclusion in the scope of the [MPIA]." *Napata v. Univ. of Md. Med. Sys. Corp.*, 417 Md. 724, 736-37 (2011). Thus, we will affirm the judgment of the Circuit Court for Baltimore City. As correctly noted by the circuit court, before now this case has

[30] We also note that, in *Trustees of Walters Art Gallery v. Supervisor of Assessments of Baltimore City*, the same Trustees before us in the instant case sought, but were denied, a property tax exemption that they could only qualify for if they constituted an "agency or instrumentality" of the government under then-Article 81, Section 9(b). *Trustees*, No. 2488, 1978 WL 1519, at *1 (Md. Tax Ct. Dec. 6, 1978). Though the Supervisor of Assessments of Baltimore City had denied the tax exemption, the issue on appeal to the Maryland Tax Court was limited to whether certain property owned by the Trustees, a parking lot, was "dedicated to a governmental use or purpose." *Id.* In other words, there was no dispute that the Trustees constituted an agency or instrumentality of the government, namely Baltimore City. *See id.* Moreover, though the Tax Court determined that the parking lot was *not* presently being used for a governmental purpose because it had been leased to a third party, the court remarked that the funds generated by the lease *were* being "used for a governmental purpose" because "[a]ll money received by [the Trustees] from the lease is used for the support of the gallery." *Id.*

not addressed "[w]hether the specific documents requested by [Appellees] are subject to disclosure under the [M]PIA" and WAM "shall be given the opportunity to respond to [Appellees'] request pursuant to the [M]PIA." [31]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.

[31] Nothing in our opinion should be taken to suggest that the sensitive personal information of employees should be turned over in response to a request under the MPIA. The requests at issue in this case relate to tax documents, financial statements, contracts between WAM and private counsel, contracts related to management of labor relations, minutes of the Trustees' meetings, and communications pertaining to labor relations. Further, the MPIA does not allow open inspection of any document. For example, GP § 4-311 provides that "a custodian shall deny inspection of a personnel record of an individual, including an application, a performance rating, or scholastic achievement information."

Circuit Court for Baltimore City
Case No. 24-C-22-003989

UNREPORTED *

IN THE APPELLATE COURT

OF MARYLAND

No. 2070

September Term, 2022

Trustees of the Walters Art Gallery, Inc., et al.

v.

Walters Workers United, Council 67,
AFSCME, AFL-CIO, et al.

Graeff,
Leahy,
Getty, Joseph M.
(Senior Judge, Specially Assigned),

JJ.

Dissenting Opinion by Getty, J.

Filed: October 16, 2024

*This is an unreported opinion. It may not be cited as precedent within the rule of stare decisis. It may be cited as persuasive authority only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

> The provision of museums of art and natural history, zoology and similar subjects has also come to be recognized as an appropriate function of a city. Such museums exist in many large cities, and are supported to a great degree at public expense. Yet experience in this country has shown that these museums are more intelligently conducted by private corporations chartered by the legislature, and under the management of public-spirited and art-loving citizens, than they would be if directed by committees of the board of aldermen.
>
> Everett P. Wheeler, *The Unofficial Government of Cities*, The Atlantic, Mar. 1900, at 373.[1]

For over 90 years, the Trustees of the Walters Art Gallery, Inc., a private corporation, (the "Trustees") and the City of Baltimore (the "City") have jointly engaged in a public-private partnership that, as stewards of a generous bequest from Henry Walters and through the talented administration of the Trustees, has expanded and grown the collection, museum facilities, and education programs of the Walters Art Museum (WAM) to serve the citizens of Maryland, thus earning a reputation as a fine arts museum of international distinction.

I view the formation and operation of the Trustees distinctly differently from the Majority, and, in contrast, I would hold that the Trustees are not an instrumentality of the State of Maryland or the City of Baltimore and therefore are not subject to the Maryland Public Information Act ("MPIA"). In dissent, I will explain my position.

[1] Everett P. Wheeler, *The Unofficial Government of Cities, in* MAKING THE NONPROFIT SECTOR IN THE UNITED STATES 300, 303 (David C. Hammock ed., 1998).

Under the conventions of forming corporations in the 1800s and early 1900s, the General Assembly regularly issued charters to private corporations that had charitable "public" purposes. The incorporation of the Trustees and the limited level of control the City exerts on the WAM demonstrates that the controlling entity is the Trustees as established by the General Assembly as a private corporation. Instead of creating a public agency, department, or instrumentality of the City, the enabling legislation for the Trustees created a private "educational corporation" as part of a public-private partnership between the City and the Trustees.

