Bill Review Letters - 2006

An Analysis of Selected Bill Review Letters of the Attorney General of Maryland on Legislation Passed at the 2006 Session of the General Assembly

Department of Legislative Services 2006

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of the
Attorney General of Maryland
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Legislation Passed at the 2006 Session of the General Assembly

Department of Legislative Services
Office of Policy Analysis
Annapolis, Maryland

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This document was prepared by:

Office of Policy Analysis
Department of Legislative Services
General Assembly of Maryland

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Foreword

At the conclusion of each session of the General Assembly, the Attorney General's office undertakes a thorough review of all legislation passed during the session and advises the Governor as to the legislation's legality and constitutionality. While most of the bills that are scrutinized pass constitutional muster without comment, the Attorney General's office frequently prepares letters that raise constitutional, legal, and technical issues that it believes warrant attention or action. In extreme cases, the Attorney General may suggest a gubernatorial veto of a bill or recommend that a provision of a bill that is constitutionally impermissible be severed from the bill. More typically, the Attorney General's concerns relate to technical matters that can be addressed in the annual curative and corrective bills prepared by the Department of Legislative Services for introduction in the next session.

The purpose of this document, *Bill Review Letters – 2006*, is two-fold. First, it is to acknowledge the Attorney General's bill review process as a valuable source of information for the department's use in preparing the annual curative and corrective bills and fulfilling its ongoing responsibility to maintain the accuracy and integrity of the Annotated Code and the laws of Maryland. Second, the document is intended to assist those directly engaged in legislative drafting for the General Assembly. The letters selected for inclusion in this publication discuss various issues relating to constitutional law, statutory construction, and other legal matters to consider in the drafting, review, and analysis of bills and amendments. Toward that end, the analysis of each letter includes a segment on drafting tips that should be considered carefully by legislative drafters.

Bill Review Letters – 2006 contains selected bill review letters that cover a wide range of topics including legislative veto, bill title requirements, special laws, powers of local governments, First Amendment issues, and Commerce Clause issues. Note that several of these topics and other important constitutional and legal considerations related to legislation and legislative drafting are discussed in more depth in the department's *Maryland Legislative Desk Reference Book*.

This document was prepared by the Department of Legislative Services, Office of Policy Analysis. The analyses included in this document were written by Kelly G. Dincau, John J. Joyce, and Lisa M. Campbell. Renée Robertson was instrumental in collecting and organizing the bill review letters, and Carol Mihm typed the document and formatted it for publication. J. Patrick Ford edited the analyses and supervised production of the document.

U.S. Constitutional Issues

First Amendment – Fund-raising by Public Officials and Employees

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Bill/Chapter: House Bill 1674/Chapter 60 of 2006

Title: University System of Maryland – Restrictions on Campaign Fund-Raising Activities by Members of the Board of Regents

Attorney General's Letter: April 5, 2006

Issue: Whether a bill that prohibits an appointed public official from engaging in political fund-raising for the benefit of certain elected public officials or from being a candidate for public office violates the First Amendment to the U.S. Constitution.

Synopsis: House Bill 1674/Chapter 60 of 2006 prohibits a member of the Board of Regents of the University System of Maryland from engaging in certain enumerated political fund-raising activities and from running for public office. It does not prohibit a member from making a personal political contribution or engaging in political activities not specifically prohibited by the bill.

Discussion: Although laws that regulate lobbying and fundraising activities in the political arena implicate First Amendment rights, the Supreme Court has ruled that the First Amendment rights to associate and to participate in political activities are not absolute. *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). Public employees, for example, have failed to convince the court to overturn the Hatch Act and similar laws restricting partisan political activities by public employees and officials. *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). If the court determines that the legislation is narrowly tailored and advances a compelling state interest (such as public confidence in the political system), a challenged law likely will be upheld. A Maryland law prohibiting lobbyists from engaging in the same political activities regulated in this legislation was upheld by the Federal District Court. *Maryland Right to Life Political Action Committee, et. al. v. Frank Weathersbee, et. al.*, 975 F. Supp. 791 (D. Md. 1997). In light of precedent, the Attorney General saw no constitutional problems with the restrictions, as tailored in this legislation. As to the prohibition against running for public office, the Maryland Court of Appeals has held that there is no constitutional right to public office or public employment. *Montgomery County v. Walsh*, 274 Md. 502, 520 (1974). The Attorney General concluded, therefore, that forcing a member of the Board of Regents to choose between remaining on the

board and running for public office does not amount to a denial of a constitutional right.

Drafting Tips: **When requested to draft a bill that regulates political activity, a drafter should always be mindful of the requirements of the First Amendment and that such legislation may be susceptible to challenge on First Amendment grounds. The bill's sponsor should be advised that the bill must be narrowly tailored to advance a compelling State interest. A law challenged on First Amendment grounds likely will be voided if it is unnecessarily broad or is not designed to address a compelling need.**

J. Joseph Curran, Jr.
Attorney General

Donna Hill Staton
Maureen Dove
Deputy Attorneys General

Robert A. Zarnoch
Assistant Attorney General
Counsel to the General Assembly

Bonnie A. Kirkland
Kathryn M. Rowe
Sandra J. Cohen
Assistant Attorneys General

The Attorney General of Maryland

Office of Counsel to the General Assembly

April 5, 2006

The Honorable Robert L. Ehrlich, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: House Bill 1674

Dear Governor Ehrlich:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 1674, "University System of Maryland - Restrictions on Campaign fund-Raising Activities by Members of the Board of Regents." We have considered whether the bill would violate the First Amendment to the U. S. Constitution and have concluded that it does not.

House Bill 1674 prohibits a member of the University of Maryland Board of Regents (Board) from engaging in certain enumerated political fund-raising activities for the benefit of the Governor, Lieutenant Governor, Attorney General, Comptroller, or member of the General Assembly, or a candidate for election to one of those positions. It does not prohibit a member of the Board from making a personal political contribution, informing any entity of a position taken by a candidate or official, or engaging in activities not specifically prohibited by the bill. Finally, the bill prohibits a member of the Board from being a candidate for public office while serving on the Board.

In *Maryland Right to Life State Political Action Committee, et al. v. Frank Weathersbee, et al.* , 975 F Supp. 791(D. Md.1997), a federal court upheld against a First Amendment challenge a Maryland statute that prohibits lobbyists from engaging in the same political activities prohibited by HB 1674.[1] The court noted that "while lobbying and fundraising activities in the political arena may implicate First Amendment rights, 'neither the

[1] HB 1674 is modeled after State Government Article, § 15-714, relating to regulated lobbyists.

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right to associate nor the right to participate in political activities is absolute.'" *Id.* at 797 (1997), quoting from *Buckley v. Valeo*, 424 U.S. 1, 25 (1976). If the State can impose these types of restrictions on private individuals such as lobbyists, it clearly can place restrictions on a public official or public employee. *See United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) (ruling that Hatch Act provision which prohibits federal employees from certain partisan political activities and positions is constitutional) and *Broadrick v. Oklahoma* 413 U.S. 601 (1973) (rejecting First Amendment challenge to Hatch Act-type restrictions on the political activities of public employees). If the First Amendment is implicated, the challenged statute will nevertheless be constitutional if the Court determines that it is narrowly tailored to advance a compelling state interest. *Buckley,* 424 U.S. at 25.

In *Letter Carriers,* 413 U.S. at 565 , the Supreme Court said:

> "...it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it if confidence in the system of representative Government is not to be eroded to a disastrous extent."

HB 1674 addresses a continuing concern over conflicts of interest or the appearance thereof of members of one of the most prestigious boards in the State. Further, as in *Weathersbee,* the statute is narrowly tailored to accomplish the compelling state interest because it only affects the relationship between members of the Board and State elected officials and candidates and it does not ban all political activity by Board members.

To the extent HB 1674 may force some members to make a choice between remaining on the Board and engaging political fund-raising or between remaining on the Board and running for public office, such a choice does not amount to denial of a constitutional right. There is no constitutional right to public office or public employment. *See Montgomery County v. Walsh*, 274 Md. 502, 520 (1974).

For these reasons, we approve House Bill 1674 for constitutionality and legal sufficiency.

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

JJC:BAK:ads

Minority Business Enterprise Programs

Bill/Chapter: Senate Bill 884 and House Bill 869/Chapter 359 of 2006
House Bill 1431/Chapter 396 of 2006

Title: Procurement – Minority Business Participation (Senate Bill 884 and House Bill 869)

Linked Deposit Program – State Depository Financial Institutions – Loans to Minority Business Enterprises (House Bill 1431)

Attorney General's Letter: April 20 and 21, 2006

Issue:

(1) Whether a bill that extends the State's Minority Business Enterprise Program for five years complies with the standards established by the U.S. Supreme Court for race-conscious affirmative action programs.

(2) Whether a bill that creates a 15-year linked deposit program intended to enhance access to credit for minority business enterprises complies with the standards established by the U.S. Supreme Court for race-conscious affirmative action programs.

Synopsis: Senate Bill 884 and House Bill 869/Chapter 359 of 2006 extend the State's minority business enterprise (MBE) program for another five years and require another study of minority participation in State contracting to be done before the expiration of the program.

House Bill 1431/Chapter 396 of 2006 creates a linked deposit program in the Department of Housing and Community Development for the purpose of stimulating opportunities for certified minority business enterprises to have access to credit by assisting these businesses in obtaining loans at below-market interest rates. The Act, effective October 1, 2006, remains in effect for 15 years.

Discussion: The U.S. Supreme Court has established that race-conscious affirmative action programs are subject to strict scrutiny and may be upheld only if they are narrowly tailored to serve a compelling state interest. *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

A state's interest in remedying the effects of past or present racial discrimination can justify the use of racial distinctions. *Shaw v. Hunt*, 517 U.S. 899, 909 (1996). However, for this interest to reach the level of a

compelling state interest, it must satisfy two conditions. First, the discrimination must be "identified" discrimination – that is, past or present discrimination, in the relevant market, in which the State was engaged or was a passive participant. *Contractor's Association of East Pennsylvania v. Philadelphia*, 91 F.3d 586, 596 (3rd Cir. 1996). Second, the State must have had a "strong basis in evidence" to conclude that the remedial action was necessary before it established the program. *Podbereski v. Kirwan*, 38 F.3d 147 (4th Cir. 1994).

The issue of whether a program is narrowly tailored depends on such factors as:

(1) whether race-neutral means have been attempted or are used in conjunction with the program;

(2) the level of flexibility in the program, including the flexibility of the goals, the availability of waivers, and durational limits on the program;

(3) whether the goals set are related to the relevant markets; and

(4) steps taken to limit the benefits of the program to those who are still affected by discrimination in the relevant markets.

Sherbrooke Turf, Inc. v. Minnesota Dept. of Transp., 345 F.3d 964, 972-973 (8th Cir. 2003).

In order to ensure that the State's MBE program continues to meet these requirements, the General Assembly has consistently set durational limits on the MBE program and has required a statistical analysis of the efficacy of, and continued need for, the program before extending its termination date. The most recent study found "strong evidence of disparity in the State of Maryland's own contracting and procurement activity." *Race, Sex, and Business Enterprise: Evidence from the State of Maryland (Final Report Executive Summary)* (March 7, 2006). The Attorney General found that this type of evidence provides adequate justification for the State's MBE program. The Attorney General noted that under Senate Bill 884 and House Bill 869, the extension is only until the year 2011 and that a new study is required before that time.

The linked deposit program established by House Bill 1431, in essence, forms a new element of the State's MBE program and is, therefore, subject to the same standards applicable to the MBE program. The linked deposit program can be upheld only if it is narrowly tailored to serve a compelling State interest. The study that supports extension of the MBE program also

cites a nationwide survey showing that loan requests by minority-owned firms were more likely to be turned down than those of other firms, even after accounting for differences in factors such as size and credit history. Furthermore, the study found that minority-owned firms paid higher interest rates on loans than did white-owned firms. The Attorney General found that this provides adequate factual support for the conclusion that House Bill 1431 serves a compelling State interest. House Bill 1431 has an initial sunset date of September 30, 2021. The Supreme Court has stated that "race conscious … policies must be limited in time." *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003). The Attorney General concluded that while the 15-year sunset does not render the bill currently unconstitutional, the program should be evaluated on a more frequent basis. The Attorney General noted that one way to ensure such review would be to have the program terminate along with the MBE program in 2011 and to again make credit availability part of the next study.

Drafting Tips: **In drafting legislation that establishes or extends a race-conscious affirmative action program, the drafter should be satisfied that the program meets the requirements set forth by the U. S. Supreme Court. Specifically, the program must be narrowly tailored to serve a compelling State interest (*i.e.* remedying past discrimination) and be justified by evidence of the discrimination the program seeks to address. In setting a termination date for the program, the drafter should remember that the duration of a race-conscious program is a factor in determining whether the program is narrowly tailored. A termination date should be set so as to ensure that the program is evaluated on a frequent basis.**

J. Joseph Curran, Jr.
Attorney General

Donna Hill Staton
Maureen Dove
Deputy Attorneys General

Robert A. Zarnoch
Assistant Attorney General
Counsel to the General Assembly

Bonnie A. Kirkland
Kathryn M. Rowe
Sandra J. Cohen
Assistant Attorneys General

The Attorney General of Maryland

Office of Counsel to the General Assembly

April 20, 2006

The Honorable Robert L. Ehrlich, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: House Bill 869 and Senate Bill 884

Dear Governor Ehrlich:

We have reviewed and hereby approve for constitutionality and legal sufficiency, House Bill 869 and Senate Bill 884, identical bills entitled "Procurement - Minority Business Participation," which extend the State's minority business enterprise ("MBE") program for another five years and require another study of minority participation in State contracting to be done before the expiration of the program. We have considered whether these bills meet the standards for minority business enterprise programs that have been established by the Supreme Court and we have concluded that they do.

The Supreme Court has established that race conscious affirmative action programs are subject to strict scrutiny and may be upheld only if they are narrowly tailored to achieve a compelling public interest. *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), *cf., Johnson v. California*, 543 U.S. 499, 505 (2005) (All race conscious programs are subject to strict scrutiny).

A state's interest in remedying the effects of past or present racial discrimination can justify the use of racial distinctions. *Shaw v. Hunt*, 517 U.S. 899, 909 (1996). However, for this interest to reach the level of a compelling state interest, it must satisfy two conditions. First, the discrimination must be "identified" discrimination - that is, past or present discrimination, in the relevant market, in which the State engaged, or was a passive participant. *Contractor's Association of East Pennsylvania v. Philadelphia*, 91 F.3d 586, 596 (3rd Cir. 1996). Second, the State must have had a "strong basis in evidence" to conclude that the remedial action was necessary before it established the program. *Podbereski v. Kirwan*, 38 F.3d 147 (4th Cir. 1994).

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In addition to the requirement of a compelling state interest, a race-based classification must be narrowly tailored. The issue of whether a program is narrowly tailored depends on such factors as whether race neutral means have been attempted or are used in conjunction with the program; the level of flexibility in the program, including the flexibility of the goals, the availability of waivers, and durational limits on the program; whether the goals set are related to the relevant markets; and steps taken to limit the benefits of the program to those who are still affected by discrimination in the relevant markets. *Sherbrooke Turf, Inc. v. Minnesota Dept. of Transp.*, 345 F.3d 964, 972-973 (8th Cir. 2003).

In order to assure that its program continues to meet these requirements the General Assembly has consistently set durational limits on its MBE program and has required a statistical analysis of the efficacy and continued need of the program before extending its expiration date. The most recent study, done by NERA Economic Consulting and available on the Department of Transportation website,[1] found "strong evidence of disparity in the State of Maryland's own contracting and procurement activity." This type of evidence can provide the basis for a race conscious MBE program, *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir.), *cert. denied* 540 U.S. 1027 (2003), and in our view provides adequate justification for the State's MBE program. We also note that the extension is only until the year 2011, and that a new study is required before that time. As a result, we approve the bills.

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

JJC,Jr./KMR/kmr
hb869_sb884.wpd

cc: Kenneth H. Masters
Secretary of State
Karl Aro
The Honorable Dan K. Morhaim
The Honorable Verna Jones

[1] http://www.mdot.state.md.us/MBE%20Program%20Updated/FinalReportNERAMaryland_ESonly.pdf

J. Joseph Curran, Jr.
Attorney General

Donna Hill Staton
Maureen Dove
Deputy Attorneys General

Robert A. Zarnoch
Assistant Attorney General
Counsel to the General Assembly

Bonnie A. Kirkland
Kathryn M. Rowe
Sandra J. Cohen
Assistant Attorneys General

The Attorney General of Maryland
Office of Counsel to the General Assembly

April 21, 2006

The Honorable Robert L. Ehrlich, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: House Bill 1431

Dear Governor Ehrlich:

We have reviewed House Bill 1431, "Linked Deposit Program - State Depository Financial Institutions - Loans to Minority Business Enterprises," for constitutionality and legal sufficiency. It is our view that the bill currently meets constitutional standards. While we approve the bill, we advise that the sunset date be shortened to ensure that the program is reviewed on a regular basis for continued constitutionality.