Maryland session laws from the 1800s and early 1900s are replete with examples of the General Assembly taking such action. For instance, during its regular session in 1933, the same year that the Trustees were incorporated, the General Assembly amended the private charter of a charitable corporation with a "public" purpose: the Baltimore Humane Impartial Society and Aged Women's and Aged Men's Homes, 1933 Md. Laws ch. 594. In addition, the General Assembly passed public laws for other private corporations such as the Grangers Mutual Fire Insurance Company of Frederick County, 1933 Md. Laws ch. 514, and the Maryland State Bible Society, 1933 Md. Laws ch. 52. In the special session in 1933, the General Assembly amended the charter of the Washington County Hospital Association to make it a public corporation, 1933 Md. Laws ch. 64, *special session*, despite it having been previously incorporated as a private corporation by legislative charter in 1904. 1904 Md. Laws ch. 234.

The Majority relies on the fact that WAM was incorporated to be used for the benefit of the public; however, such a purpose is not the hallmark of a public corporation. Maj. op, *supra*, at 40–41. *See Regents of University of Maryland v. Williams*, 9 G. & J. 365, 365 (1838) ("A corporation may be *private,* and yet the act, or charter of incorporation, contain provisions of a purely public character, introduced solely for the public good, and as a general police regulation of the state.") (emphasis in original). Instead, the distinction between a public and private corporation "depends upon the nature of the franchises granted, and not the expected beneficial results to the community." *Williams*, 9 G. & J. at 366 ("The government has the sole right as trustee, to inspect, regulate, and control [public corporations].")

In changing the Washington County Hospital Association from a private to a public corporation during the 1933 special session, the General Assembly also changed the appointment process for its Trustees, thereby changing "the nature of the franchise[ ] granted." *Id.* at 365. Whereas before the change, the trustees were selected by Judges of the Circuit Court for Washington County, after the corporation became public, the trustees were selected by the governor. *Compare* 1904 Md. Laws ch. 234, *with* 1933 Md. Laws ch. 64, *special session*. Thus, occurring in the same year, the General Assembly in 1933 clearly knew what it was doing in amending the private charter to become a public corporation for the Washington County Hospital Association led by governor-appointed trustees but, in contrast, establishing the WAM led by a self-appointed board of Trustees,

obviously indicating that the "nature of the franchise[ ] granted" is private. *Williams*, 9 G. & J. at 365. *See infra* p. 14.

I differ from the Majority's conclusion that the organizational documents evidence that the Trustees are an instrumentality of the State or City. Although it seems anachronistic by today's standards, the City ordinances and State legislation did exactly what was required at the time: they created a public-private partnership to be the steward of Henry Walters' legacy. The Trustees are the private arm of this partnership. While the Majority places reliance on the fact that the Trustees were established by the General Assembly passing a state statute as a defining factor in the Trustees being a government instrumentality, I would take the opposite view that the act of the General Assembly clearly formed a private corporation when assessing the interrelationship between the City and the Trustees. *See A.S. Abell Pub. Co. v. Mezzanote*, 297 Md. 26, 35 (1983).

Nor would I rely, as the Majority does, on Article III, Section 48 of the Maryland Constitution to conclude that the Trustees must have been created for a municipal purpose because the charter would otherwise be void as a special act. Maj. op, *supra*, at 42–43. In this analysis to determine whether Chapter 217 runs afoul of the Constitution, the Majority relies upon its interpretation of Article III, Section 48 which I believe is contrary to the actual practices of the General Assembly from 1851 through the early 20th century.

First, we examine the question of whether Chapter 217 is in fact a special act prohibited by the Constitution that would fall under the "special act" prohibitions in Article III, Section 33. In *Cities Service Co. v. Governor*, the Supreme Court of Maryland

identified a series of potential factors to consider when deciding whether an act is special or general. 290 Md. 553, 569–70 (1981). These factors include whether the purpose was to benefit or burden a particular member or members of a class instead of the whole class, whether the entity at issue "sought and received special advantages from the Legislature," and if there was a public need underlying the enactment and whether the general law was inadequate to meet that need. *Id.* The Supreme Court also highlighted that the purpose of Article III, Section 33 was to "prevent one who has sufficient influence to secure legislation from getting an undue advantage over others." *Id.* at 569 (quoting *Mayor & City Council of Balt. v. United Rys. & Elec. Co.*, 126 Md. 39, 52 (1915)).