House Bill 1431 creates a linked deposit program in the Department of Housing and Community Development for the purpose of stimulating opportunities for certified minority business enterprises to have access to credit by assisting these businesses in obtaining loans at lower than market interest rates. The Act takes effect October 1, 2006 and remains in effect for fifteen years.

This program essentially forms an additional portion of the State's Minority Business Enterprise ("MBE") Program, and like that program, can be upheld only if it is narrowly tailored to serve a compelling state interest. *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), *cf., Johnson v. California*, 543 U.S. 499, 505 (2005) (All race conscious programs are subject to strict scrutiny). In our letter on House Bill 869 and Senate Bill 884 of this year, we concluded, based on a study done by NERA Economic Consulting, that the MBE program continues to serve the compelling state interest in remedying the effects of past or present racial discrimination. *Race, Sex and Business Enterprise: Evidence from the State of Maryland (Final Report Executive Summary)* (March 7, 2006). That same study cites a nationwide survey showing that loan requests by minority-owned firms were more likely to be turned

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down than those of other firms, even after accounting for differences in factors such as size and credit history, and that minority-owned firms paid higher interest rates on loans than did White-owned firms. The NERA study states that the "evidence from our analysis of Maryland's geographic market area, taken from our Maryland Credit Survey, is entirely consistent with the results of [this nationwide survey]." It is our view that the NERA study and the material on which it relies provide adequate factual support for the conclusion that House Bill 1431 serves a compelling public purpose.

For the most part, it is our view that House Bill 1431 is narrowly tailored for the same reasons that the overall MBE program is narrowly tailored. *See* 74 *Opinions of the Attorney General* 76 (1989). There is, however, one significant difference. While the sunset date on the MBE program was just extended from 2006 to 2011 based on the latest NERA study, House Bill 1431 has an initial sunset date of September 30, 2021. The Supreme Court has stated that "race-conscious ... policies must be limited in time." *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003). Such limits are a crucial and necessary part of the narrow tailoring required to support a race-conscious program. *Concrete General, Inc. v. Washington Suburban Sanitary Com'n*, 779 F.Supp. 370, 381 (D.Md. 1991). While we do not believe that the fifteen year sunset renders the bill currently unconstitutional, it would be our recommendation that the continued need for the program be evaluated on a more frequent basis than that. One way to provide for that would be to have the program sunset along with the MBE program in 2011, and to have credit availability again made part of the next study.

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

JJC,Jr./KMR/kmr
hb1431.wpd
cc: Kenneth H. Masters
Secretary of State
Karl Aro
The Honorable Michael L. Vaughn

Takings Clause – Regulatory Taking

Bill/Chapter: Senate Bill 1099 of 2006 (Vetoed by Governor)

Title: Constellation Energy Group, Inc., and Baltimore Gas and Electric Company – Return of Transition Costs

Attorney General's Letter: April 6, 2006, citing Letter of Advice to Senator Thomas Middleton dated March 28, 2006

Issue: Whether a bill that prohibits the merger of two public utility companies and an increase in utility rates, unless one of the merging companies returns specified "transition costs" to another company to be used to reduce increases in utility rates charged to consumers, is an unconstitutional governmental taking of property without just compensation.

Synopsis: Senate Bill 1099 of 2006 would have provided that, until Constellation Energy Group (Constellation) returned $528 million in "transition costs" recovered by Baltimore Gas and Electric (BGE) in accordance with State law, a proposed merger between Constellation and Florida Power and Light could not occur and electricity rates for BGE residential customers could not be increased. Once the transition costs were returned, the legislation would have required BGE to use the money to reduce any increase in electricity rates charged to consumers. Finally, should Constellation fail to return the transition costs, the legislation would have required Constellation to reimburse BGE for losses incurred due to BGE's inability under the bill to increase rates.

Discussion: The Takings Clause of the Fifth Amendment to the U.S. Constitution, made applicable to the states through the Fourteenth Amendment, provides that private property shall not "be taken for public use, without just compensation." The federal courts have developed standards to decide whether a challenged governmental action is a "regulatory taking" without compensation under the Fifth Amendment. Two categories of regulatory action that are generally deemed to be takings *per se* involve physical invasion of property or deprivation of all economically beneficial use of property. While the Attorney General found that neither of these factors applied to the regulatory action contemplated under this legislation, the legislation could still be vulnerable to a claim that it involves a regulatory taking. Factors that will be considered by the courts in resolving such a claim include the extent to which the regulation has interfered with "distinct investment-backed expectations" and the

character of the governmental action (*i.e.*, whether the regulation amounts to a physical invasion of the property or, instead, merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good"). *Lingle v. Chevron, U.S.A., Inc.*, 544 U.S. 528, 537 (2005).

The Attorney General advised that requiring the return of transition costs to ratepayers raises a constitutional issue since Constellation might claim that it had a legitimate investment-backed expectation to keep the funds. However, since a court might be persuaded by a good-faith argument that the money represents an unforeseen "windfall" rather than a legitimate investment-backed expectation, and that the return of the funds to consumers is justifiable to protect them from hardships, the Attorney General advised that this feature of the legislation is "not clearly unconstitutional." On the other hand, the Attorney General concluded that the provision of the legislation that freezes rates until the transition costs are returned would probably be considered confiscatory and a taking, even using the consumer protection argument. The Attorney General advised, however, that this provision could be severed from the bill and the remaining portion of the legislation could still be given effect.

Drafting Tips: **A drafter of a bill regulating business should consider the extent to which the legislation could result in State interference with a private investment-backed expectation and whether the legislation is subject to challenge as a governmental taking without just compensation in violation of the U.S. and Maryland constitutions. A drafter should be prepared to discuss this potential problem with the sponsor of the legislation.**

J. Joseph Curran, Jr.
Attorney General

Donna Hill Staton
Maureen Dove
Deputy Attorneys General

Robert A. Zarnoch
Assistant Attorney General
Counsel to the General Assembly

Bonnie A. Kirkland
Kathryn M. Rowe
Sandra J. Cohen
Assistant Attorneys General

The Attorney General of Maryland

Office of Counsel to the General Assembly

April 6, 2006

The Honorable Robert L. Ehrlich, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: Senate Bill 1099

Dear Governor Ehrlich :

We have reviewed for constitutionality and legal sufficiency SB 1099, which effective June 1, 2006 would add §7-518 to the Public Utility Companies to provide that:

> (A) NOTWITHSTANDING ANY OTHER PROVISION OF LAW, UNTIL CONSTELLATION ENERGY GROUP, INC., RETURNS TO THE BALTIMORE GAS AND ELECTRIC COMPANY THE $528,000,000 IN TRANSITION COSTS THAT WERE RECOVERED BY BALTIMORE GAS AND ELECTRIC COMPANY IN ACCORDANCE WITH §7-513 OF THIS SUBTITLE AND PUBLIC SERVICE COMMISSION ORDER NO. 75757:
>
> (1) A MERGER BETWEEN FPL GROUP, INC., AND CONSTELLATION ENERGY GROUP, INC., MAY NOT OCCUR; AND
>
> (2) BALTIMORE GAS AND ELECTRIC COMPANY MAY NOT INCREASE ELECTRICITY RATES FOR RESIDENTIAL CUSTOMERS IN THE BALTIMORE GAS AND ELECTRIC SERVICE TERRITORY.

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(B) BALTIMORE GAS AND ELECTRIC COMPANY SHALL USE THE TRANSITION COSTS RETURNED IN ACCORDANCE WITH SUBSECTION (A) OF THIS SECTION TO REDUCE ANY INCREASE IN ELECTRICITY RATES FOR RESIDENTIAL CUSTOMERS IN THE BALTIMORE GAS AND ELECTRIC SERVICE TERRITORY THAT MAY OCCUR AFTER ELECTRICITY RATE CAPS FOR RESIDENTIAL CUSTOMERS EXPIRES.

(C) IF CONSTELLATION ENERGY GROUP, INC., DOES NOT RETURN THE TRANSITION COSTS TO BALTIMORE GAS AND ELECTRIC COMPANY, CONSTELLATION ENERGY GROUP, INC., SHALL REIMBURSE BALTIMORE GAS AND ELECTRIC COMPANY FOR ANY LOSSES INCURRED BY BALTIMORE GAS AND ELECTRIC COMPANY THAT ARE DIRECTLY ATTRIBUTABLE TO THE PROHIBITION ON ELECTRICITY RATE INCREASES UNDER SUBSECTION (A) OF THIS SECTION

As you know, a substantial constitutional issue is raised by legislation returning transition costs to ratepayers. Constellation may argue that any requirement that the holding company return the $528 million in transition costs unless it complies with the conditions imposed by the bill is an unconstitutional taking. PSC Order No. 95757, adopted in 1999 under a valid state law, resulted in Commission-approved rates under which Constellation has received $528 million over six years. As a result, Constellation will likely contend on the basis of relevant caselaw that it has a legitimate investment-backed expectation to keep the $528 million.

On the other hand, a court may be persuaded to find that consumer-subsidized transition costs required by a deregulation law whose underlying expectations have failed might be seen as an "unforeseen windfall benefit" for Constellation, and its return to consumers justifiable to protect against the hardships caused by hikes in utility rates. *See* Letter of Advice to Hon. Thomas Middleton, dated March 28, 2006 (copy enclosed). Because a good faith argument can be made in favor of SB 1099's conditional transfer of transition costs, we do not believe that this feature of the legislation is clearly unconstitutional as a taking.

Although it may not be unconstitutional for the General Assembly to act to condition the return of transition costs to BGE customers, serious constitutional issues are raised by the mechanisms SB 1099 uses to encourage that return.

A very troubling feature is the rate freeze the legislation would impose for residential customers in the BGE service territory until the transition costs are returned. The Department of Legislative Services has advised that just a one-year residential rate freeze would cost BGE some $790 million. Such a freeze would probably be considered confiscatory and a taking, *see Duquesne Light Co. v. Brasch,* 488 U.S. 299 (1989); *FPC v. Hope Natural Gas Co.,* 320 Md. 591 (1944), even if justifiable under some regulatory theories.[1] However, we believe the unconstitutional price freeze alternative of SB 1099, *i.e.* §7-518(A)(2), is severable from §7-518(A)(1) and §7-518(B) of the legislation, which could be given effect.[2]

If SB 1099's moratorium on the Constellation merger were intended to be permanent, a serious issue would also be raised. However, it is our view that this portion of the bill would likely be read in conjunction with HB 1713's delay of the merger until action by the 2007 General Assembly and thus, regarded as a temporary, not permanent, measure. *See* Bill Review Letter on HB 1713, dated April 6, 2006.

For all of these reasons, we approve SB 1099 for signing.

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

JJCjr/RAZ/as

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[1] *See Citizens Utility Board News Release: Study Shows Com Ed / Exelon Doesn't Need Big Rate Hikes,* CUB Announces Push to Extend Freeze on Electric Rates (Feb. 20, 2006).

[2] If §7-518(A)(2) is severed from the legislation, so too must be §7-518(C), which mandates Constellation reimbursement to BGE for losses caused by the caps set by subsection (A)(2). The two provisions are "so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other." Sutherland on Stat. Construction at §44.4.

J. Joseph Curran, Jr.
Attorney General

Donna Hill Staton
Maureen Dove
Deputy Attorneys General

Robert A. Zarnoch
Assistant Attorney General
Counsel to the General Assembly

Bonnie A. Kirkland
Kathryn M. Rowe
Sandra J. Cohen
Assistant Attorneys General

The Attorney General of Maryland
Office of Counsel to the General Assembly

March 28, 2006

The Honorable Thomas M. Middleton
Chairman, Senate Finance Committee
3E Miller Senate Building
Annapolis, Maryland 21401-1991

Dear Chairman Middleton:

You have requested advice on the constitutionality of proposed legislation that would require the return to BGE customers / rate payers of all or a portion of the $528 million in "transition costs" paid pursuant to §7-513 of the Public Utility Companies (PUC) Article and to a Stipulation and Settlement Agreement approved by the Public Service Commission without change more than 6 years ago. *See In re. Baltimore Gas & Elec. Co.*, 197 P.U.R. 4th 1 (Md. P.S.C. Nov. 10, 1999).[1] I have considered whether such a requirement would unconstitutionally impair the obligation of contract in violation of Article I, §10 of the U.S. Constitution or unconstitutionally take property in violation of the 5th and 14th Amendments to the U.S. Constitution. In my view, this proposed legislation would be constitutional.

Background

The background of your inquiry is comprehensively stated in your March 21, 2006 letter, which is attached to this response. I note only the following salient points.

[1] This charge for "transition costs" known as a "competitive transition charge" is still being collected from rate payers and will be phased out July 1, 2006. BGE has passed these charges through to Constellation Energy, a nonregulated holding company of BGE and generator of electricity from power plants in Maryland transferred to it by BGE.

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1) Among the key purposes of the 1999 utility deregulation statutes that authorized the competitive transition charges were to "create competitive retail electricity supply and electricity supply services" and "provide economic benefit for all customer classes". PUC Art. §7-504. In fact, the Fiscal Notes for SB 300 and HB 703 (May 25, 1999) noted that as a result of the legislation "[c]competition will encourage innovation and efficiency in the industry which could result in downward pressure on price."

2) Competition failed to occur in the deregulated utility market and, as noted in your letter, "the cost of energy has skyrocketed, causing an anticipated increase of 72 percent in electric bills for BGE customers."

3) In determining appropriate stranded costs, the PSC accepted BGE's argument that its power plant would become a risky investment and uncompetitive and should be subsidized by rate payers. Six years later, the value of these power plants has increased. and coal and nuclear plants are now commanding high assessment values. *See* J. Hancock, *Deregulation deck stacked against rate payers, Baltimore Sun* (March 15, 2006).

Constitutional Analysis

Supreme Court cases analyzing impairment of contract and takings claims both focus on the reasonable expectations of the contracting party or property owner. *See Energy Reserve Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983) and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

A. Contract Clause Principles

In Contract Clause cases, the threshold inquiry is whether the State law operates as a "substitantial" impairment of a contract, *Energy Reserves*, 459 U.S. at 411. A "state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment." *Id.* As noted in *City of El Paso v. Simmons*, 379 U.S. 497, 515 (1965), "[t]his Court's decisions have never given a law which imposes unforeseen advantages or burdens on a contracting party constitutional immunity against change." Also relevant to the impairment inquiry is "whether the industry the complaining party has entered has been regulated in the past." *Energy Reserve*, 459 U.S. at 411.

Even if the regulation constitutes a substantial impairment, the State, in justification, can assert "a significant and legitimate purpose behind the regulation ... such as the

remedying of a broad and general social or economic problem," and demonstrate that it has adjusted the rights and responsibilities of contracting parties "upon reasonable conditions" and the adjustment is of a character appropriate to the public purpose justifying the legislation. *Id.* at 411-13. A judicial determination of the reasonableness of a Legislature's reformation of earlier legislation that allegedly disadvantages intervening contract rights often focuses on whether the earlier law had effects that were unforeseen and unintended.[2] *See also U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 31, n. 30 (1977)("This Court previously has regarded the elimination of unforeseen windfall benefits" that allow contracting parties "to recover far more than their legitimate entitlement" as a reasonable basis for sustaining statutory changes.)

B. Contract Clause Analysis

In my view, proposed legislation requiring a return to BGE customers of all or a part of more than a half-billion dollars in transition or stranded costs would satisfy these principles.

First, although the 1999 Stipulation and Settlement Agreement is a contract, BG&E's right to recover "net transition costs" pursuant to a "competitive transition charge" was initially grounded in a statute, PUC Art., §7-513, subject to subsequent legislative change.[3] In addition, it was government action, *viz.* PSC approval, that placed these consumer charges

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[2] A classic example of such a legislative scenario occurred in *MSTA v. Hughes*, 594 F. Supp. 1353 (D. Md.), *aff'd.* No. 84-2213 (4th Cir., Dec. 5, 1985), *cert. denied*, 475 U.S.1140 (1986). This was an impairment of contract challenge to 1984 State pension reform legislation enacted because of the failure of a 1979 law, which the General Assembly had "confidently predict[ed] ... would result in a financially sound retirement system." 594 F. Supp. at 1369. Because the 1979 act "had effects that were unforeseen and unintended" and because by 1984 the "confident predictions had not been borne out", the court found legislative changes to be reasonable despite their adverse impact on teachers' and employees' contract rights. *Id.* at 1369-70.

[3] Thus, the decision of the Court of Special Appeals affirming the validity of the PSC's approval of the 1999 settlement does not enhance a claim of immutable contract rights.

in the hands of BGE and Constellation.[4]

Second, past State regulation of public utilities, power plants, and utility rates undercuts reasonable reliance that the 1999 Stipulation and Settlement Agreement would be immune from change by the General Assembly or the PSC *see Energy Reserves*, 459 U.S. at 411. While Constellation is not itself a regulated entity, holding companies that own public utilities can be subjected to state regulation. *See the Energy Policy Act of 2005*, P.L. 109-58, at Sec. 1261 - Sec. 1275; and *Alliant Energy Corp. v. BIE*, 330 F. 3d 904 (7th Cir. 2003) *cert. denied*, 540 U.S. 1105 (2004). Most importantly, the sources of Constellation's profits from the competitive transition charge are legislative and regulatory actions subject to change.

Third, no contract impairment arises from the fact that BGE has been subject to price caps for the last six years. BGE, as a conduit for the passage of these consumer - subsidized transition costs to Constellation would simply act as a conduit for their return. Moreover, competition, some marketplace restraints on prices, and financial risks for assuming costs of coal and nuclear power plants were "confidently predicted", *MSTA v. Hughes*, 594 F. Supp. at 1369, as a result of the 1999 legislation. With the failure of these expectations, the Legislature, without contract impairment, can restrict Constellation to gains reasonably expected from the contract.

Even if the proposed legislation would result in a substantial contract impairment, it would be justified as serving a significant and legitimate purpose, such as the protection of consumers from the hardships caused by the escalation of utility prices. *See Energy Reserve*

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[4] Under §7-513(e)(2), the Commission is required to determine an "equitable allocation" of costs or benefits between shareholders and ratepayers in determining the allocation of transition costs or benefits, including "whether the investment continues to be used and useful" and "whether investors have already been compensated for the risk." This is not a one-time determination that precludes the PSC from reconsidering or modifying its approval of the 1999 Stipulation and Settlement Agreement. In fact, as recently as January, 2006, the PSC approved another settlement relating to stranded cost quantifications. *See In the matter of the Baltimore Gas & Electric Company's Proposed: (A) Stranded Cost Quantifications Mechanism; (B) Price Protection Mechanism; and (C) Unbundled Rates*, 2006 W.L. 322041 (Md. P.S.C.). Thus, the passage of six years - - during which the competitive transition charges have continued to be collected from ratepayers - - gives no superceding effect to BGE or Constellation's contract rights.

at 416-17. In addition, such legislation could be viewed as a reasonable response to the unforeseen and unintended effects of the 1999 legislation and a reasonable attempt to eliminate what might be characterized as an unforeseen windfall benefit. *See U.S. Trust Co. of New York v. New Jersey*, 431 U.S. at 31, n. 30. For these reasons, it is my view that the proposed legislation concerning transition costs would not unconstitutionally impair the obligation of a contract.

C. *Takings Clause Principles*

The Takings Clause of the 5th Amendment made applicable to the States through the 14th Amendment, provides that private property shall not "be taken for public use, without just compensation". Supreme Court cases set forth two categories of regulatory action that will generally be deemed *per se* takings: 1) physical invasion of property and 2) deprivation of all economically beneficial use of property. *See Lingle v. Chevron, U.S.A., Inc.*, 125 S. Ct. 2074, 2081 (2005). Neither of these categories are applicable here. *See Branch v. United States*, 69 F. 3d 1571, 1577 (Fed. Cir. 1995)(Requiring money to be spent is not a *per se* taking of property.)

All other regulatory taking challenges are governed by the standards set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Among the factors a court must consider in resolving a takings claim are: 1) the economic impact of the regulation on the claimant, particularly, the extent to which the regulation has interfered with "distinct investment-backed expectations"; and 2) the character of the governmental action, *viz.* whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good." *Lingle*, 125 S. Ct. at 2082. *See also Chevy Chase Savings & Loan v. State*, 306 Md. 384, 411 (1980). Examining these criteria, the U.S. Court of Appeals for the Federal Court found relevant the issue of whether the government was appropriating the property for its own uses, whether the alleged taking was a necessary consequence of a statutory regulatory scheme; and whether property owners did business in a regulated field. *See Branch*, 69 F. 3d at 1579.

D. *Takings Clause Analysis*

In my view, applying the above principles to proposed legislation requiring a return to ratepayers of previously paid transition costs would not result in an unconstitutional taking of property without just compensation. Even assuming statutorily-imposed rate payer charges are BGE's or Constellation's property in the constitutional sense, the proposed

legislation would not interfere with the kind of investment-backed expectations accorded Takings protection. As noted above, in the Contract Clause analysis, the premise of the proposed legislation is that expectations of the 1999 deregulation law have failed and that the beneficiaries of transition costs have received an unintended windfall. In addition, those beneficiaries are in an industry subject to state regulation, either traditionally or in the recent past.

In addition, the proposed legislation would not result in the government appropriation of property for itself, but would represent a necessary consequence of a statutory change in a regulatory scheme and would adjust economic conditions to promote the common good, *viz.* protecting the interest of consumers from utility rate hikes.

For these reasons, it is my opinion that proposed legislation requiring a return of transition costs to ratepayers would not violate the Takings Clause of the Fifth Amendment.

Sincerely,

Robert A. Zarnoch
Assistant Attorney General
Counsel to the General Assembly

RAZ:ads
cc: The Honorable E.J. Pipkin

Commerce Clause – Alcoholic Beverages Licenses – Residency Requirements

Bill/Chapter: House Bill 482 and Senate Bill 656/Chapter 530 of 2006

Title: Harford County – Alcoholic Beverages Licenses – Residency Requirement for Applicants

Attorney General's Letter: May 9, 2006

Issue: Whether a bill that requires an applicant for an alcoholic beverages license in Harford County to meet a certain residency requirement violates the Commerce Clause of the U.S. Constitution.

Synopsis: House Bill 482 and Senate Bill 656/Chapter 530 of 2006 amend Article 2B, § 10-104(n) of the Code by extending the residency requirement for an applicant seeking an alcoholic beverages license in Harford County to require residency for one year prior to the time that the application is filed. Previously, the law had provided that an applicant for an alcoholic beverages license in Harford County must be a bona fide resident of the county at the time the application is filed.

Discussion: Maryland law establishes various residency requirements for alcoholic beverages license applicants. With the exception of two counties that allow the residency requirement to be waived if the applicant can present local residents to attest to the applicant's good character or otherwise demonstrate fitness, all counties have a residency requirement. *See, e.g.*, Article 2B, § 10-103.

After a review of older cases, the Attorney General determined that, for many years, challenges to residency requirements for alcoholic beverages licenses were uniformly rejected. Many of these cases were brought under the Privileges and Immunities Clause of the U.S. Constitution and were rejected on the grounds that the sale of alcoholic beverages was not a privilege or immunity of a citizen of the United States. The courts found it entirely reasonable that a State would want to restrict licenses to those who are known in the community and to those who are amenable to process within the State. The Attorney General found only one older case that addresses a challenge to a residency requirement for an alcoholic beverages license under the Commerce Clause. *Kohn v. Melcher*, 29 F. 433 (D.Iowa 1887). In *Kohn*, the court upheld the residency requirement, concluding that it was not enacted for purposes of economic protectionism, but rather for the legitimate regulatory purpose of aiding in the enforcement of the law against selling alcohol for use as a beverage.

The most recent case to uphold a residency requirement in the alcoholic beverages context was *Coolman v. Robinson*, 452 F.Supp. 1324 (D.C. Ind. 1978). This case concerned an equal protection challenge to a statute that required an applicant for any alcoholic beverages license to be a resident of the State for five years continuously prior to the application. The court concluded that the appropriate test of the statute's residency requirement was the rational basis test, not "strict scrutiny" under the "right to travel" cases. Furthermore, the statute was entitled to even greater deference in light of the Twenty-first Amendment to the U.S. Constitution. The court found that the five-year residency requirement was rationally related to the State's practice of placing reliance on first-hand knowledge of members of a community regarding an applicant's character and reputation.

However, since the *Coolman* case, challenges to residency requirements have been based on the Commerce Clause and have been uniformly successful. Generally, courts have held that residency requirements interfere with interstate commerce and have, therefore, applied a strict scrutiny test to the statutes. Courts also have found that the Twenty-first Amendment would not shield a statute from Commerce Clause scrutiny if the statute did not serve the core purposes of that amendment. The Attorney General noted that all of these cases focused mainly on statutes requiring some portion of the ownership of corporations to be residents of the State or county where a license is to be issued. In Maryland, in contrast, licenses are not issued to corporations, but to officers of the corporation who are authorized to act on its behalf. Article 2B, § 9-101. There are, however, local provisions that do require some shareholders to be residents. *See, e.g.*, Article 2B, § 9-101(d)(3). While acknowledging that some of the objections to the stockholder provisions may not apply in the case of an individual applicant, the Attorney General found that much of the rationale of these cases still applies and, further, that the individual requirements also discriminate against out-of-state investment.

The Attorney General concluded that, although the State has a legitimate interest in limiting its licenses to people who are known in, have ties to, and can be vouched for by the residents of the communities in which the potential licensees will do business (as opposed to interests amounting to mere economic protectionism), this "legitimate interest" has received short shrift from the courts in recent cases. As a result, the Attorney General concluded that there is a "substantial risk" that residency requirements for alcoholic beverages license applicants could be found invalid if challenged under the Commerce Clause. In light of the relatively short residency period established in House Bill 482 and Senate Bill 656 compared to the existing rquirements applicable in other counties, the Attorney General did not recommend a veto of the bills. Rather, the Attorney General suggested

that the State undertake a review of such residency requirements as part of the code revision process.

Drafting Tips: **When drafting legislation that involves State regulation of alcoholic beverages and commerce, the drafter must always consider the Commerce Clause and the Twenty-first Amendment to the U.S. Constitution. If the legislation seeks to establish residency requirements for alcoholic beverages licenses, the drafter should work with the sponsor to ensure that the residency requirements are in furtherance of legitimate governmental interests and can withstand the strict constitutional scrutiny given to challenged statutes that, on their face, appear to discriminate against interstate commerce. The drafter should establish a clear record as to what those legitimate interests are and determine whether other less discriminatory requirements (*e.g.*, shorter residency periods) might serve those interests in a constitutionally permissible manner.**

J. Joseph Curran, Jr.
Attorney General

Donna Hill Staton
Maureen Dove
Deputy Attorneys General

Robert A. Zarnoch
Assistant Attorney General
Counsel to the General Assembly

Bonnie A. Kirkland
Kathryn M. Rowe
Sandra J. Cohen
Assistant Attorneys General

The Attorney General of Maryland

Office of Counsel to the General Assembly

May 9, 2006

The Honorable Robert L. Ehrlich, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: House Bill 482 and Senate Bill 656

Dear Governor Ehrlich:

We have reviewed Senate Bill 656 and House Bill 482, identical bills entitled "Harford County - Alcoholic Beverages Licenses - Residency Requirement for Applicants," for constitutionality and legal sufficiency. While we conclude that the bill may be signed into law, we write to discuss the increasingly unsettled state of the law with respect to residency requirements for alcoholic beverages licenses.

Senate Bill 656 and House Bill 482 amend Article 2B, § 10-104(n), which currently provides that an applicant for an alcoholic beverages license in Harford County must be a bona fide resident of the County at the time that the application is filed, and must remain a resident so long as the license is in effect, but that the applicant need not be a registered voter. The bills extend the requirement of residency to one year prior to the time that the application is filed.

Such residency requirements are common around the country and in other parts of Article 2B. Article 2B, § 10-103(b)(4)(i) provides that "[e]xcept as provided in subparagraph (ii) of this paragraph," every new application for a license shall contain "a statement that the applicant has been for two years next proceeding the filing of his application a resident of the county or of the City of Baltimore in which he proposes to operate under the license applied for." This provision has appeared in Article 2B since it was enacted in 1933 following the repeal of Prohibition. Chapter 2, Laws of the Special Session of 1933, § 5(3). Subparagraph (ii) provides that the residency requirement is one year in Dorchester County. Other counties have exceptions that are not reflected in subparagraph (ii), but all but two require residency in the county in which the license is to be issued. The remaining two,

104 Legislative Services Building · 90 State Circle · Annapolis, Maryland 21401-1991
410-946-5600 · 301-970-5600 · Fax 410-946-5601 · TDD 410-946-5401 · 301-970-5401

Calvert and Howard, have the residency requirement, but allow it to be waived if the applicant can present local residents to vouch for his or her good character or otherwise demonstrate fitness. Article 2B, § 10-104(f) and (o).

For many years, challenges to residency requirements for alcoholic beverage licenses were uniformly rejected. Many of these were brought under the Privileges and Immunities Clause of the United States Constitution and were rejected on the grounds that the sale of alcoholic beverages was not a privilege or immunity of a citizen of the United States. *Bartemeyer v. State of Iowa*, 85 U.S. 129 (1873); *Glicker v. Michigan Liquor Control Commission*, 160 F.2d 96 (6th Cir. 1947); *Bloomfield v. State*, 99 N.E. 309 (Ohio 1912); *De Grazier v. Stephens*, 105 S.W. 992 (Tex. 1907); *Welsh v. State*, 25 N.E. 883 (Ind. 1890); *Mette v. McGuckin*, 25 N.W. 338 (Neb. 1885) *affirmed by an equally divided court*, 149 U.S. 781 (1892); *Austin v. State*, 10 Mo. 591, 1847 WL 3647 (Mo. 1847); *cf., Trageser v. Gray*, 73 Md 250 (1890) (Upholding requirement that applicant be citizen of the United States); *Hinebaugh v. James*, 192 S.E. 177, 112 ALR 59 (W.Va. 1937). The courts in these cases generally found it entirely reasonable that a state would want to restrict licenses to those who are known in the community, and to those who are amenable to process within the state. For example, in *Trageser v. Gray*, 73 Md 250, 254 (1890), the Court, noting that the privilege was one that is "very liable to be abused," concludes that it "seemed wise to the Legislature to confer it only on those who, being natives of the country, might reasonably be supposed to have a regard for its welfare; or who, not being natives, had, as required by the naturalization law, proven by credible testimony before a court of justice, that they were attached to the principles of the Constitution of the United States, and were well disposed to their good order and happiness." Similarly, in *Mette v. McGuckin*, 25 N.W. 338 (Neb. 1885), the Court stated that failure to restrict licenses to those "subject to the laws of the state, and to the jurisdiction of her courts, and liable to their processes, ... would completely destroy the efficacy of the law, and deprive the people of the protection which the law is intended to give." *See also De Grazier v. Stephens*, 105 S.W. 992 (Tex. 1907).

We have found only one older case that addresses a challenge to a residency requirement for an alcoholic beverages license under the Commerce Clause. *Kohn v. Melcher*, 29 F. 433 (D.Iowa 1887) involved a requirement that an applicant be a citizen of the State of Iowa in order to receive a license to sell alcohol for industrial and pharmaceutical purposes. The Court upheld this requirement, holding that if it were enacted for the purposes of economic protectionism it would be invalid, but concluded that it was instead enacted for legitimate regulatory purposes, to aid in the enforcement of the law against selling alcohol for beverage purposes.

The most recent case to uphold a residency requirement in the alcoholic beverages context was *Coolman v. Robinson*, 452 F.Supp. 1324 (D.C.Ind. 1978). That case concerned an Equal Protection challenge to a statute that required that an applicant for any alcoholic beverages license be a resident of the state for five years continuously prior to the application. The Court first determined that the residency requirement was not one that would call for the application of strict scrutiny under the right to travel cases, and that the appropriate test was rational basis. *Id.* at 1328.
The Court further concluded that the statute was entitled to even greater deference because of the Twenty First Amendment. *Id.* at 1329. As a result, the Court found that the five year residency requirement was rationally related to the state's practice of placing reliance on first-hand knowledge of members of a community of an applicant's character and reputation. *Id.* at 1330. *See also*, 12 Okl. Op. Atty. Gen. 153, 1980 WL 114686 (Okl.A.G.) (November 19, 1980) (Ten year residency requirement for package store license does not clearly violate Equal Protection); Tenn. Op. Atty. Gen. No. 83-397, 1983 WL 167243 (Tenn.A.G.) (September 12, 1983) (Two year residency requirement for winery license does not violate Equal Protection).

Since the *Coolman* case, challenges to residency requirements have been based on the Commerce Clause, and have uniformly been successful. The first relevant case involved not liquor, but gaming. In *Gulch Gaming, Inc., v. South Dakota*, 781 F.Supp. 621 (D.S.D.1991), the Court held that a statute requiring that an individual applicant for a gaming license show that they are a bona fide residents and that corporations show that a majority of the ownership are bona fide residents violated the Commerce Clause. The Court held that the requirement implicated the Commerce Clause because it interfered with the flow of investments across state lines. It accepted that the purpose of the requirement was to protect the morals and welfare and to retain tight regulatory control of the industry. However, focusing on the corporate side of the statute, it held that regulation of the residence of stockholders had no relation to this goal, since stockholders did not run the business, keep the books, or pay the taxes. Thus, the Court found that the statute violated both the Commerce Clause and Equal Protection.[1]

In *Cooper v. McBeath*, 11 F.3d 547 (5th Cir.) *cert. denied* 512 U.S. 1205 (1994), the Court considered a Texas statute requiring three years durational residency, which applied both to individual applicants and to 51% of the stockholders of corporate residents. The

[1] A subsequent case, *Chance Management, Inc. v. State of S.D.*, 876 F.Supp. 209 (D.S.D. 1995), *affirmed* 97 F.3d 1107 (8th Cir. 1996), *cert. denied* 519 U.S. 1149 (1997), upheld a similar residency requirement for State lottery agents, applying the market participant doctrine.