Applying these factors to Chapter 217, it is clearly not a special act violative of the Maryland Constitution. Although the enactment created and identified a singular entity, the purpose of the corporation and the role of the Trustees was to control Henry Walters' art collection for the benefit of the public. Thus, although a discrete private corporate entity was created and given powers, Chapter 217 did not benefit any specific individual, nor did it risk granting "[an individual] with sufficient influence . . . an undue advantage over others." *Cities Serv.*, 290 Md. at 569. Regardless, it is not clear that the Trustees could have been incorporated in 1933 under general laws because of the nature of the public-private partnership sought and ultimately created.

Second, having survived the analysis that Chapter 217 is not an unconstitutional special act, I next disagree with the Majority's reliance on Article III, Section 48, which I assert has no relevance to the status of the Trustees as a private corporation. In fact, Section

48 is considered by one commentator on Maryland's Constitution as serving no purpose under Maryland's modern corporate laws. Judge Dan Friedman, a member of this Court, has described the prohibition on special acts for corporate charters in Section 48 as having "no continuing importance" and explained that this prohibition "could safely be deleted from the constitution," in large part because it is redundant to the prohibition on special acts generally articulated in Article III, Section 33. Dan Friedman, *The Maryland State Constitution* 129–30 (2006). In fact, the new Constitution written in 1967 by the Maryland Constitutional Convention Commission eliminated Section 48 entirely from their proposal (ultimately the new Constitution was rejected by Maryland voters). Maryland Constitutional Convention Commission, *Report of the Constitutional Convention Commission* (Aug. 25, 1967) 327–28.[2]

[2] During the period of Maryland's industrialization, in the early- to mid-1800s, the state granted to corporations, such as railroads and canals, permanent tax-exempt status to facilitate expansion of the transportation network to support a burgeoning economy and advance economic advantages in competition with other states. By the late 1800s, these private corporations were very profitable but resisted any attempts to tax their capital stock, profits, real property, improvements or equipment. Moreover, the Court of Appeals ruled that this tax exemption was irrepealable and extended to local taxation on any part of the railroad property and franchises. *State v. Baltimore and Ohio Railroad Company*, 48 Md. 49, 70-71, 74 (1878). On November 3, 1891, the people of Maryland voted to ratify the Constitutional Amendment revising Article III, Section 48 so that the General Assembly: (1) could not grant permanent tax-exempt status to new corporations; and (2) could require that any corporation that currently enjoyed a permanent tax exemption but requested that its charter be altered or amended would surrender its tax exemption. The amendment's purpose was retrospective in nature, with an aim to reclaim the state's ability to tax such corporations, the primary one being the Baltimore and Ohio Railroad (incorporated by the General Assembly in 1826). *See The State Constitution: Proposed Amendment to Control Corporate Exemptions*, The Sun, July 24, 1891, at 1. According to Judge Friedman, by 1967, the only remaining corporation that would be affected by removing Section 48

[Footnote Continued]

Third, in addition to the Majority's reliance on a totally ineffective provision of the modern Constitution, *i.e.* Article III, Section 48, as the dispositive factor of the Trustees being a instrumentality of the state, I also disagree with the Majority's position that such a private corporation could have been incorporated under the general corporation laws of the State. ("Put simply, nearly every flavor of corporation could be formed under the general laws after 1908 and thus, it would not have been necessary to resort to a special act to confer upon a corporation 'special powers . . . [which would] make[] a special charter valid.'" Maj. op, *supra*, at 42–43.)

On this issue of whether the Trustees could have been formed under the general corporation laws at that time, I share the view of Chief Judge Robert C. Murphy as stated in his dissent in *Moberly v. Herboldsheimer,* 276 Md. 211, 228 (1975) (Murphy, C.J., dissenting). In explaining his view as to why Chapter 411 of the Acts of 1927 resulted in the General Assembly establishing the Memorial Hospital of Cumberland as a private corporation and not a public agency,[3] Murphy explained: "In my opinion, however,

entirely from the Constitution was Baltimore and Ohio Railroad which later forfeited its tax exemption under the above-mentioned amendment by merging into CSX Corporation, leading Judge Friedman to conclude that "the tax exemption surrender provision…no longer applies to the B&O or to any other known entity." Friedman, *supra*, at 130.

[3] In *Moberly*, the Supreme Court determined by a 5 to 2 vote that the Memorial Hospital of Cumberland was a city agency. The dispositive factors in the Court's analysis were the continuing control that the City Council retained over the operations of the hospital and the state umbrella of tort liability protection. These factors are distinguished by the Trustees in this case, particularly because WAM is not covered by the state tort liability protection (the trial court found that WAM was not listed in the definition of "local government" for purposes of the Local Government Tort Claims Act—indicating WAM is not entitled to sovereign immunity protections. *See* Maj. op., *supra*, at 6 n.5.)