Court found that the statute facially discriminated against interstate commerce, and that it was, as a result, subject to strict scrutiny. The Court further found that the test was not met by general interests such as health, safety and morals, and that, while the state's ability to investigate out-of-state applicants may be more limited, "however legitimate may be the State's ultimate goals, it cannot pursue them via the illegitimate means of a flat proscription of non-Texans." *Id.* at 554. The Court also found that the Twenty First Amendment would not shield a statute that did not serve the core purposes of that amendment from Commerce Clause scrutiny, and that the residency requirement did not promote those purposes but was "mere economic protectionism."

Subsequent cases have followed the rationale of the *Cooper* case. *Indiana Wholesale Wine & Liquor Co., Inc. v. State ex rel. Indiana Alcoholic Beverage Com'n*, 662 N.E.2d 950 (Ind.App. 1996), *vacated* 695 N.E.2d 99 (Ind.1998) (Holding that case should have been decided on basis of interpretive issue rather than reaching the constitutional issue) dealt with a statute that held that a corporate applicant must have 60% or more of its common stock owned by people who have been state residents for five years or more, and held that it violated the Commerce Clause and was not saved by the Twenty First Amendment. This case, like *Gulch Gaming,* focused in part on the fact that the residence requirement was placed on stockholders who would not have direct control over the operations of the licensee, that no restrictions were placed on the board of directors, and that those who would have control would be reachable for enforcement purposes.

Finally, *Glazer's Wholesale Drug Co., Inc. v. Kansas*, 145 F.Supp.2d 1234 (D.Kan. 2001) concerned a challenge to a statute limiting distribution licenses to residents of the state and to corporations with no nonresident officers or shareholders. As in the other cases, the court found that the statute was facially discriminatory, and subject to strict scrutiny. *Id.* at 1241. The Court also rejected the argument that the Commerce Clause related only to the movement of goods in interstate commerce, holding that it was also implicated when nonresidents were prevented from providing a service in another state. *Id.* at 1242, n. 9. The court further found no nexus between the requirement and the general purposes of alcoholic beverage regulation. And it found that the better ability to do background checks on instate residents was "not credible" as a purpose, and that the state was unable to show that there were not "neutral, non-discriminatory alternatives adequate to protect the interests at stake." *Id.* at 1243. This court also found that the Twenty First Amendment provided no shelter from Commerce Clause analysis for a statute that was not aimed at the core interests protected by that amendment.

All of these cases are focused mainly on portions of statutes requiring some portion

of the ownership of corporations to be residents of the state or county where a license is to be issued. In Maryland, in contrast, licenses are not issued to corporations, but to officers of the corporation who are authorized to act on its behalf. Article 2B, § 9-101. There are, however, local provisions that do require some shareholders to be residents. *See e.g.*, Article 2B, § 9-101(d)(3). It is certainly the case that some of the objections to the stockholder provisions do not apply in the case of an individual applicant. However, it is also the case that much of the rationale of these cases still applies. The individual requirements also discriminate against out-of-state investment. And while it is our view that the State has a legitimate interest in limiting its licensees to people who are known in, have ties to, and can be vouched for by the residents of, the communities in which they will do business, we must recognize that these interests have received short shrift from the courts in these recent cases. Thus, we are forced to conclude that there is a substantial risk that these residency requirements could be found invalid if challenged.

The residency requirement in Senate Bill 656 and House Bill 482 is shorter than those applicable in most other counties, and we do not recommend that the bill not be signed. However, we do recommend a statewide review of the requirements that are in place, both to determine whether other or shorter requirements might serve the goals of these provisions, and to establish a clear record as to what those goals are for residency requirements that are retained. This matter can be addressed during the Code Revision process.

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

JJC,Jr./KMR/kmr
sb656_hb482.wpd
cc: Kenneth H. Masters
Secretary of State
Karl Aro
The Honorable J. Robert Hooper
The Honorable Nancy Jacobs
The Honorable Barry Glassman

Interstate Commerce – Tax Credits

Bill/Chapter: House Bill 487/Chapter 248 and Senate Bill 335/Chapter 247 of 2006

Title: Tax Credit for Maryland-Mined Coal

Attorney General's Letter: May 2, 2006

Issue: Whether a bill that continues a tax credit for the purchase of a State product but not for the purchase of the same product from out-of-state violates the Commerce Clause of the U.S. Constitution.

Synopsis: House Bill 487/Chapter 248 and Senate Bill 335/Chapter 247 of 2006 continue existing tax credits for Maryland-mined coal but not for the purchase of coal mined out-of-state. The legislation also phases out and eventually eliminates the credits.

Discussion: The Commerce Clause found in Article I, § 8 of the U.S. Constitution has long been interpreted to prohibit state discrimination against interstate commerce. Discriminatory taxation of out-of-state manufacturers has been specifically struck down by the U.S. Supreme Court. *Granholm v. Heald*, 125 S. Ct. 1885 (2005) (wineries); *New Energy Company of Indiana v. Limbach*, 486 U.S. 269 (1988) (gasohol). The Attorney General believes, therefore, that, to the extent House Bill 487 and Senate Bill 335 continue a tax credit for Maryland-mined coal but not for out-of-state coal, the legislation is unconstitutional.

The Attorney General noted that the bills in question also phase out and eventually eliminate the tax credits, and, thus, signing the bills would be an improvement over the existing situation. Therefore, despite the fact that the bills continue constitutionally suspect tax credits, the Attorney General "did not disapprove" the signing of the bills.

Drafting Tips: **Drafting a bill that seeks to provide an economic benefit to a State industry at the expense of similar out-of-state industries can run afoul of the Commerce Clause of the U.S. Constitution. A drafter should be prepared to discuss this problem with the sponsor of the legislation. The drafter should encourage the sponsor to craft a bill that credibly advances legitimate legislative objectives beyond mere economic protectionism and that does not patently discriminate against interstate trade.**

J. Joseph Curran, Jr.
Attorney General

Donna Hill Staton
Maureen Dove
Deputy Attorneys General

Robert A. Zarnoch
Assistant Attorney General
Counsel to the General Assembly

Bonnie A. Kirkland
Kathryn M. Rowe
Sandra J. Cohen
Assistant Attorneys General

The Attorney General of Maryland

Office of Counsel to the General Assembly

May 2, 2006

The Honorable Robert L. Ehrlich, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: House Bill 487 / Senate Bill 335

Dear Governor Ehrlich:

We have reviewed for constitutionality and legal sufficiency HB 487 and SB 335, identical bills which would continue existing tax credits for Maryland-mined coal, but phase out and eventually eliminate the credits.[1].

In bill review letters in 1989 and 2000, this office concluded that a State law providing a tax credit for the purchase of Maryland coal but not for the purchase of coal mined out-of-state would very likely be found by a court to discriminate against interstate commerce in violation of Article I, §8, Cl. 3 of the U.S. Constitution. *See* Bill Review Letter on HB 336 and SB 525, dated May 22, 1989 and Bill Review Letter on HB 729, dated May 15, 2000.

The legal rationale for our advice remains valid today. Our letters cited the decision of the Supreme Court in *New Energy Company of Indiana v. Limbach,* 486 U.S. 269 (1988), in which a state motor fuel tax credit for locally-produced gasohol was invalidated. The Supreme Court held that "discriminatory taxation of out-of-state manufacturers" runs afoul of the Commerce Clause. 486 U.S. at 277. *Limbach* remains the law of the land. It was relied upon last year to strike down, on Commerce Clause grounds, statutes in Michigan and New York that favored in-state wineries over out-of-state wineries in their right to sell wine directly to consumers. *Granholm v. Heald,* 125 S. Ct. 1885 (2005).

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[1] Under the legislation, the maximum amount of credits that can be claimed in each year is (1) $9 million in 2007 through 2010; (2) $6 million in 2011 through 2014; and (3) $3 million in 2015 through 2020. The credit is completely phased out in 2021.

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Thus, to the extent HB 487 / SB 335 continues the tax credit for Maryland-mined coal, we believe such legislation is unconstitutional. However, we are mindful that the 2006 bills would phase-out and ultimately eliminate the tax credits. Thus, the measure would reduce the value of the credits and, although not overnight, would completely curtail them. Because HB 487 / SB 335 is better than the existing situation, we do not disapprove its signing.

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

JJC,Jr./RAZ/JL/as
cc: Kenneth H. Masters
Secretary of State
Karl Aro
Gerald Langbaum
David Lyon

Federal Preemption – Criminal Justice Information System

Bill/Chapter: House Bill 656/Chapter 338 and Senate Bill 591 of 2006

Title: Criminal Procedure – Defendant with an Alcohol or Drug Dependency – Commitment Procedures

Attorney General's Letter: May 1, 2006

Issue: Whether a bill can require the Department of Health and Mental Hygiene to obtain and disseminate information from the Criminal Justice Information System (CJIS).

Synopsis: House Bill 656/Chapter 338 and Senate Bill 591 of 2006 alter the commitment procedures for defendants with alcohol or drug dependency problems. When a defendant is committed to the Department of Health and Mental Hygiene, the bills would require the department to "order a report of all pending cases, warrants, and detainers for the defendant and forward a copy of the report to the Court, the defendant, and the defendant's last attorney of record."

Discussion: CJIS is a collection of criminal identification, crime, and other records that are exchanged between the federal government, the states, cities, and criminal justice institutions. Federal regulations strictly regulate access to and dissemination of CJIS records. Information from the system may only be made available to criminal justice agencies for criminal justice purposes; to federal agencies authorized to receive the information pursuant to federal statute or executive order; in connection with licensing or employment; for issuance of press releases and publicity designed to effect the apprehension of wanted persons; to criminal justice agencies for the conduct of background checks under the National Instant Criminal Background Check System; to noncriminal justice government agencies performing criminal justice dispatching functions of data processing/information services for criminal justice agencies; and, subject to certain limitations, to private contractors for the above agencies. 28 C.F.R. § 20.33(a).

The Attorney General advises that the Maryland Department of Health and Mental Hygiene does not fall into any of the categories of authorized recipients of CJIS reports and, to the extent that the bills require the department to obtain and distribute information from CJIS, federal law would prohibit giving effect to the bills. Conversely, to the extent that the department can comply with the bill's requirements by obtaining the

information through other means, the Attorney General advises that the bill raises no legal issues. The department has indicated that it can obtain the required information without the CJIS reports, and, as one alternative, the Attorney General suggests that the department could order the reports on behalf of the court, which is an authorized recipient, and have the information sent to the court.

Drafting Tips: **A legislative drafter should always consider and understand the potential impact of federal law on the proposed legislation. With respect to House Bill 656 and Senate Bill 591, it is not clear that any consideration was given to how federal law might prohibit or restrict what the bills were intended to accomplish. Requests for bills requiring that criminal history information be gathered for a specified purpose have become more common. When a bill includes this type of provision, the drafter should be careful to consider whether the proposed recipient of the criminal history information is authorized under federal law to receive the information from the Criminal Justice Information System. If the proposed recipient is not authorized to receive CJIS reports, the drafter should consider and discuss with the sponsor whether the recipient can obtain the information in another manner not restricted by federal law.**

J. Joseph Curran, Jr.
Attorney General

Donna Hill Staton
Maureen Dove
Deputy Attorneys General

Robert A. Zarnoch
Assistant Attorney General
Counsel to the General Assembly

Bonnie A. Kirkland
Kathryn M. Rowe
Sandra J. Cohen
Assistant Attorneys General

The Attorney General of Maryland

Office of Counsel to the General Assembly

May 1, 2006

The Honorable Robert L. Ehrlich, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: House Bill 656 and Senate Bill 591

Dear Governor Ehrlich:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 656 and Senate Bill 591, identical bills entitled "Criminal Procedure - Defendant with an Alcohol or Drug Dependency - Commitment Procedures." We write to point out an issue with respect to Criminal Justice Information Service ("CJIS") reports.

House Bill 656 and Senate Bill 591 relate to the procedures under which a defendant may be committed to the Department of Health and Mental Hygiene ("DHMH") for drug or alcohol treatment as a condition of release. The bills make two changes in this procedure. First, they remove language that makes the commitment procedure inapplicable to defendants with a sentence of incarceration in effect or a detainer currently lodged, and instead provides, as a condition for entry of an order that the defendant be delivered for treatment that any detainer have been removed and that any sentence no longer be in effect. As a result, the court may take such preliminary steps as ordering evaluation even though there is a detainer or an outstanding sentence.

The second change is in new § 8-507(c), which provides that:

> Immediately on receiving an order for treatment under this section, the Department shall order a report of all pending cases, warrants, and detainers for the defendant and forward a copy of the report to the Court, the defendant, and the defendant's last attorney of record.

It is our understanding that the Department believes that this requirement can be met

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without the use of CJIS reports. To the extent that this is the case, the bill raises no legal issue. To the extent that this section would require the Department to obtain and distribute the defendant's criminal history record information from CJIS it may not be able to be given effect as anticipated.

The CJIS system requires the FBI to acquire, collect, and preserve identification, criminal identification, crime and other records, and exchange such records and information with officials of the federal government, the states, cities, and penal and other institutions. 28 USC § 534(a)(4). Federal regulations place strict limitations on the dissemination of this information. Specifically, the information may be made available only to criminal justice agencies for criminal justice purposes, to federal agencies authorized to receive it pursuant to federal statute or Executive order, for connection in with licensing or employment, for issuance of press releases and publicity designed to effect the apprehension of wanted persons, to criminal justice agencies for the conduct of background checks under the National Instant Criminal Background Check System (NICS), to noncriminal justice government agencies performing criminal justice dispatching functions of data processing/information services for criminal justice agencies and, subject to certain limitations, to private contractors for the above agencies. 28 C.F.R. § 20.33(a)

For reasons explained in a letter to the Honorable Pauline H. Menes dated February 16, 2006, and attached hereto, neither the Department, nor the Alcohol and Drug Abuse Administration of the Department, is a criminal justice agency. Nor is the defendant's attorney an authorized recipient. Thus, the Department may not procure this report and forward it to others. Nor, if the Department could procure a report from CJIS, could it disseminate it to the defendant's attorney. However, the court is a criminal justice agency authorized to receive criminal history record information from CJIS. 28 C.F.R. § 20.3(g). Thus, if it is necessary to obtain such reports to comply with the bill, it is possible that the Department could order this information on behalf of the court and have it sent to the court.

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

Maryland Constitutional Issues

Compensation of a Public Officer – Salary Increases

Bill/Chapter: Senate Bill 985/Chapter 551 of 2006

Title: Election Law – Baltimore City Board of Elections – Compensation for Substitute Board Members and Election Judges

Attorney General's Letter: May 9, 2006

Issue: Whether a bill that increases the compensation of Baltimore City election judges and that is *enacted* before the judges' terms of office begin but *takes effect* during the term of office violates Article III, § 35 of the Maryland Constitution, which prohibits in-term compensation increases for public officers.

Synopsis: Senate Bill 985/Chapter 551 of 2006, among other things, increases the compensation paid to election judges in Baltimore City. While the bill contains standard "boilerplate" language providing that salary increases take effect at the start of a new term, that language is directed specifically toward provisions of the bill relating to substitute election board members, not election judges. While the Attorney General assumed that the compensation increase would not apply to the September 2006 primary (based on the bill's October 1, 2006, effective date and a statement in the bill's fiscal note that the increase is "for the November 2006 general election"), in fact, the bill does not specify for which election the increase in the judges' compensation is to take effect.

Discussion: Article III, § 35 of the Maryland Constitution prohibits in-term increases in the compensation provided to a public officer who serves a term of four years or less. The Attorney General's office has concluded that an election judge is a public officer serving a term of four years or less and, therefore, Article III, § 35 applies to such judges. The term of an election judge runs from the Tuesday that is 13 weeks before the statewide primary election until the Tuesday that is 13 weeks before the next statewide primary election. Thus, the beginning of the term in 2006 is June 13, 2006, a date that is after Senate Bill 985 was enacted (*i.e.* May 26, 2006) but before the effective date of the bill (*i.e.* October 1, 2006). The validity of the compensation increase under Article III, § 35 depends on a determination of the critical date on which the compensation is considered to be "fixed" and whether that date is before the start of an election judge's term.

The Attorney General stated that, while there are no direct court opinions on the matter of when compensation is determined to be fixed for purposes of Article III, § 35, there is limited evidence to suggest that the effective date of the statute fixes the compensation. The Attorney General suggests, however, that this interpretation may be too rigid in light of the purposes underpinning Article III, § 35. The Court of Appeals has stated that the intent of Article III, § 35 is "to prevent a public officer from using his office for the purpose of putting pressure on the General Assembly or other authorized agency to award him additional compensation and, on the other hand, to prevent the General Assembly or other agency from putting pressure on a public official by offering him increased compensation or threatening a decrease thereof." *Comptroller v. Klein*, 215 Md.427, 434 (1958). However, once the General Assembly passes the legislation and it is signed by the Governor (or in this case becomes law without the signature of the Governor), there is no longer any threat of inappropriate influences. There is no opportunity for the abuses described in *Klein* if the increases are "fixed" before the officer's term begins. The opinion of the Attorney General is that, for all practical purposes, the legislation is final once *enacted*. In this case, the bill was enacted without the Governor's signature on May 26, 2006, and, therefore, the compensation can be considered fixed as of that date. Since the compensation was fixed before the start of the term of office, it was not an in-term increase and could, therefore, take effect for judges serving during the November 2006 election.

Drafting Tips: **In drafting legislation that provides a salary increase for a public officer, the drafter should be mindful of the applicability of Article III, § 35 and be careful to note when the term of office actually begins for the public officer in question. Because Article III, § 35 prohibits in-term compensation increases for public officers, the sponsor's intent that the salary increase apply as of a certain date may violate the constitution if the officer's new term starts before the salary increase is "fixed." However, since the courts have not definitively ruled on when compensation is fixed for purposes of Article III, § 35, the drafter should also be aware of the Attorney General's argument that it is reasonable to conclude that an increase in compensation is considered to be fixed on the date of the *enactment* of the legislation providing for the increase as opposed to the *effective date* of that legislation.**

J. Joseph Curran, Jr.
Attorney General

Donna Hill Staton
Maureen Dove
Deputy Attorneys General

Robert A. Zarnoch
Assistant Attorney General
Counsel to the General Assembly

Bonnie A. Kirkland
Kathryn M. Rowe
Sandra J. Cohen
Assistant Attorneys General

The Attorney General of Maryland

Office of Counsel to the General Assembly

May 9, 2006

The Honorable Robert L. Ehrlich, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: Senate Bill 985

Dear Governor Ehrlich:

We have reviewed for constitutionality and legal sufficiency Senate Bill 985, which among other things, would increase the compensation of election judges in Baltimore City, effective October 1, 2006. We approve the bill after resolving an issue of whether this pay increase can be given effect consistent with the dictates of Article III, §35 of the Maryland Constitution.

Senate Bill 985 would increase the amount paid by Baltimore City to chief election judges from $150 to $200 and to other election judges from $125 to $150. The legislation also authorizes the payment of election judges of $20 for completing a training course, an amount these officials were already receiving. *See* Fiscal & Policy Note on SB 985, dated March 14, 2006.[1]. The bill's Fiscal & Policy Note indicated that the increased compensation was "for the November 2006 general election" and made no mention of an increase to be paid for the September primary. *Id.* In light of this assertion and SB 985's October 1, 2006 effective date, we assume there was no intent to have the increases apply to service by election judges in the September primary.

Under Article III, §35, the compensation of a public officer may not be increased during his or her term, unless that term exceeds four years. In *Comptroller v. Klein*, 215 Md.

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[1] The bill also authorized a pay raise for substitute members of the Baltimore City Board of Elections. Section 2 of the legislation stated that this increase was subject to Article III, §35 of the Maryland Constitution and could not be paid until the beginning of a new term.

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427, 434 (1958), the Court of Appeals described the purpose of this constitutional provision as follows:

> "[It was] intended to prevent a public officer from using his office for the purpose of putting pressure upon the General Assembly or other authorized agency to award him additional compensation and, on the other hand, to prevent the General Assembly or other agency from putting pressure on a public official by offering him increased compensation or threatening a decease thereof."

Attorney General Burch and Attorney General Sachs have noted that there is no opportunity for such abuses where "the increases are *fixed* prior to the commencement of [the officer's] term." 60 *Opinions of the Attorney General* 823, 832 (1975); and 65 *Opinions of the Attorney General* 373, 374 (1980).

We have previously concluded that an election judge is a public officer serving a term of less than four years and thus, such positions are subject to Article III, §35. *See* 65 *Opinions of the Attorney General* 381 (1980). The key issue here is whether the pay increases authorized by SB 985 are fixed before the start of a City election judge's term. That term generally runs from the Tuesday that is 13 weeks before the statewide primary election until the Tuesday that is 13 weeks before the next statewide primary. *See* Election Law Article, §10-203(a) and (c). This year, the Tuesday that is 13 weeks before the September 12, 2006 primary is June 13. That date will occur after SB 985 passed both Houses and after the legislation would have been enacted if signed into law. If these are the critical events for fixing the increased compensation, the pay increase will have been fixed before the beginning of the new term of election judges. On the other hand, if the effective date of the bill, October 1, 2006, is the date the compensation is fixed, the term will already have begun and the pay increase for the 2006 general election may not be paid pursuant to the terms of Article III, §35.

There is no case or Opinion of the Attorney General that directly speaks to this issue. There is *dicta* in one opinion and in at least one out-of-state case that suggests that it is the effective date of the statute that fixes the compensation. *See* 65 *Opinions of the Attorney General* 373, 374 (1980)(The General Assembly could provide a public officer with cost-of-living increases designed to take effect during the terms of officers "first beginning after the effective date of the legislation."); and *Cline v. Lewis*, 165 P. 915, 916 (Cal. 1917)("[I]f such

increase is provided it must be by a law for that limited purpose takes effect long before the expiration of the current term"[2]. On the other hand, the purposes of Article III, §35 would not be served by such a rigid interpretation. Clearly, once SB 985 has passed both Houses and is signed by the Governor, there is nothing election judges can do to pressure for a pay raise, and nothing these state officials could do to pressure the election judges with respect to action on a pay hike. For all practical purposes, any action of the Legislature and the Governor would be final before the start of the next term of election judges.

For this reason, it is our view that SB 985 *fixes* the compensation of City election judges before the beginning of their terms on June 13, 2000.[2] Such pay increases may be given effect for services performed at the November 2006 general election.[3]

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

JJC,Jr./RAZ/as
sb 985
cc: Kenneth H. Masters
Secretary of State
Karl Aro

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[2] As the bill provides for salary enhancements without the need to return to the General Assembly, any future salary adjustment must be administered in accordance with Article III, §35.

[3] This conclusion is not inconsistent with 65 *Opinions of the Attorney General* 381 (1980). There, election judges were barred by Article III, §35 from receiving a pay increase, because 1980 was a Presidential Primary year where the 13 weeks before the primary occurred in February 1980. At that time, the legislation was subject to change by the General Assembly and action by the Governor long after the terms had begun.

Compensation of a Public Officer – Salary Increases

Bill/Chapter: House Bill 1605/Chapter 208 of 2006

Title: Calvert County Board of Education – Elected Members – Health Insurance Coverage

Attorney General's Letter: April 18, 2006

Issue: Whether a bill that provides health insurance for elected members of the Calvert County Board of Education violates the ban against in-term compensation increases for public officers under Article III, § 35 of the Maryland Constitution.

Synopsis: House Bill 1605/Chapter 208 of 2006 entitles elected members of the Calvert County Board of Education to the health insurance benefits regularly provided to employees of the board.

Discussion: Article III, § 35 of the Maryland Constitution prohibits in-term increases in the compensation provided to a public officer who serves a term of four years or less. Compensation that is covered under this provision of the constitution takes many forms. In addition to salary, the prohibition also applies to health insurance and expense allowances. In the case of House Bill 1605 of 2006, the prohibition in Article III, § 35 against in-term compensation increases would prevent the current members of the Calvert County Board of Education, who are "public officers" serving a term of four years, from obtaining the health insurance benefits provided by the bill until a new term begins.

Drafting Tips: **In drafting legislation that provides a benefit for a public official, the drafter should be mindful that the benefit may not be able to take effect for the official's current term if the public official serves a term of four years or less and if the benefit is a form of compensation, including, for example, a salary increase, provision of health insurance, or an increase in expense allowances. In these instances, there is standard language in the *Legislative Drafting Manual* that should be used in an uncodified "special section" to state explicitly, in accordance with Article III, § 35, that the compensation increase specified in the bill does not apply to the public official's current term.**

Note: For more on this subject, see Attorney General's letters of: April 8, 2006 (attached), on House Bill 269/Chapter 85 of 2006; April 19, 2006 (attached), on House Bill 611/Chapter 184 and Senate Bill 386 of 2006; and April 21, 2006 (attached), on House Bill 1145/Chapter 382 of 2006.

J. Joseph Curran, Jr.
Attorney General

Donna Hill Staton
Maureen Dove
Deputy Attorneys General

Robert A. Zarnoch
Assistant Attorney General
Counsel to the General Assembly

Bonnie A. Kirkland
Kathryn M. Rowe
Sandra J. Cohen
Assistant Attorneys General

The Attorney General of Maryland

Office of Counsel to the General Assembly

April 18, 2006

The Honorable Robert L. Ehrlich, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: House Bill 1605

Dear Governor Ehrlich:

We have reviewed House Bill 1605 for constitutionality and legal sufficiency. While we do not disapprove the bill, we advise that it must be carefully implemented so as to avoid a violation of Article III, §35 of the Maryland Constitution.

House Bill 1605 would provide that an elected member of the Calvert County Board of Education is entitled to health insurance benefits regularly provided to employees of the Board.

Article III, §35 bans in-term compensation increases for public officials with terms of four years or less. Members of a local school board are public officials and in Calvert County they serve for a term of four years. More importantly, the first-time provision of government-funded health insurance, *see* Fiscal Note on HB 1605, dated March 20, 2006, is compensation subject to the restrictions of §35. *See* 78 *Opinions of the Attorney General* 296 (1993). Thus, Article III, §35 prevents the immediate application of HB 1605 to members of the Calvert County Board. However, the bill can be constitutionally implemented by providing the health insurance benefit to a Board member only as a new term begins for each holder of the office.

So implemented, HB 1605 would not be unconstitutional.

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410-946-5600 · 301-970-5600 · Fax 410-946-5601 · TDD 410-946-5401 · 301-970-5401

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

JJC,Jr/RAZ/as
hb1605.wpd
cc: Kenneth H. Masters
Secretary of State
Karl Aro
The Honorable Anthony O'Donnell
Robert L. Gray, President
Calvert Co. Board of Education

J. Joseph Curran, Jr.
Attorney General

Donna Hill Staton
Maureen Dove
Deputy Attorneys General

Robert A. Zarnoch
Assistant Attorney General
Counsel to the General Assembly

Bonnie A. Kirkland
Kathryn M. Rowe
Sandra J. Cohen
Assistant Attorneys General

The Attorney General of Maryland

Office of Counsel to the General Assembly

April 8, 2006

The Honorable Robert L. Ehrlich, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: House Bill 269

Dear Governor Ehrlich:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 269, "Garrett County - Board of Education - Member Expense Allowance." While the bill may be signed into law, it is possible that it may not be given immediate effect because of the provisions of Article III, §35 of the Maryland Constitution.

House Bill 269 repeals the existing $400 annual expense allowance for travel and other expenses of members of the Board of Education of Garrett County and authorizes allowances as provided in the budget of the Board.

Article III, §35 of the Maryland Constitution prevents the General Assembly from increasing or decreasing the compensation of a public officer during the officer's term if the office has a term of four years or less. Members of the Board of Education are public officers who serve terms of four years. Education Article,§3-601(e). A flat rate expense allowance is considered "compensation" under §35. 42 *Opinions of the Attorney General* 316 (1957); 20 *Opinions of the Attorney General* 217 (1935).

If the effect of House Bill 269 is to increase or decrease the expense allowance, and thereby the compensation, of the members of the Board, under Article III, §35 this increase or decrease may not be given effect during the present term of Board members. However, consistent with §35, the bill may be given effect, and the change to an expense allowance as provided in the budget may occur as each member begins a new term.

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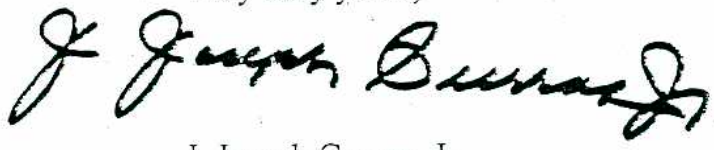
Very truly yours,



J. Joseph Curran, Jr.
Attorney General

JJC:BAK:ads

J. Joseph Curran, Jr.
Attorney General

Donna Hill Staton
Maureen Dove
Deputy Attorneys General

Robert A. Zarnoch
Assistant Attorney General
Counsel to the General Assembly

Bonnie A. Kirkland
Kathryn M. Rowe
Sandra J. Cohen
Assistant Attorneys General

The Attorney General of Maryland
Office of Counsel to the General Assembly

REVISED

April 19, 2006

The Honorable Robert L. Ehrlich, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: House Bill 611 and Senate Bill 386

Dear Governor Ehrlich:

We have reviewed and hereby approve House Bill 611 and Senate Bill 386, identical bills entitled "Charles County - Salary of State's Attorney." We write to point out that the bills must be administered so as to ensure their constitutionality.

House Bill 611 and Senate Bill 386 provide that the salary of the State's Attorney for Charles County shall be equal to the salary of a judge of the circuit court in the State. Maryland Constitution Article III, § 35 provides that the salary and compensation of a public officer may not be increased or diminished during his term of office. This provision applies to State's Attorneys. *County Commissioners v. Goodman*, 172 Md. 559 (1937). Where a State's Attorney's salary is linked to the salaries of judges, the increases can be given effect only to the extent that they are set at the beginning of the State's Attorney's term. *Marshall v. Director of Finance*, 294 Md. 435, 440 (1982); 65 *Opinions of the Attorney General* 373-378 (1980). In this case, it is our understanding that the salaries of the judges of the circuit courts are set to increase in fiscal years 2007 through 2011. Because these increases are set by law prior to the beginning of the next term of the State's Attorney, they may be given effect during the term. However, any additional increases granted during the term may not be given effect until the beginning of the next term.

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410-946-5600 · 301-970-5600 · Fax 410-946-5601 · TDD 410-946-5401 · 301-970-5401

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

JJC,Jr./KMR/kmr
hb611_sb386rev.wpd

cc: Kenneth H. Masters
Secretary of State
Karl Aro
The Honorable Sallie Y. Jameson
The Honorable Thomas Mac Middleton
County Commissioners of Charles County
The Honorable Leonard C. Collins, Jr., Esq.

J. Joseph Curran, Jr.
Attorney General

Donna Hill Staton
Maureen Dove
Deputy Attorneys General

Robert A. Zarnoch
Assistant Attorney General
Counsel to the General Assembly

Bonnie A. Kirkland
Kathryn M. Rowe
Sandra J. Cohen
Assistant Attorneys General

The Attorney General of Maryland

Office of Counsel to the General Assembly

April 21, 2006

The Honorable Robert L. Ehrlich, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: House Bill 1145

Dear Governor Ehrlich:

We have reviewed for constitutionality and legal sufficiency HB 1145, which makes a number of changes to the statutes governing the State Board of Dietetic Practice. One of those changes is to provide that a member of the Board "is entitled to compensation in accordance with the budget of the Board." While we approve the bill for signing, we note that the provision governing compensation may not be given immediate effect because of the operation of Article III, §35 of the Maryland Constitution.

Article III, §35 bars in-term increases in compensation of public officers with terms of four years or less. Members of the State Board of Dietetic Practice are public officers with terms of four years. A first time authorization of compensation is an increase under §35. *See* 64 *Opinions of the Attorney General* 267 (1979). Thus, Board members may not receive the pay increase authorized by HB 1145 until they start a new term.

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

JJC,Jr./KMR/kmr
cc: Kenneth H. Masters
Secretary of State
Karl Aro
Dan O'Brien, Esq.

104 Legislative Services Building · 90 State Circle · Annapolis, Maryland 21401-1991
410-946-5600 · 301-970-5600 · Fax 410-946-5601 · TDD 410-946-5401 · 301-970-5401

Effective Dates – Constitutional Amendments

Bill/Chapter: House Bill 427/Chapter 575 of 2006

Title: Courts – Jury Trials in Civil Actions – Amount in Controversy

Attorney General's Letter: April 18, 2006

Issue: Whether it is proper, in the case of a bill that is contingent on the passage of a constitutional amendment by the General Assembly and ratification of the amendment by the voters of the State, to designate the effective date of the bill to be the date of the *certification* of the election results of the ratification vote.

Synopsis: House Bill 427/Chapter 575 of 2006 amends the current law on the availability of a jury trial in a civil action to provide that a party may not demand a jury trial if the amount in controversy does not exceed $10,000. The bill is intended to implement the constitutional amendment proposed by House Bill 413/Chapter 422 of 2006 and is expressly made contingent on the passage of that bill and ratification of the amendment by the voters of the State. The effective date clause of House Bill 427 provides that the bill is to take effect "on the date of *certification of the election results* on the question of ratification of the Constitutional Amendment by voters of the State." (Emphasis added.) This language is "boilerplate" taken from the *Legislative Drafting Manual* and, no doubt, was intended to make the effective date of the bill implementing the proposed constitutional changes (House Bill 427) contemporaneous with the taking effect of the constitutional amendment itself (House Bill 413).

Discussion: Article XIV, § 1 of the Maryland Constitution provides that constitutional amendments take effect on the *proclamation by the Governor* that "the said amendment or amendments having received the majority of votes … have been adopted by the people of Maryland."