Chapter 411 of the Acts of 1927 created a private corporation with a governing body not obtainable under the general incorporation laws, viz., a board which included two governmental officials, each serving in an ex-officio capacity. No provision existed in the general law for the appointment of such governmental officers as ex-officio board members." *Id*.

In my view, appointing ex-officio members as Trustees and other special powers granted in Chapter 217 provide the rationale for the General Assembly exercising its judgment to create the Trustees by special act. We must evaluate the act of the General Assembly in forming a private corporation from the perspective of Maryland corporate practice in 1933, as influenced by a contemporaneous understanding of Article III, Section 48. The language of Article III, Section 48 originated in the Constitution of 1851 as follows:

> "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, and *in cases where, in the judgment of the Legislature, the object of the corporation cannot be attained under general laws*."

Constitution of 1851, Article III, Section 47 (emphasis added).

By its plain language, this Constitutional provision grants broad latitude to the General Assembly to exercise its discretion for passing legislation for corporate formation by special act. The underlying purpose is that benevolent and charitable corporations

received a tax exemption,[4] and there needed to be an oversight process to determine that such corporations were actually created for a charitable objective that warranted a tax exemption.

Following the ratification of the Constitution of 1851, the General Assembly passed a statute in 1852 providing for the incorporation of an organization with "any moral, scientific, literary, dramatic, agricultural or charitable purpose." The statute included an oversight process for the corporate charter to be presented to the Judge of the Circuit Court in the county where the charitable corporation was located. 1852 Md. Laws ch 231. The statute further provided that the corporate charter had to set forth the "objects, articles, conditions and provisions" of its charitable purpose and that the charter "shall be acknowledged before, and certified by said judge." *Id*. Thus, the General Assembly created a proxy in each county for ensuring that the tax exemption went to a truly worthy charitable corporation but still reserved to itself the ability to form corporations by state statute if broader powers needed to be specified for the corporation.

The broad discretion granted to the General Assembly in passing special acts to form a corporation remained largely unchanged in the Constitution of 1864. *See* Constitution of 1864, Article III, Section 51. In the Constitution of 1867, this sentence was changed to the language of today's Constitution (apart from minor changes in punctuation):

[4] For example, see 1896 Md. Laws ch. 52, that specified a tax exemption for "buildings, equipment and furniture of hospitals, asylums, charitable or benevolent institutions" as well as the "buildings, furniture, equipment or libraries of incorporated educational or literary institutions."

> "Corporations may be formed under general Laws, but shall not be created by special act, except for municipal purposes, and *except in cases where no general Laws exist, providing for the creation of corporations of the same general character, as the corporation proposed to be created*; and any act of incorporation passed in violation of this section shall be void."

Maryland Constitution, Article III, Section 48 (emphasis added and punctuation changed to that of today's constitution).

The original language from 1851 makes clear that the General Assembly had the discretion to choose when to incorporate a charter under a special act, because in their judgment, the general laws were insufficient.[5] In support of this interpretation, another legal scholar on the Maryland Constitution, Alfred S. Niles, noted in 1915 that the Supreme Court of Maryland has held "that corporations may be created by special act where the powers granted are more extensive than are conferred under the general incorporation law, even though the company be of a class the incorporation of which is provided for in the general law." Alfred S. Niles, MARYLAND CONSTITUTIONAL LAW 207 (1915). For

[5]As I understand the Majority's reasoning, the Trustees would be an illegal private corporation (and therefore must be a public entity) because the plain language of Section 48 prohibits the creation of new private corporations after the ratification of the amended Section 48 in 1891. That cannot be the legislative intent of Section 48 (or else the General Assembly flagrantly violated its own Constitutional Amendment) because the General Assembly continued to pass legislation creating, revising, or amending charters through at least the next forty years, thereby exercising the discretion afforded it in Article III, Section 48. For example, in the 5 years immediately following the ratification of Section 48 in 1891, the General Assembly passed over 200 bills relating to private charters. These statutes are scattered throughout the chapter laws but are collated under the index headings of "Corporations" for each year's chapter laws. *See* Md. Session Laws 1892; Md. Session Laws 1894; Md. Session Laws 1896.

example, Niles explained that in *Reed v. Baltimore Trust & Guarantee Co.*, the Supreme Court of Maryland refused to issue an injunction against a trust company formed by special act, allegedly in contravention of Article III, Section 48, because although a trust company in general could be formed under general corporate laws at the time, such a company "would be powerless to exercise such corporate powers and rights as were granted and conferred to this company by the special act of the legislature." 72 Md. 531, 531 (1890).[6]

[6] Contemporaneous to the WAM charter in 1933, the General Assembly passed five bills in 1935 that would repeal and reenact with amendments the charters of five private corporations. In an Opinion of the Attorney General, Herbert R. O'Conor advised Governor Nice to veto these bills as violative of the spirit of Article III, Section 48. Due to the proliferation of acts relating to private charters, the Attorney General also made a point to discourage the passage of such acts in general:

> I am aware that a few acts of this character have been approved *at nearly every session of the Legislature*, although it would be a simple matter for any corporation, desiring to incorporate or change its charter, to file a certificate of incorporation or articles of amendment with the State Tax Commission to accomplish the same purpose. I think the practice of approving special laws for corporations should be discouraged, in view of the fact that Article 23 of the Code contains adequate provisions therefor, and it is desirable that the State Tax Commission have a complete record in its files of all corporations without having to refer to the Acts of each Legislature.

Herbert R. O'Conor, 20 ANNUAL REPORT AND OFFICIAL OPINIONS OF THE ATTORNEY GENERAL OF MARYLAND 357, 359 (1935) (emphasis added). Clearly then, while the Attorney General and the Courts have sometimes misinterpreted the meaning of Section 48, the General Assembly at its discretion continued the practice of granting private corporate charters for charitable and educational corporations throughout this period. Furthermore, Governor Nice disregarded Attorney General O'Conor's advice on four of the five special acts, thereby implicitly endorsing this practice of the General Assembly by signing acts to amend the charters of the Mutual Fire Insurance Company, in Harford County, 1935 Md. Laws ch. 5; the Methodist Episcopal Church of Havre de Grace, 1935 Md. Laws ch. 181; the Amish Mennonite Children's Home, Inc., 1935 Md. Laws ch. 438; and the Independent Junior Fire Company of Hagerstown, 1935 Md. Laws ch. 503 (the [Footnote Continued]

The General Assembly, in its discretion, chose to grant to Baltimore Trust & Guarantee Co. more extensive powers than were available under the general laws at the time. Similarly, the General Assembly in its discretion, chose to incorporate WAM with ex-officio members on its board and with specific powers to enter into agreements with the City, which would not have been possible under the general corporate laws of 1933, *see supra* at 8, despite the revised 1908 general corporate statute cited by the Majority, which greatly expanded the types of corporations able to be formed under general law.

The facts in this case are pellucid that the City received a bequest but determined that it did not want to operate an art museum as a city agency. Through his will, Henry Walters gifted the City his art collection and created an endowment fund to maintain the gallery gifted to the City. Consequently, instead of retaining control for itself or otherwise encapsulating the gift into an existing or new agency in City government, the City in collaboration with the General Assembly created the Trustees as a private "educational corporation" with a public purpose to facilitate the gift and manage WAM in accordance with Henry Walters' will.

It is also significant to explicitly state that the Trustees do not meet the traditional notion of a public corporation as it appears in Maryland precedent under our caselaw. In *The Regents of the University of Maryland v. Williams*, the Supreme Court described a public corporation as:

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vetoed, fifth special act would have reverted the Washington County Hospital Association to a private corporation, 1935 Md. Laws ch. 170, *vetoed*).

> one that is created for political purposes, with political powers, to be exercised for purposes connected with the public good in the administration of civil government; an instrument of the government subject to the control of the legislature, and its members officers of the government, for the administration or discharge of public duties, as in the cases of cities, towns, &c.; so where a bank is created by the government for its own uses, and the stock belongs exclusively to the government, it is a public corporation; and so of a hospital created and endowed by the government for general purposes of charity.

9 G. & J. 365, 397 (1838). The *Williams* Court rejected the argument that "whenever the end is public, the franchise granted to effect that end is also public." *Id.* at 399 (emphasis removed).

The Supreme Court expanded upon the difference between a public and private corporation in *Levin v. Sinai Hospital of Baltimore City*:

> A public corporation is an instrumentality of the state, founded and owned by the state in the public interest, supported by public funds, and governed by managers deriving their authority from the state. Public institutions, such as state, county and city hospitals and asylums, are owned by the public and are devoted chiefly to public purposes. On the other hand, a corporation organized by permission … of the state or any political subdivision, is a private corporation, although engaged in charitable work or performing duties similar to those of public corporations.