The Attorney General notes that it is possible that the Governor's proclamation could occur on some date after the certification of the election results, resulting in a "confusing" situation in which the contingent bill takes effect before the constitutional provision that it is designed to implement. To avoid this, the Attorney General recommends that, in this particular case, the Governor's proclamation be entered the same day as the certification. Furthermore, to avoid such confusion in the future, the Attorney General suggests a change in the effective date language used in the *Legislative Drafting Manual* to more accurately

reflect the language of the Maryland Constitution as to when constitutional amendments take effect.

Drafting Tips: **In drafting legislation that is contingent on the ratification by the voters of a constitutional amendment proposed in another bill, the effective date clause of the contingent bill should provide that it "shall take effect on the proclamation by the Governor that the Constitutional Amendment, having received the majority of votes cast at the General Election, has been adopted by the people of Maryland." The 2007 *Legislative Drafting Manual* has been revised accordingly.**

J. Joseph Curran, Jr.
Attorney General

Donna Hill Staton
Maureen Dove
Deputy Attorneys General

Robert A. Zarnoch
Assistant Attorney General
Counsel to the General Assembly

Bonnie A. Kirkland
Kathryn M. Rowe
Sandra J. Cohen
Assistant Attorneys General

The Attorney General of Maryland

Office of Counsel to the General Assembly

April 18, 2006

The Honorable Robert L. Ehrlich, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: House Bill 427

Dear Governor Ehrlich:

We have reviewed and hereby approve House Bill 427, "Courts - Jury Trials in Civil Actions - Amount in Controversy," for constitutionality and legal sufficiency. We write to discuss the effective date of the bill.

House Bill 427 amends the current law on the availability of jury trial in civil actions to provide that a party may not demand a jury trial if the amount in controversy does not exceed $10,000. The bill is intended to implement the constitutional changes made by House Bill 413, and is expressly made contingent on the passage of that bill and its ratification by the voters of the State. Section 4. The effective date clause, Section 5, provides:

> That, subject to the provisions of Section 4 of this Act, this Act shall take effect on the date of certification of the election results on the question of ratification of the Constitutional Amendment by the voters of the State.

This language is boilerplate taken from the Legislative Drafting Manual (1999). However, constitutional amendments take effect on proclamation by the Governor that "the said amendment or amendments having received the majority of votes ... have been adopted by the people of Maryland." Maryland Constitution Article XIV, § 1. This provision gives exclusive power to the Governor to ascertain the results of the vote from the returns made to him. *Worman v. Hagan*, 78 Md. 152, 165 (1893). It is entirely possible that this proclamation would follow certification, with the result that the bill would take effect before the constitutional provision that it is to implement.

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Because the change made by House Bill 427 is arguably not authorized until the change in House Bill 413 takes effect, *Davis v. Slater*, 383 Md. 599 (2004), we would recommend that the proclamation be entered on the same day as the certification so as to avoid confusion with respect to the effective date. We would also recommend that the standard language in the Legislative Drafting Manual be altered to base the effective date of legislation that is contingent on enactment of a constitutional amendment on the Governor's proclamation.

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

JJCJr./KMR/kmr
hb427.wpd

cc: Kenneth H. Masters
Secretary of State
Karl Aro
The Honorable Joseph F. Vallario, Jr.

Legislative Veto

Bill/Chapter: Senate Bill 370/Chapter 46 of 2006

Title: Maryland Consolidated Capital Bond Loan Bill

Attorney General's Letter: April 5, 2006

Issue: Whether a provision of a bill requiring approval by a legislative committee before an executive department provides a grant to a public entity from funds appropriated under the bill is an invalid legislative veto.

Synopsis: Senate Bill 370/Chapter 46 of 2006 includes an appropriation to provide capital grants to public entities for the purpose of improving public recreational facilities in areas experiencing, or at imminent risk of experiencing, gang-related violence and crime. The legislation provides that the Department of Juvenile Justice shall administer the grants, "which shall be approved by the Legislative Policy Committee before being provided to the grantees."

Discussion: A "legislative veto" is a provision in law purporting to reserve to the legislature or a legislative committee the right to disapprove or reverse actions of the Executive Branch through some action other than enactment of a new law. The provision in Senate Bill 370 that requires approval by the Legislative Policy Committee before specified grants may be provided and administered by the Department of Juvenile Justice amounts to a legislative veto, which, arguably, violates the explicit separation of powers requirement of the Maryland Declaration of Rights. Although the issue of legislative veto has never been directly addressed by the appellate courts of Maryland, several states and the U.S. Supreme Court have relied on similar constitutional provisions to declare legislative vetoes unconstitutional.

The Attorney General states that, since the late 1980s, it has consistently advised that legislative veto provisions in the exercise of constitutional budget powers have no support in case law and are of doubtful validity. Although the legislative approval provision found in Senate Bill 370 may be found to be invalid, the Attorney General advises that "it is nevertheless severable" and the bill, in other respects, may be given effect.

Drafting Tips: **In drafting legislation that would make an executive action contingent on the approval of a legislative committee or the entire General Assembly by means other than passage of a bill, the drafter should**

alert the sponsor of the bill that such legislative veto provisions are of doubtful constitutional validity. The drafter may wish to suggest that other methods of legislative oversight, including review, investigation, budget control, and notification and reporting requirements, are available.

J. Joseph Curran, Jr.
Attorney General

Donna Hill Staton
Maureen Dove
Deputy Attorneys General

Robert A. Zarnoch
Assistant Attorney General
Counsel to the General Assembly

Bonnie A. Kirkland
Kathryn M. Rowe
Sandra J. Cohen
Assistant Attorneys General

The Attorney General of Maryland

Office of Counsel to the General Assembly

April 5, 2006

The Honorable Robert L. Ehrlich, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: SB 370

Dear Governor Ehrlich:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 370, the Maryland Consolidated Capital Bond Loan Bill.[1] We write to address two issues relating to the bill.

Legislative Veto

SB 370 includes an appropriation of $647,414 to provide capital grants to public entities for the purpose of improving public recreational facilities in areas experiencing , or at imminent risk of experiencing gang-related violence and crime. The provision provides that the "Department of Juvenile Services shall administer the grants, which shall be approved by the Legislative Policy Committee before being provided to the grantees." Such approval amounts to a legislative veto. Since the late 1980's, this Office has consistently advised that legislative veto provisions in the exercise of constitutional budget powers have no support in case law and are of doubtful validity. *See* Bill Review Letter on SB 856 dated May 3, 2002; Bill Review Letter on SB 355 dated May 12, 1998; and Bill Review Letter on HB 1062 dated May 22, 1989. Although the legislative veto provision may be found to be invalid, it is nevertheless clearly severable. *See* Bill Review Letter on SB 355 dated May 12, 1998.

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[1] The Bill is also referred to as the "Capital Budget Bill."

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The bill also includes an appropriation of $2,000,000 to provide funds for the design, construction and capital equipping of improvements and safety enhancements to the James Senate Office Building, Legislative Services Building, House Office Buildings, Miller Senate Building, Goldstein Treasury building and all grounds, parking areas, outbuildings, and appurtenances at those locations. The item provides that "these funds are restricted from expenditure until the Presiding Officers of the Maryland General Assembly, in consultation with the Comptroller and State Treasurer, have provided the Department of General Services with a list of projects to be funded with this authorization." The provision contemplates the Presiding Officers consulting with the Comptroller and Treasurer and providing a list that delineates the specific acceptable uses of the authorized funds. The language at issue is not clearly a legislative veto, because the Presiding Officers may be viewed as acting in their capacities as interested agency tenants rather than their legislative capacities.[2] On the other hand, to the extent the language attempts to preserve the power of the Presiding Officers to delineate specific projects in derogation of executive authority to implement the item of appropriation, it is severable and not binding.

Item Veto

Article II, § 17(e) of the Maryland Constitution gives the Governor the "power to disapprove of any item or items of any Bills making appropriations of money embracing distinct items." An "item" is "an indivisible sum of money that is dedicated to a stated purpose." 61 *Opinions of the Attorney General,* 247, 253 (1976). Thus, a provision in a bill that has no sum of money attached to it is not an item of appropriation subject to the Governor's item veto authority. SB 370 includes two amendments to the Annotated Code of Maryland relating to the process of allocating public school construction funds, State Finance and Procurement Article, § 8-113 and Education Article, § 5-302. These provisions are not attached to a sum of money and would not be considered an "item of appropriation" as defined above, and thus, are not subject to item veto. Last year we cautioned "that inclusion of provisions in a supplementary appropriation bill that are not items of appropriation or related to items of appropriation and thus, are not subject to veto, may be subject to challenge on that very basis."[3] We continue to hold that view. However, we note that the two provisions discussed above are both related to the allocation of public school construction funds, and

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[2] Previous advice of this Office finding constitutionally suspect legislative vetoes has applied to statutory provisions providing for the approval of executive action by a committee of the General Assembly. (See bill review letters on HB 147 - 5/19/05; SB 430 - 5/4/04; HB 345-3/1/04; SB 93 - 4/22/02; HB1252 - 5/12/00; SB682 - 5/11/99; SB 355 - 5/12/98)

[3] *See* Bill Review Letter on HB 340 dated May 19, 2005.

thus, do not present as great a concern as several provisions included in last year's Capital Budget Bill.

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

JJC:KMR:ads

cc: Kenneth H. Masters
Secretary of State
Karl Aro

Single Subject Rule

Bill/Chapter: House Bill 1215/Chapter 59 of 2006

Title: Baltimore City Public School System

Attorney General's Letter: April 3, 2006

Issue: Whether a bill relating to the amount of bonds issued for financing a city's public school projects and, after amendment, prohibiting State officials from restructuring the governance arrangement of a public school in that city or removing a public school from the city's school system violates the single subject requirement of Article III, § 29 of the Maryland Constitution.

Synopsis: House Bill 1215/Chapter 59 of 2006 increases the maximum aggregate principal amount of bonds issued for the purpose of financing or refinancing Baltimore City public school projects. The bill was amended to also prohibit the State Board of Education and the State Superintendent of Schools from imposing a major restructuring of a governance arrangement of a Baltimore City public school or removing a public school from the Baltimore City Public School System.

Discussion: The single subject rule, found in Article III, § 29 of the Maryland Constitution, provides that "every Law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title." The key to evaluating whether different provisions of a bill comply with this rule is whether each is "germane" to the same subject matter. *Migdal v. State*, 358 Md. 308, 317 (2000). While the court has traditionally construed this rule liberally in order to give effect to legislation, *MCEA v. State*, 346 Md. 1, 13 (1997) (germaneness can be "horizontal" or "vertical"), more recently the court has become stricter in its interpretation and is prepared to examine the circumstances surrounding the passage of the challenged legislation. In *Delmarva Power and Light v. Public Services Commission*, 371 Md. 356, 370 (2002), the court reviewed a bill that established a public utility deregulation fund and included another provision, added to the bill by amendment, that excused the Public Service Commission (which regulates public utilities) from compliance with the Administrative Procedure Act. In voiding the legislation as a violation of the single subject rule, the court closely analyzed how the latter provision became part of the final bill. The court noted that the compliance provision was added by amendment in conference committee on the last day of the session in a hurried response to a decision the court had just

handed down. The court also noted that the proposal added by amendment had previously failed as a separate bill and was not subsequently reviewed by a standing committee. The court expressed concern that the legislators may not have been fully informed of the amendment when they voted on adoption of the conference committee report on the bill.

The Attorney General found none of these problems with House Bill 1215. Both provisions dealt with the single subject of the improvement of Baltimore City public schools. Although the restructuring provisions were added by amendment, this was done by the Budget and Taxation Committee and presented to the full Senate on second reading with over a week remaining until the end of session. Additionally, the provision had not been previously defeated.

Drafting Tips: **When drafting legislation in Maryland, the drafter must always take the constitution's single subject rule into consideration. The subject matter of two or more provisions in a single bill must always at least be arguably germane. When, however, a provision not directly related to the original bill is proposed by amendment, particularly if it deals with a matter that has already been defeated or is sought to be added in a conference committee rather than by a standing committee, the drafter of the amendment should advise the legislator making the request of the potential constitutional problem facing the measure. At a minimum, the drafter should take care to adequately describe the amendment in the title of the bill.**

J. Joseph Curran, Jr.
Attorney General

Donna Hill Staton
Maureen Dove
Deputy Attorneys General

Robert A. Zarnoch
Assistant Attorney General
Counsel to the General Assembly

Bonnie A. Kirkland
Kathryn M. Rowe
Sandra J. Cohen
Assistant Attorneys General

The Attorney General of Maryland

Office of Counsel to the General Assembly

April 3, 2006

The Honorable Robert L. Ehrlich, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: House Bill 1215

Dear Governor Ehrlich :

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 1215, "Baltimore City Public School System." We have considered this amended bill in light of the single subject requirement of the Maryland Constitution, Article III, § 29 and have concluded that it does not violate the one subject rule. Further, we conclude that HB 1215 would not impair the State's ability to carry out its responsibilities under No Child Left Behind (NCLB) and would not put the State's federal funding under NCLB in jeopardy.

House Bill 1215 increases the maximum aggregate principal amount of bonds issued for the purpose of financing or refinancing Baltimore City public schools projects. The bill further prohibits the State Board of Education and the State Superintendent of Schools from imposing a major restructuring of a governance arrangement of a Baltimore City public school or removing a public school from the Baltimore City Public School System. This latter provision was added by amendment in the Senate Budget and Taxation Committee.

In relevant part, Section 29 of Art. III of the Maryland Constitution provides that "every Law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title." The key to evaluating the validity of a particular piece of legislation under this provision is "the germaneness of the individual components of the law passed." *Migdal v. State,* 358 Md. 308, 317 (2000). Germaneness can be on either a horizontal or vertical plane. Two matters can be regarded as a single subject "either because of a direct connection between them, horizontally, or because they each have a direct connection to a broader common subject to which the Act relates." *MCEA v. State,* 346 Md. 1, 15-16 (1997).

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Thus, in the *MCEA* case the Court upheld a bill designed to break the cycle of dependency on government assistance that contained provisions relating to welfare, privatization of child support collection, and suspension of driver's licenses to enforce child support. Similarly, both provisions of HB 1215 relate to Baltimore City public schools, more specifically their improvement and both are drafted to Title 4 of the Education Article, "Subtitle 3. Baltimore City."

The Court of Appeals has said that the single subject requirement will be given "a liberal construction so as not to interfere with or impede legislative action." *MCEA* at 13. In addition, the Court has considered other factors in deciding whether there is a violation of the one subject requirement. These include whether the alleged second subject was added by an amendment, whether the title reflects the added provisions, the point in the legislative process at which the provisions were added (such as during a conference committee late in the session), and what the members of the two Houses were told. *Delmarva Power & Light Co. v. Public Service Commission,* 371 Md. 356, 376-377(2002). In *Delmarva Power,* the Court of Appeals held that a bill that created a public utility deregulation fund and that, under an eleventh hour amendment, excused the Public Service Commission from compliance with the Administrative Procedure Act, violated the single subject requirement. The circumstances of HB 1215 are very different. While the restructuring provision of HB 1215 was added by amendment, it was not added during a conference committee in the waning hours of the legislative session. It was added by the Budget and Taxation Committee and presented to the full Senate on Second Reading with over a week remaining before the end of session. Additionally, the amendment did not add a provision from a bill previously killed. Further, the provision are adequately described in the bill's title, and both Houses were fully aware of the provision, as evidenced by the extensive debate in both. For these reasons, it is our view that HB 1215 does not violate the single subject requirement of the Maryland Constitution, Article III, § 29.

There remains the question of this statute's impact on the federal funds that Maryland receives under the No Child Left Behind Act (NCLB). To receive funds under the federal law, the State must prepare and submit for approval a State Plan that includes, *inter alia*, a system of corrective actions it shall implement if an individual school or school system fails to perform. 20 U.S.C. § 6311(a); § 6316(c)(10). The NCLB Act lists seven specific corrective actions, one or more of which must be implemented when a school system is identified for corrective action. 20 U.S.C. § 6316(c)(10)(c). The Maryland State Board of Education, through regulation, adopted seven corrective actions that essentially mirror those included in the NCLB Act. COMAR 13A.01.04.08(B) Baltimore City Public School System

(BCPSS) is a school system in corrective action.

House Bill 1215 precludes the State Board from exercising one corrective action under COMAR 13A.01.04.08(B) – – removing a public school from the direct control of the Baltimore City Board of School Commissioners. It further prohibits the State Board from implementing a "major restructuring of a governance arrangement of a public school in the Baltimore City Public School System." "Major restructuring of a governance arrangement", while not defined in the bill, would be read to mean directing BCPSS to: (1) reopen a school as a charter school; (2) replace all of the school staff; or (3) enter into a contract with a third party entity to operate a school. That definition is consistent with the regulatory options for schools in restructuring implementation. COMAR 13A.01.04.07(c).