186 Md. 174, 178 (1946) (citing *Williams*, 9 G. & J. at 388; *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819)).

It is undoubtedly clear from Henry Walters' will, the City ordinances, and Chapter 217 that the Trustees and by extension WAM were created for the benefit of the public but as a private "educational corporation." As demonstrated above, the public purpose established in Chapter 217 does not inherently mean the General Assembly created a public

corporation or an instrumentality of the State or the City. The next consideration is the level of control afforded to and exerted by the City on the Trustees.

The Maryland Supreme Court has held that absolute control is not necessary for an entity to be an instrumentality of the State. *See Mezzanote*, 297 Md. at 34–35. As the Majority outlines, there are a plethora of factors that have been considered in previous decisions examining whether an entity is an instrumentality of the State. Maj. op., *supra*, at 28–40. My assessment of the City's lack of control over the Trustees turns on the following factors: (1) the Trustees are a self-perpetuating entity to which the City and State make no appointments; (2) Chapter 217 stated that the purpose of the corporation was to "have and exercise complete control over the real properties and contents given to the Mayor and City Council of Baltimore by Henry Walters" and "full and complete control over the expenditure of income from the endowment fund given by Henry Walters" through his will; and (3) the various grants of explicit authority to the Trustees contained in Chapter 217.

Chapter 217 provides that the Trustees have the power "to fill vacancies in the membership of the Board," as well as to elect a president, treasurer, and secretary of the Board. 1933 Md. Laws ch. 217, § 4. Although the Mayor and President of the City Council are ex-officio members of the Board of Trustees, this does not impact the autonomy of the Trustees as an independent, self-perpetuating corporation, nor does it give any City official substantial control over the governing of WAM. As is explained further below, the Trustees have broad authority to control essentially every aspect of WAM's operation. The

Mayor and City Council President may be members of the Board of Trustees, but at most, they represent only two votes out of as many as forty Trustees.

In my view, the ex-officio membership, as well as the reporting requirements in Chapter 217, are not demonstrative of City control over the Trustees but instead are assurances that the tenets of Henry Walters' gift and vision would be properly carried out, thus allowing the City a level of due diligence but not control. Undoubtedly, these provisions are not an assertion of authority and control that would convert the status of a private corporation to become a City agency or instrumentality. Unlike in the cases cited by the Majority, *i.e.*, *A.S. Abell Publishing Co. v. Mezzanote*, 297 Md. 26 (1983); *Andy's Ice Cream, Inc. v. City of Salisbury*, 125 Md. App. 125 (1999); *City of Baltimore Development Corporation v. Carmel Realty Associates*, 395 Md. 299 (2006); *Napata v. University of Maryland Medical System Corporation*, 417 Md. 724 (2011), the City exercises no control over the Trustees' membership other than its two ex-officio members and thus, by extension, virtually no control over the self-determination provided to the Trustees as a private corporation.[7]

Chapter 217, Section 2 also explicitly provides that the purpose of the corporation is "to have and exercise *full and complete control* over the real properties and contents

[7] The Majority notes that the General Assembly granted the City the authority to expand the number of Trustees, both elected and ex-officio, by ordinance. *See* Maj. op., *supra*, at 50; 1959 Md. Laws ch. 457. Although this is a potential control over the makeup of the Board of Trustees, it does not necessarily indicate control over the actual *functioning* of the Board. Further, as the Trustees highlight in their brief, the City has never exercised this authority.

given to the Mayor and City Council of Baltimore by Henry Walters"[8] and "to have and exercise *full and complete control* over the expenditure of the income from the endowment fund given by Henry Walters." (Emphasis added.) The Trustees are otherwise afforded "all the powers with respect to the affairs of said corporation which are conferred by the Public General Laws of Maryland upon the directors or managing bodies of Maryland corporations." *Id.* at § 4.

These provisions represent a clear grant of authority to the Trustees as a private corporation through a public general law enacted by the General Assembly. As the Trustees note in their brief, it would be counterintuitive to determine that WAM was incorporated as an instrumentality of the City, despite substantial control over WAM being invested in the Trustees, not the City. The City has no approval or veto power over WAM's general operation or budget, nor can it dissolve the Trustees at will. The provision in Article 18, Section 14-11(a) of the Baltimore City Code requiring the City's consent before the Trustees sell or dispose of any art is not inherently demonstrative of control over WAM; rather, the provision recognizes that Henry Walters gifted his art collection to the City, and thus, the City's consent is necessary before any art is removed from that collection.[9] This

[8] Baltimore City Code Article 18, Section 14-8(b) grants functionally identical authority to the Trustees: "The Trustees shall have full and complete control over the property and funds given to the City of Baltimore by Henry Walters."

[9] Section 14-11(b) requiring the Trustees to notify the City when art is loaned or exhibited elsewhere is even less indicative of control. The Mayor, City Council, and Board of Estimates cannot prohibit WAM from loaning art in the collection. Therefore, the notification is nothing more than a formality. The requirement in Section 14-12(b) that the [Footnote Continued]

provision does not alter the Trustees' authority to control the day-to-day operations of WAM by the Trustees' decisions on the administration of the corporation including the budget, fundraising, programs, policies, and staffing of WAM.

Finally, Chapter 217 affords several other powers to the Board of Trustees that demonstrate private control over WAM. The Trustees have the authority "to make, alter and repeal by-laws," thus giving them power over their own organization with no provision requiring City approval before a change to the by-laws can be made. 1933 Md. Laws ch. 217, § 4. The Trustees "have [the] power to elect or appoint a president . . . a secretary and a treasurer, and such other officers as its by-laws may provide." *Id.* The Trustees "have *full and exclusive* power to appoint a director for the Walters Art Gallery, and to appoint or provide for the appointment of such curators, assistants and other employees as may be advisable." *Id.* (emphasis added). These provisions indicate that the Trustees, not the City, have broad authority over the general operations of WAM, including its own corporate structure and personnel decisions. The broad powers of the Trustees are in contrast to the one power still maintained by the City—consenting to sell or dispose of art in the collection—which constitutes only a minor aspect of WAM's operations.

In addition to the above rationale regarding the express grants of authority to the Trustees found in WAM's governing documents, I disagree that the record supports the conclusion that City funding of certain aspects of WAM's operation necessitates a finding

by-laws be publicly available and filed with the City is similarly a ministerial formality and is not indicative of any City control over the by-laws.

that the City controls WAM. The Majority relies on three aspects of the City's support for WAM employees to determine that the City acts as an employer: (1) that employees can participate in the City's health benefit plan and the City covers the employer share of those who participate; (2) that the City reimburses WAM for the employer share of payroll taxes; and (3) that WAM employees formerly were eligible for the City's pension program with some employees still enrolled. Maj. op., *supra*, at 53–54.

What the Majority fails to note is that WAM's financial statements show that WAM, not the City, pays the salaries of its employees. In my view, it is contradictory to conclude that WAM employees are City workers solely because the City helps cover certain expenses related to employment, despite the fact that the City does not actually pay those employees. If the Majority gives weight to the City's assistance in covering certain employee-related expenses, it should also note that WAM funds other employee benefits like short-term disability, a 457B retirement plan match, flexible spending accounts, and paid holidays and personal time. The status of WAM employees as non-government employees seems especially pertinent in the context of the present case, as the impetus for the MPIA request is related to labor relations. I would not read the MPIA's broad application into such labor relations without a clear indication that the employees are, in fact, government employees under the administration of the City's human resources department. The Appellees have not conclusively shown that is the case here. Without such an indication, the employees themselves have no reason to expect that the personal

information they have chosen to provide to their private employer would be publicly available via an MPIA request.

In summary, let us return to the plain language and statutory context of the bill. It is plainly clear from the words of Chapter 217 that the intent of the General Assembly was to create a private "educational corporation." The Majority places a focus on the word "agency" as proof that the Trustees are a city agency. The incongruity here is that the City may designate a private corporation as its agent for many purposes—here as stewards of the Walters bequest and to administer a fine arts museum—without the corporation *ipse dixit* becoming an instrumentality of city or state government.[10]

Moreover, isolating the word "agency" ignores the entire context of the statute. The plain language of Chapter 217 encompasses all of the essential provisions for a charter of