With those limitations in mind, it is our opinion that House Bill 1215 would not impair the State Board's ability to carry out its responsibility under NCLB because the State Board may continue to impose one or more of the corrective actions set forth in federal and state law. Further, the Senate Budget and Taxation Committee Floor Report on HB 1215 indicates that the bill "would not affect the other 42 [C]ity schools that are in the restructuring phase of [NCLB]." In addition, House Bill 1215 has a one-year life span by imposing only a one-year moratorium on specific corrective actions. Finally, unlike states that have challenged NCLB as an unfunded federal mandate, House Bill 1215 only affects a particular action taken by the State Board and does not retreat from the State's commitment to NCLB. Thus, it is our view that House Bill 1215 would not put the State's federal funding under NCLB in jeopardy.

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

JJCjr/BAK/as

Title Defect

Bill/Chapter: House Bill 1450/Chapter 398 of 2006

Title: Environment – Reducing Lead Risk in Housing – Penalties

Attorney General's Letter: May 1, 2006

Issue: Whether a provision of a bill that increases maximum criminal penalties for violation of environmental regulations can constitutionally be given effect when the title of the bill only describes changes to civil and administrative penalties for the violations.

Synopsis: House Bill 1450/Chapter 398 of 2006 alters the penalties that may be imposed for certain violations relating to reducing lead risk in housing. The title of the bill states that the bill's purpose is to alter "the maximum administrative and civil penalty that may be imposed" for the violations. The bill, however, in addition to altering administrative and civil penalties, also alters criminal penalties.

Discussion: Article III, § 29 of the Maryland Constitution provides that "every law enacted by the General Assembly shall embrace but one subject, and that shall be described by its title." Although the title of a bill need not be an index to all the bill contains and need not set forth all of its conditions and exclusions, *Eutaw Enterprises v. Baltimore City*, 241 Md. 686, 699 (1966), it should ensure that "the public and members of the legislature are adequately informed about the nature and impact of pending legislation." *Equitable Life v. State Comm'n*, 290 Md. 333 (1981). The test is "whether there is a likelihood that the title may have led to a misconception of the enactment." *Pressman v. State Tax Commission*, 204 Md. 78 (1954).

The Attorney General points out that there is no suggestion in the title of House Bill 1450 that *criminal* penalties are being increased. Furthermore, specific references to administrative and civil penalties also allow a strong inference that criminal penalties are *not* being affected. For this reason, the Attorney General concludes that, with respect to the criminal penalty changes, the title of the bill does not comply with the constitution's requirement that the subject of the bill be described in its title. The Attorney General recommends that the criminal penalty changes not be given effect until the defect in the title is addressed in the 2007 Curative Bill.

Drafting Tips: **When drafting legislation, the drafter must ensure that the title accurately addresses each element of the bill. This is particularly true when drafting changes to the criminal code. In addition to the Maryland constitutional requirement for accuracy in bill titles, due process guarantees in both the State and federal constitutions strongly suggest that the public and its representatives be put on notice when a bill under consideration would increase the amount of time an individual may be deprived of liberty.**

J. Joseph Curran, Jr.
Attorney General

Donna Hill Staton
Maureen Dove
Deputy Attorneys General

Robert A. Zarnoch
Assistant Attorney General
Counsel to the General Assembly

Bonnie A. Kirkland
Kathryn M. Rowe
Sandra J. Cohen
Assistant Attorneys General

The Attorney General of Maryland

Office of Counsel to the General Assembly

May 1, 2006

The Honorable Robert L. Ehrlich, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: House Bill 1450

Dear Governor Ehrlich:

We have reviewed House Bill 1450, "Environment - Reducing Lead Risk in Housing - Penalties," for constitutionality and legal sufficiency. Although we approve the bill, it is our view that a severable portion thereof may not be given effect due to a title defect. We recommend that this provision be included in next year's curative bill.

The title of House Bill 1450 provides that it is:

> FOR the purpose of altering the maximum administrative and civil penalty that may be imposed for certain violations relating to reducing lead risk in housing; and generally relating to reducing lead risk in housing.

The bill, however, raises criminal, as well as administrative and civil penalties.

Article III, § 29 of the Maryland Constitution provides that "every Law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title." The purpose of the title portion of this requirement is to ensure that "the public and members of the legislature are adequately informed about the nature and impact of pending legislation." *Equitable Life v. State Comm'n*, 290 Md. 333 (1981). A title need not be an index to all that the bill contains and need not set forth all of its conditions and exclusions. *Eutaw Enterprises v. Baltimore City*, 241 Md. 686, 699 (1966). "The test for determining whether the title of an act is so faulty that it violates article 3 section 29 of the Constitution, is whether there is a likelihood that the title may have led to a misconception of the enactment." *Pressman v. State Tax Commission*, 204 Md. 78 (1954). This test is found to be met where

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there is matter in the bill that is simply not mentioned in the title. In such a case, the effectiveness of the bill is limited to those matters that do appear in the title. *State's Attorney v. Triplett*, 255 Md. 270, 281-282 (1969).

The title of House Bill 1450 makes no suggestion that criminal penalties are being increased by the bill. Moreover, the specific references to administrative and civil penalties gives rise to the presumption that other types of penalties are not affected. As a result, it is our view that the title could lead to a misconception of the enactment. For this reason, it is our view that the increase in the criminal penalties, which is severable from the remainder of the bill, should not be given effect. However, it is our view that this defect in the title can be cured in next year's curative bill.

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

JJC,Jr./KMR/kmr
hb1450.wpd

cc: Kenneth H. Masters
Secretary of State
Karl Aro
The Honorable Nathaniel T. Oaks

Title Defect

Bill/Chapter: Senate Bill 544/Chapter 526 and House Bill 638 of 2006

Title: Residential Property – Municipalities – Authority to Establish Condominium Regimes

Attorney General's Letter: May 9, 2006

Issue: Whether a bill that allows a leaseholder to establish a condominium regime on leasehold property if a municipal corporation owns the reversionary fee simple estate is effective when the title of the bill instead states that the bill is authorizing a municipal corporation to establish the regime.

Synopsis: Senate Bill 544/Chapter 526 and House Bill 638 of 2006 amend the Real Property Article to allow a *leaseholder* to establish a condominium regime on the leasehold property if the reversionary fee simple estate is owned by a municipal corporation. The title of the bill, however, identifies the bill's purpose as authorizing a *municipal corporation* to establish a condominium regime on residential property owned by the municipal corporation.

Discussion: Article III, § 29 of the Maryland Constitution provides that "every law enacted by the General Assembly shall embrace but one subject, and that shall be described by its title." The title of a bill should ensure that "the public and members of the legislature are adequately informed about the nature and impact of pending legislation." *Equitable Life v. State Comm'n*, 290 Md. 333 (1981). The test is "whether there is a likelihood that the title may have led to a misconception of the enactment." *Pressman v. State Tax Commission*, 204 Md. 78 (1954).

In analyzing this legislation, the Attorney General reviewed the history of the provision being amended. This analysis confirmed that the bill represents the latest in a series of amendments to the Code (dating back to 1982) that add exceptions to a prohibition against leasehold estates being subjected to condominium regimes if used for residential purposes. The legislative history makes clear that the authorization in the provision being amended is granted to the *leaseholder*, not the owner of the reversionary fee simple estate. The Attorney General concluded that, by referring to the establishment of condominium regimes by municipal corporations rather than the holders of leasehold estates, the title of the bill failed to adequately reflect the legal effect of the bill and was affirmatively

misleading. Therefore, the Attorney General advised that the bill be signed but not given effect until the faulty title is addressed in the annual Curative Bill.

Drafting Tips: **Legislative drafters must take great care when drafting the title of a bill to ensure that the title meets the requirements of Article III, § 29 of the Maryland Constitution. A drafter must have a full understanding of the purpose of the legislation and the current law being affected in order to draft a title that provides constitutionally adequate notice to the public and the legislature of the legal effect of the legislation. Toward that end, it is essential that the drafter pay close attention to the language and history of any provisions being amended and be precise in crafting the language of the bill and its title.**

J. Joseph Curran, Jr.
Attorney General

Donna Hill Staton
Maureen Dove
Deputy Attorneys General

Robert A. Zarnoch
Assistant Attorney General
Counsel to the General Assembly

Bonnie A. Kirkland
Kathryn M. Rowe
Sandra J. Cohen
Assistant Attorneys General

The Attorney General of Maryland

Office of Counsel to the General Assembly

May 9, 2006

The Honorable Robert L. Ehrlich, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: House Bill 638 and Senate Bill 544

Dear Governor Ehrlich:

We have reviewed House Bill 638 and Senate Bill 544, identical bills entitled "Residential Property - Municipalities - Authority to Establish Condominium Regimes," for constitutionality and legal sufficiency. We have concluded that the title of the bill does not accurately reflect its contents. However, because this matter can easily be corrected in next year's curative bill, we do not recommend veto, but simply recommend that the bill be added to next year's curative bill and that the implementing agencies not give it effect until the curative legislation is enacted.

House Bill 638 and Senate Bill 544 each amend Real Property Article §11-102(a) to allow establishment of a condominium regime on leasehold property if the reversionary fee simple estate is owned by a municipal corporation. The title, however, provides that the bills are:

> FOR the purpose of authorizing a municipal corporation to establish a condominium regime on residential property owned by the municipal corporation; and generally relating to the authority of municipal corporations to establish condominium regimes.

It is our view that the purpose of the bills is to permit the leaseholder, not the municipal corporation, to establish a condominium regime on the property. Thus, the title essentially fails to reflect the contents of the bills, and is in violation of the requirements of Maryland Constitution Article III, § 29, which provides that "every Law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title." An

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examination of the history of this provision makes clear that this is the case.

In 1981 Attorney General Sachs opined that the condominium law, then commonly known as the Horizontal Property Act, permitted establishment of a condominium regime by the owner of a leasehold estate. 66 *Opinions of the Attorney General* 50 (1981). The next year, presumably in response to this opinion, the General Assembly amended § 11-102(a) to specify that a "fee simple owner" of property in the State could establish a condominium regime, thus barring establishment of a condominium regime by holders of leasehold estates. Chapter 836 of 1982. Two years later, the section was amended again, to return the ability to establish a condominium regime to a "lessee under a lease that exceeds 60 years." Chapter 23 of 1984. This provision further provided, however, that a "leasehold estate may not be subjected to a condominium regime if it is used for residential purposes."

In 1990, the General Assembly began to add exceptions to this rule. Chapter 519 of 1990 amended § 11-102(a)(2) as follows:

> [However] NOTWITHSTANDING THE PROVISIONS OF PARAGRAPH (1) OF THIS SUBSECTION, a leasehold estate may not be subjected to a condominium regime if it used for residential purposes UNLESS THE STATE IS THE OWNER OF THE REVERSIONARY FEE SIMPLE ESTATE.[1]

In 1995, the General Assembly added property in which the reversionary fee simple estate was owned by a charter county to the list of those on which a condominium regime could be established by a lessee. Chapter 360 of 1995.[2] And in 1996, the General Assembly added the Washington Metropolitan Area Transit Authority ("WMATA") to the list, bringing the provision to its current form. Chapter 483 of 1996.[3]

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[1] The title of Chapter 519 provided that the act was "FOR the purpose of specifying that a leasehold estate for residential purposes may be subjected to a condominium regime if the State is the owner of the reversionary fee simple estate."

[2] The title of Chapter 360 provided that the act was "FOR the purpose of permitting certain leasehold estates to be subjected to a condominium regime if a charter county is the owner of the reversionary fee simple estate."

[3] The title of Chapter 483 of 1996 provided that the act was "FOR the purpose of permitting certain leasehold entities to be subjected to a condominium regime *under certain circumstances* if the [WMATA] is the owner of the reversionary fee simple estate."

This history makes clear that the authorization in the provision is given to the leaseholder, not to the owner of the reversionary fee simple estate. Nor in our view, could the bill constitutionally give the authority to establish a condominium regime to the owner of a reversionary fee simple estate in property that is currently subject to a long term lease. The title of the bill refers only to the establishment of condominium regimes by municipal corporations and makes no reference to leasehold estates or to the establishment of condominium regimes by the holders of leasehold estates. As a result, the title of the bill fails to reflect the legal effect of the bill so thoroughly that it is our view that it is affirmatively misleading, and fails to comply with the requirements of Article III, § 29 of the Maryland Constitution. For that reason, we recommend that this provision be added to next year's curative ibll and that the implementing agencies not give it effect until the curative legislation is enacted.

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

JJC,Jr./KMR/kmr
hb638_sb544.wpd
cc: Kenneth H. Masters
Secretary of State
Karl Aro
The Honorable John A. Giannetti, Jr.
The Honorable Barbara Frush
Assistant Attorney General William Brockman

Special Laws

Bill/Chapter: Senate Bill 78/Chapter 506 of 2006

Title: Baltimore City – Alcoholic Beverages – Class C License in Highlandtown Arts and Entertainment District

Attorney General's Letter: April 10, 2006

Issue: Whether a bill that appears to only affect a single entity constitutes an invalid special law prohibited by the Maryland Constitution.

Synopsis: Senate Bill 78/Chapter 506 of 2006 authorizes the issuance of a Class C beer, wine and liquor license for use by an arts club that has been incorporated less than five years and is located on Highland Avenue in the Highlandtown Arts and Entertainment District.

Discussion: Article III, § 33 of the Maryland Constitution prohibits the General Assembly from passing a special law "for any case, for which provision has been made, by an existing General Law." The Court of Appeals has stated that the purpose of this provision is to prevent or restrict the passage of "special" or "private" laws for the relief of particular named parties or providing for individual cases. However, after a review of Court of Appeals cases, the Attorney General concluded that a law that affects only a single entity may be upheld where there is no general law that could apply. The Attorney General cited, for example, the *Police Pension Cases*, 131 Md. 315 (1917), in which the court upheld the validity of a series of bills, which named specific persons and provided pensions for those persons, on the ground that "no general law provided a pension for the persons involved."

While Senate Bill 78 did not mention any specific entity, the Attorney General acknowledged that the apparent intent of the bill is to permit the issuance of a Class C beer, wine and liquor license for the use of the arts club conducted at Schiavone Fine Art on Highland Avenue. The Attorney General concluded that, while the most likely effect of Senate Bill 78, even though it did not name a specific entity, is to permit one specific entity to obtain a Class C beer, wine and liquor license, the bill is not an invalid special law because there is no general law that would permit issuance of such a license for the arts club.

Drafting Tips: **In drafting legislation that appears to have a very limited application, the drafter should be aware of the possible application of Article III,**

§ 33 of the Maryland Constitution, which prohibits the enactment of special laws. However, the drafter should recognize that there are circumstances under which legislation relating to a single entity may be upheld. A law affecting a single entity (even though not specifically named) may not violate the constitutional prohibition against special laws where, as noted by the Attorney General, "the result achieved by the law could not have been reached under any general law." ***See, M & C.C. of Baltimore City v. U. Rwys. & E. Co.,*** **126 Md. 39 (1915).**

J. Joseph Curran, Jr.
Attorney General

Donna Hill Staton
Maureen Dove
Deputy Attorneys General

Robert A. Zarnoch
Assistant Attorney General
Counsel to the General Assembly

Bonnie A. Kirkland
Kathryn M. Rowe
Sandra J. Cohen
Assistant Attorneys General

The Attorney General of Maryland

Office of Counsel to the General Assembly

April 10, 2006

The Honorable Robert L. Ehrlich, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: Senate Bill 78

Dear Governor Ehrlich:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 78, "Baltimore City - Alcoholic Beverages - Class C License in Highlandtown Arts and Entertainment District." In approving this bill, we have concluded that the bill is not invalid as a special law under Maryland Constitution Article III, § 33.

Senate Bill 78 provides that, "notwithstanding any provision of Article 2B of the Code, the Board of Liquor License Commissioners of Baltimore City may issue one Class C beer, wine and liquor license for use by an arts club that has been incorporated less than 5 years and is located on Highland Avenue in the Highlandtown Arts and Entertainment District." The bill takes effect on June 1, 2006 and sunsets at the end of December 31, 2006.

The apparent intent of this bill is to permit the issuance of a Class C beer, wine and liquor license for the use of a club conducted at Schiavone Fine Art, which is located at 244 S. Highland Avenue on the site of an old Moose Lodge. It is not known to us whether there is any other entity on Highland Avenue that could meet the qualifications for this license. However, the relatively short time period provided would seem to make it unlikely. *Cf., Cities Service Co. v. Governor*, 290 Md. 553 (1981). Thus, while the bill does not use the name of a specific entity, its most likely effect is to permit one specific entity to obtain this license.

Maryland Constitution Article III, § 33 provides that "the General Assembly shall pass no special Law, for any case, for which provision has been made, by an existing General

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Law." It has often been said that the purpose of this provision is to prevent or restrict the passage of special, or what are more commonly called private acts, for the relief of particular named parties, or providing for individual cases. *Beauchamp v. Somerset County Sanitary Commission*, 256 Md. 541 (1970). However, a law that affects only a single entity may be upheld where there is no general law that could apply. For example, in *Hodges v. Baltimore Union P. Ry. Co.*, 58 Md. 603 (1882), the Court of Appeals upheld a law permitting the Baltimore Union Passenger Railway Company to construct and operate passenger railways on certain streets in the City of Baltimore, as there was no general law permitting construction of a passenger railway of the type in question. Similarly, in *M & C.C. of Baltimore City v. U. Rwys. & E. Co.*, 126 Md. 39 (1915), the Court upheld a law that specified the amount of the park tax to be imposed, and other matters, with respect to the United Railways and Electric Company of Baltimore, also finding that the result achieved by the law could not have been reached under any general law. And in *Police Pension Cases*, 131 Md. 315 (1917), a variety of laws that provided for varying amounts to be paid to persons who had left the police department, but for a variety of reasons, did not qualify for the pension plan that had been established. Each of the bills involved named a specific person, and provided specifically for a pension for that person, but the bills were held not to be invalid special laws on the ground that no general law provided a pension for the persons involved.

Article 2B, § 9-204.1(a)(4) provides that no new licenses for the sale of alcoholic beverages may be issued in the 46th alcoholic beverages district of Baltimore City. The Fiscal and Policy Note on Senate Bill 78 reflects that the art center in question is located in the 46th alcoholic beverages district. Thus, there is no general law that would permit issuance of a license for this arts club. For this reason, it is our view that Senate Bill 78 is not an invalid law prohibited by Article III § 33.

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

JJC,Jr./KMR/kmr
sb78 wpd

Budget Appropriation Process – Supplementary Appropriation Bill

Bill/Chapter: House Bill 1668/Chapter 416 of 2006

Title: State Police Helicopter Replacement Fund and Volunteer Company Assistance Fund – Moving Violations – Surcharges

Attorney General's Letter: Approval letter dated April 21, 2006, citing follow-up letter (discussed below) dated June 6, 2006

Issue: Whether a bill that allocates new revenues collected under the bill on a one-time basis in the pending fiscal year to reimburse costs incurred in implementing certain provisions of the bill is an improper attempt by the General Assembly to allocate revenues outside of the budget appropriation process specified in the Maryland Constitution or is a proper supplementary appropriation bill within the constitutional authority of the General Assembly.

Synopsis: House Bill 1668/Chapter 416 of 2006 creates the State Police Helicopter Replacement Fund and requires a $7.50 surcharge to be assessed for every motor vehicle conviction for which points may be assessed. The bill requires the Comptroller to pay the surcharges collected to both the fund created by the bill and the Volunteer Company Assistance Fund established under Title 8, Subtitle 2 of the Public Safety Article. The bill further requires that, in fiscal 2007, the first $328,850 in surcharges collected be paid to the District Court of Maryland on a one-time basis to pay certain costs related to the implementation of the surcharge.

Discussion: Article III, § 52(1) through (5) of the Maryland Constitution generally reserves the initiative for appropriating funds from the State Treasury to the Governor in accordance with the Executive Budget Amendment. Article III, § 52(6) of the Maryland Constitution generally limits the General Assembly's budgetary power to striking or reducing items of appropriation in the Budget Bill. However, once the Budget Bill has been passed, the General Assembly may take the initiative for appropriating funds in a supplementary appropriation bill. Article III, § 52(8) specifies the requirements for a supplementary appropriation bill. A supplementary appropriation bill must:

(1) be limited to some single work, object, or purpose and be called a Supplementary Appropriation Bill;

(2) provide the revenue necessary to pay the appropriation; and

(3) be presented to the Governor for approval or veto in accordance with Article II, § 17 of the Maryland Constitution.

The purpose of House Bill 1668 is to raise revenue to be directed to the enhancement of fire and rescue services in the State which, in the Attorney General's view, is clearly a single work, object, or purpose. The Attorney General also noted that, while it would be prudent to include the words "supplementary appropriation" in the bill's title, such exclusion does not render the bill defective as a supplementary appropriation bill. The Attorney General further determined that the bill provides the revenue necessary to pay the appropriation through the imposition of a surcharge, and the bill was presented and signed by the Governor on May 2, 2006. Therefore, the Attorney General concluded that House Bill 1668 does not allocate revenues outside the budget appropriation process and is a valid supplementary appropriation bill.

Drafting Tips: **In drafting legislation that allocates revenues outside the budget appropriation process, the drafter should be aware that Article III, § 52 of the Maryland Constitution specifies the process for the appropriation of funds from the State Treasury and generally reserves to the Governor the power to initiate appropriations. While the General Assembly may initiate appropriations after passage of the operating budget through a supplementary appropriation bill, such a bill must limit the appropriation to a single work, object, or purpose and be called a supplementary appropriation bill. Ideally, the bill's short title should include the words "Supplementary Appropriation" and the purpose paragraph should include "making this Act a supplementary appropriation." Furthermore, the bill must provide the revenue necessary to pay the appropriation and be presented to the Governor to be signed or vetoed in accordance with Article II, § 17.**

J. Joseph Curran, Jr.
Attorney General

Donna Hill Staton
Maureen Dove
Deputy Attorneys General

Robert A. Zarnoch
Assistant Attorney General
Counsel to the General Assembly

Bonnie A. Kirkland
Kathryn M. Rowe
Sandra J. Cohen
Assistant Attorneys General

The Attorney General of Maryland

Office of Counsel to the General Assembly

April 21, 2006

The Honorable Robert L. Ehrlich, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: House Bill 1668

Dear Governor Ehrlich:

We have reviewed for constitutionality and legal sufficiency House Bill 1668 and approve the legislation for signing. However a severable portion of the bill appears to allocate revenues outside the budget appropriation process and thus raises an issue that we will address in detail in a subsequent letter.

House Bill 1668 creates the State Police Helicopter Replacement Fund and requires a $7.50 surcharge be assessed for every motor vehicle conviction for which points may be assessed. The revenues will eventually be allocated to this and another special fund. However Section 2 of the bill states that:

> [N]otwithstanding any other provision of this Act, in fiscal year 2007, the first $328,850 in surcharges collected under this Act shall be paid to the District Court of Maryland to pay its costs related to implementation of the surcharge required under this Act.

In a May 1, 1990 bill review letter on HB 134, we questioned the ability of the General Assembly in ordinary legislation to allocate existing general revenues to political subdivisions outside the budget process. The statutory scheme envisioned by HB 1668, where new revenues are allocated on a one-time basis to the judiciary, might warrant a constitutional difference.

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However, the issue deserves a closer look. Thus, we will address the question in greater detail in a subsequent letter.

In the meantime, because Section 2 of the bill would be severable in any event, we approve HB 1668 for signing.

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

JJC,Jr./RAZ/as

cc: Kenneth H. Masters
Secretary of State
Karl Aro

J. Joseph Curran, Jr.
Attorney General

Donna Hill Staton
Maureen Dove
Deputy Attorneys General

Robert A. Zarnoch
Assistant Attorney General
Counsel to the General Assembly

Bonnie A. Kirkland
Kathryn M. Rowe
Sandra J. Cohen
Assistant Attorneys General

The Attorney General of Maryland

Office of Counsel to the General Assembly

June 6, 2006

The Honorable Robert L. Ehrlich, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: House Bill 1668

Dear Governor:

This letter is to follow up on my Bill Review Letter on House Bill 1668, "State Police Helicopter Replacement Fund and Volunteer Company Assistance Fund - Moving Violations - Surcharges" dated April 21, 2006 in which we approved the bill for signing but indicated that "a severable portion of the bill appears to allocates revenues outside the budget appropriation process and thus raises an issue that we will address in detail in a subsequent letter." It is our view that it does not because it is a proper supplementary appropriation bill and is constitutional in all respects.

House Bill 1668 creates the State Police Helicopter Replacement Fund as a special fund and requires the State Treasurer to hold the Fund separately and requires the Comptroller to account for the Fund. The bill further requires a $7.50 surcharge to be assessed for every motor vehicle conviction for which points may be assessed and requires the Comptroller to pay the surcharges collected in accordance with a formula provided in the bill to both the Fund created by HB 1668 and the Volunteer Company Assistance Fund.[1] Further, Section 2 of the bill states that:

> [N]otwithstanding any other provision of this Act, in fiscal year 2007, the first $328,850 in surcharges collected under this Act shall be paid to the District Court of Maryland to pay its costs related to implementation of the surcharge required under this Act.

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[1] Established under Title 8, Subtitle 2 of the Public Safety Article.

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This provision was added by amendment to reimburse the District Court for computer modifications. *See* Fiscal Note, page 1. The Fiscal Note further explains that expenditures "in the District Court of $328,850 in fiscal year 2007 only for modification of automated systems, cash register changes, redistribution of traffic citation forms and modifications of the District Court's Interactive Voice Response System would be reimbursed by the first $328,859 in surcharges collected in fiscal year 2007 only." *Id.* at 4.

Generally, the initiative for appropriating funds from the State Treasury is reserved to the Governor in accordance with the Executive Budget Amendment. Md. Const., Art. III, Sec. 52 (1) through (5). Further, the General Assembly's budgetary power is generally limited to striking or reducing items of appropriation in the Budget Bill. Sec. 52 (6). However, once the Budget Bill has been passed, the General Assembly may take the initiative in a supplementary appropriation bill. Art. 52, Sec. 52(8) specifies the requirements for a supplementary appropriation bill: it which must be limited to some single work, object, or purpose and called a Supplementary Appropriation Bill; provide the revenue necessary to pay the appropriation, and be presented to the Governor for his signature or veto in accordance with Article II, Sec. 17.

In *Panitz v. Comptroller,* 247 Md. 501 (1967), the Court of Appeals held invalid as a supplementary appropriation bill Chapter 142 of the Laws of 1967 because it attempted to appropriate in creased State income tax to State aid for increased police protection, for schools and for unrestricted State grants to local subdivisions in clear violation of Sec. 52(8)'s requirement that a supplementary appropriation bill be limited to a single work, object or purpose. The purpose of HB 1668 is to raise revenue to be directed to the enhancement of fire and rescue services in the State. This is accomplished by directing the money from the surcharge to the Volunteer Company Assistance Fund the purpose of which is to ensure adequate fire protection and rescue services, and the newly created State Police Helicopter Replacement Fund the purpose of which is to procure new helicopters and related equipment to enhance rescue services. In our view, this is clearly a single work, object or purpose.

While most supplementary appropriation bills include in the short title the words "Supplementary Appropriation" and include in the purpose paragraph a clause "making this Act a supplementary appropriation," this is not always the case. For example, the Capital Budget Bill is a supplementary appropriation bill, but does not contain those phrases. Thus, it is our view that, while it would be prudent to include such words and phrases in the bill's title, such exclusion does not render the bill defective as a supplementary appropriation bill.

Finally, the bill meets the last two requirements of Art. III, Sec. 52(8). It provides the revenue through the imposition of a surcharge on traffic citations for which points may be assessed.[2] Further, the bill was presented to the Governor and signed on May 2, 2006 as Chapter 416 of the Laws of 2006.

For the above reasons, it is our view that House Bill 1668 does not allocate revenues outside the budget appropriation process and is a valid supplementary appropriation bill.

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

JJCjr/BAK/as

[2] House Bill 134 of 1990was not a supplementary appropriation bill because it did not provide the revenue necessary to pay the appropriation, but rather distributed existing revenues. *See* 75 *Opinions of the Attorney General* 124, 132 (1990).

Local Laws – Express Powers

Bill/Chapter: House Bill 128 of 2006 (Vetoed by Governor)

Title: Baltimore City – Housing – Proposed Development – Notice to Community Association

Attorney General's Letter: May 2, 2006

Issue: Whether a bill that establishes conditions for the granting of construction permits for certain developments in Baltimore City would be a public local law concerning the express powers of Baltimore City in violation of Article XI-A, § 4 of the Maryland Constitution, which prohibits the General Assembly from enacting a public local law on any subject covered by the express powers.

Synopsis: House Bill 128 of 2006 provides that, before a developer can obtain a permit from Baltimore City to construct a development containing at least 20 housing units within the boundaries of a community represented by a community association, the developer or the developer's agent must (1) notify the community association of the proposed development and (2) attend a scheduled association meeting or an association committee or subcommittee meeting and consult with the association's members in attendance.

Discussion: Baltimore City has adopted a charter form of government under Article XI-A, § 1 of the Maryland Constitution. Under that form of government, Baltimore City is governed by the express powers contained in Article II of the Baltimore City Charter. The General Assembly is prohibited, under Article XI-A, § 4 of the Maryland Constitution, from enacting a public local law on any subject covered by the express powers.

A statute violates Article XI-A, § 4 of the Maryland Constitution if it is a public local law, as opposed to a public general law, and if it addresses a subject covered by the express powers granted to the jurisdiction affected by the statute. A law is a public local law if, in its subject matter and substance, it affects only "prescribed territorial limits" and is equally applicable to all within those limits. The Attorney General finds that the permit requirement of House Bill 128 applies only in Baltimore City and applies to anyone wishing to construct a certain type of development within the city. Therefore, the Attorney General concludes that House Bill 128 is a public local law.

With regard to the express powers of Baltimore City, the Attorney General concludes that the granting of permits for construction of a development within the city is among Baltimore's express powers under Article II, § 27 (general "police power") of the Baltimore City Charter and, more specifically, under Article II, § 1 of the Baltimore City Charter, which authorizes the city to "regulate the location, construction, use, operation, maintenance, and removal of buildings and structures, or any part thereof, of every kind." According to the Attorney General, House Bill 128 would be a public local law for Baltimore City concerning a subject clearly covered by the express powers of Baltimore City. For this reason the Attorney General was unable to approve the bill.

Drafting Tips: **In drafting legislation that affects a single jurisdiction with a charter form of government, the drafter should be mindful of the express powers granted to that jurisdiction and must ensure that there is no conflict between the express powers and the subject matter of the legislation.**

J. Joseph Curran, Jr.
Attorney General

Donna Hill Staton
Maureen Dove
Deputy Attorneys General

Robert A. Zarnoch
Assistant Attorney General
Counsel to the General Assembly

Bonnie A. Kirkland
Kathryn M. Rowe
Sandra J. Cohen
Assistant Attorneys General

The Attorney General of Maryland

Office of Counsel to the General Assembly

May 2, 2006

The Honorable Robert L. Ehrlich, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: House Bill 128

Dear Governor Ehrlich:

We have reviewed House Bill 128, "Baltimore City - Housing - Proposed Development - Notice to Community Association," for constitutionality and legal sufficiency. We regret that we are unable to approve the bill.

As amended, House Bill 128 requires that a developer notify affected community associations of a proposed development and attend a scheduled meeting of the community association or a committee or subcommittee of the association and consult with members of the association who attend the meeting before the developer may obtain a permit from Baltimore City for the construction of a development consisting of 20 or more housing units.

Maryland Constitution Article XI-A § 1 permits the counties and Baltimore City to adopt a charter form of government, and Baltimore City has done so. Article XI, § 2 provides that the express powers of Baltimore City are those set forth in Article 4, Section 6 of the Public Local Laws of Maryland, now contained in Article II of the Baltimore City Charter, and that they may be extended, modified, amended or repealed by the General Assembly. Article XI-A, § 4 prohibits the General Assembly from enacting a local law for the City on any subject covered by those express powers. As a result, if the General Assembly wishes to diminish the powers granted to Baltimore City, it must do so by amending the express powers in Article II of the Charter. *State's Attorney v. City of Baltimore*, 274 Md. 597, 604 (1975).

A conclusion that a statute violates Article XI-A, § 4, requires two findings:

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(1) that the law in question is a public *local* law, as opposed to a public *general* law; and (2) that the law addresses a subject covered by the express powers granted to the particular geographical subdivision.

Park v. Board of Liquor License Commissioners for Baltimore City, 338 Md. 366, 377 (1995).

The test of whether a statute is a public local law is whether the law, in its subject matter and substance, is confined in its operation to prescribed territorial limits and is equally applicable to all within those limits. *Steimel v. Board of Election Supervisors*, 278 Md. 1 (1976). House Bill 128 imposes a condition on the issuance of a permit for development in Baltimore City, and not in any other jurisdiction. Moreover, it applies to any person who wishes to construct such a development. As a result, it is our view that it is a public local law.

Article II, § 27 of the City Charter gives the City the authority to "have and exercise within the limits of Baltimore City all the power commonly known as the Police Power to the same extent as the State has or could exercise the said power within said limits." And Article II, § 47 provides that the City may "pass any ordinance, not inconsistent with the provisions of this Charter or the laws of the State, which it may deem proper in the exercise of any of the powers, either express or implied, enumerated in the Charter, as well as any ordinance as it may deem proper in maintaining the peace, good government, health and welfare of Baltimore City." It is our view that the general police power, in itself, is enough to bring the regulation of the conditions for a grant of a permit for a development within the reach of the City's authority. However, this matter is made even more clear by Article II, § 1 of the Charter, which authorizes the City to "regulate the location, construction, use, operation, maintenance and removal of buildings and structures, or any part thereof, of every kind." Given these powers, it is our view that this is a matter within the express powers granted to the City, and House Bill 128 violates Maryland Constitution Article XI-A, § 4.

Very truly yours,

J. Joseph Curran, Jr.
Attorney General