[10] The use of the word "agency" does not, in and of itself, definitively determine that the Trustees are a State or City agency. Under Maryland's laws of agency as established by our court precedents, agency is determined by a comprehensive investigation into the circumstances and transactions of the relationship. *Green v. H & R Block, Inc.,* 355 Md. 488, 506 (1999). In particular, Maryland courts focus but do not strictly rely on "three fact specific characteristics of an agency relationship … [including] (1) the agent's power to alter the legal relations of the principle; (2) the agent's duty to act primarily for the benefit of the principle; and (3) the principle's right to control the agent" over the label designated by either party. *Id*. at 503; *see Napata v. University of Maryland Medical System Corporation*, 417 Md. 724, 733 n.5 (2011). As we have examined in the statutory analysis *supra*, the language of Chapter 217 clearly grants "full control and authority" to the Walters' Board of Trustees, thus underscoring that it is not a city or state agency. In *Napata v. University of Maryland Medical System Corporation*, the court favors a "comprehensive analysis" in determining whether the University of Maryland Medical System Corporation was a state institution and further explains that "the terminology used to describe the relationship is not controlling." 417 Md. 724, 733 n.5 (2011). Under the laws of agency in Maryland, the City may assign certain rights for certain matters to a private corporation without converting that corporation into a governmental department, agency, or instrumentality of the State.

a private corporation. Section 1 names the initial Trustees and establishes that "they are hereby constituted and created a body corporate under the laws of the State of Maryland under the name of the Trustees of Walters Art Gallery." Section 2 states the corporation's purpose with "full and complete control" over the administration of the museum. Section 3 outlines the additional powers as a private corporation to enter into agreements with the City "as to the terms, conditions and provisions under which the real properties, art treasures and income will be managed and administered by said Corporation for the benefit of the public." In addition to providing for the self-governance and powers of the Trustees, Section 4 of Chapter 217 provides that the Trustees "have all the powers with respect to the affairs of said corporation which are conferred by the Public General Laws of Maryland upon the directors or managing bodies of Maryland corporations."

It is significant that Section 5 of Chapter 217 defines this newly created entity as an educational corporation: "*And be it further enacted*, That said Corporation shall be classed as an educational corporation, but shall not be required to file any reports or accounting with any agency of the State." The general corporation laws as revised in 1908 contained many classes of corporation but did not include a specific classification for charitable organizations for educational and cultural purposes.[11] The fact that the General Assembly

[11] The classes of corporations that were explicitly defined in the corporation law as revised in 1908 include: bridge companies; building associations; cemetery companies; gas and electric light companies; insurance companies; fraternal orders; mining companies; railroad companies; religious corporations; telegraph and telephone companies; trust, surety, and fidelity companies; turnpike, plank road, and passenger railway companies; and water companies. 1908, art. 23, ch. 240, sec. 2. Despite the many classes of corporations

[Footnote Continued]

still continued to incorporate these organizations by special act refutes the theory of the Majority that the Trustees must be a public agency because its formation otherwise would violate Article III, Section 48.[12]

I consider the plain language of the statute, the organization documents, and other evidence in the record of the relationship between the City and WAM, led by the Trustees, as demonstrating a valued public-private partnership. The City provides an annual stipend to the Trustees just as it does to other private charitable organizations that support public and charitable purposes. In addition to the annual stipend, the City provides assistance with certain employee benefits and capital funds that are part of the public contribution in this public-private partnership. The Trustees are the private arm of the partnership, managing the operations, staffing, and expenditures of WAM. In my opinion, the various attributes cited by the Majority do not pierce the veil of corporate status granted by the General Assembly to the Trustees as a private "educational corporation."

enumerated, there was no specific provision for the formation of charitable corporations of educational or cultural purposes (although there is a provision whereby charitable corporations can merge without coming to the legislature for a new special act).

[12] The Majority reasons that general corporation law enacted in 1908 eliminated the need for the General Assembly to pass special acts to form corporations. However, between 1910 and 1914, the General Assembly passed approximately 147 bills relating to private charters including the incorporation and amendment of private corporations, public service commissions, insurance companies, and banks. These statutes are scattered throughout the chapter laws but are collated under the index headings of "Corporations" for the 1912 and 1914 chapter laws. For the 1910 chapter laws, the bills are alphabetically listed in the index under a section titled "Private Acts." *See* Md. Session Laws 1910; Md. Session Laws 1912; Md. Session Laws 1914.

Having found that the private corporation of the Trustees is not an instrumentality of the City or State under the MPIA, I would reverse the judgment of the Circuit Court for Baltimore City. I am also concerned about the future of other public-private partnerships in Maryland that could be impacted as a result of the Majority's opinion. Such partnerships are found throughout State, local, and municipal government as beneficial alliances supporting public programs in our communities. It would be an injustice to these private partners if the Courts were to determine that the private corporations engaged in public-private partnerships must be "instrumentalities" of government through an overly-broad reading of the mandate that the MPIA statute be "liberally construed" to give effect to its "broad remedial purpose." Maj. op., *supra*, at 26–27.

Respectfully, I dissent.