Bill Review Letters - 2007

An Analysis of Selected Bill Review Letters of the Attorney General of Maryland on Legislation Passed at the 2007 Session of the General Assembly

Department of Legislative Services 2007

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of the
Attorney General of Maryland
on
Legislation Passed at the 2007 Session of the General Assembly

Department of Legislative Services
Office of Policy Analysis
Annapolis, Maryland

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This document was prepared by:

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General Assembly of Maryland

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Contents

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 – 2007*, 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 – 2007 contains selected bill review letters that cover a wide range of topics including legislative veto, bill title requirements, retroactive laws, special laws, powers of local governments, and issues concerning due process and First Amendment rights. 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, Stacy M. Goodman, and Yvette W. Smallwood. Renée L. Robertson was instrumental in collecting and organizing the bill review letters, and Lindsay Javel and Catherine Foxwell typed the document and formatted it for publication. J. Patrick Ford edited the analyses and supervised production of the document.

Constitutional Issues: Federal and State

Due Process – Suspension of License before Hearing

Bill/Chapter: Senate Bill 1036/Chapter 371 of 2007

Title: Anne Arundel County – Alcoholic Beverages – Immediate Suspension of Licenses

Attorney General's Letter: April 27, 2007

Issue: (1) Whether a bill that authorizes a county board of license commissioners to immediately suspend a liquor license under certain conditions before a hearing takes place violates the due process rights of the license holder.

(2) Whether a bill that authorizes the immediate suspension of a license for violations of law occurring "with such frequency and during such a limited time period so as to demonstrate a willful failure to comply" is unconstitutionally vague.

Synopsis: Senate Bill 1036/Chapter 371 of 2007 authorizes the Board of License Commissioners of Anne Arundel County to immediately suspend an alcoholic beverages license if an authorized person alleges that the licensee sold or furnished alcohol to an underage person with such frequency and during such a limited time period so as to demonstrate a willful failure to comply with the law. The board is required to hold a hearing within seven days on such an action and the licensee is free to seek an injunction to enjoin the suspension.

Discussion: The due process rights guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article 24 of the Maryland Constitution do not always require a hearing *before* deprivation of property where there are safeguards against the risk of baseless or unwarranted deprivation and adequate post-deprivation procedures that require the government to act promptly. *Gilbert v. Homar*, 520 U.S. 924 (1988); *Dept. of Transportation v. Armacost*, 299 Md. 392 (1984). The Attorney General found no constitutional problems with Senate Bill 1036, noting the important governmental interest served by the bill (*i.e.* enhancing the enforcement of prohibitions against selling alcohol to minors by targeting businesses that have a pattern of violating the law) and that only a person authorized to investigate violations of underage drinking laws may initiate the procedure, a hearing is required within seven days, and injunctive relief is available to the licensee. According to the Attorney General, Senate Bill 1036 provides "adequate safeguards to ensure that the Board does not act arbitrarily" and, thus, meets due process requirements.

The Attorney General also found that the bill was not unconstitutionally vague, notwithstanding its failure to delineate how many violations within a specified period of time would amount to violating the law "with such frequency … so as to demonstrate a willful failure to comply" and subject the licensee to an immediate license suspension under the bill. Merely because a statute allows officials some discretion does not make it void for vagueness. "It is only where a statute is so broad to be susceptible to irrational and selective patterns of enforcement that it will be held unconstitutional." *Bowers v. State*, 238 Md. 115, 122 (1978).

Drafting Tips: **A drafter must be aware that both the federal and State constitutions provide that a person's property rights may not be taken away without "due" process. The right to a hearing before the action is taken, however, is not always required. If the government has a legitimate reason for taking the action immediately, combined with legislative safeguards against arbitrary deprivation of the property right and a procedure that requires a hearing within a short period of time, a court will likely support the process established by the law.**

It is also critical that the legislative drafter strive to write clearly and avoid vagueness. Ideally, statutes should be drafted to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and "provide explicit standards for those who apply [the law]." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 27, 2007

The Honorable Martin J. O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: Senate Bill 1036

Dear Governor O'Malley:

We have reviewed and hereby approve the constitutionality and legal sufficiency of Senate Bill 1036, which authorizes the Anne Arundel County Board of License Commissioners to immediately suspend a liquor license under certain conditions. In our view, Senate Bill 1036 is constitutional.

Senate Bill 1036 amends Article 2B and provides that the Board of License Commissioners of Anne Arundel County "may suspend immediately an alcoholic beverages license if a person unauthorized under § 16-405 of this article alleges that the licensee has sold or furnished alcoholic beverages to a person under the age of 21 years with such frequency and during such a limited time period so as to demonstrate a willful failure to comply" with the law regarding such sales. Once the Board takes such action, it must hold a hearing within 7 days and give the licensee notice at least 2 days before the hearing. The legislation also notes that the licensee is not prevented from seeking "an injunction or other appropriate relief."

Because Senate Bill 1036 allows the Board to take action before the hearing takes place, we considered whether the bill would violate the due process rights of the license holder under the Fourteenth Amendment of the United States Constitution or Article 24 of the Maryland Constitution. In our opinion, the bill does not. The Supreme Court has recognized that due process does not always require a hearing before deprivation of property where there are adequate post-deprivation procedures that require the government to act quickly. "[A]n important government interest, accompanied by a substantial assurance that

104 LEGISLATIVE SERVICES BUILDING · 90 STATE CIRCLE · ANNAPOLIS, MARYLAND 21401
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the deprivation is not baseless orunwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard under after the initial deprivation." *Gilbert v. Homar*, 520 U.S. 924, 930-931 (1988). *See also Matthews v. Eldridge*, 424 U.S. 319, 334-335 (1976)(setting forth the appropriate due process factors, namely the consideration of the private interest affected, the risk of erroneous deprivation, and any additional procedural safeguards available); *Dept. of Transportation v. Armacost*, 299 Md. 392 (1984).

While no doubt suspension of an alcoholic beverages license is substantial to its holder, the bill serves an important governmental interest. Its purpose is to target businesses who have a pattern of violating the law and selling alcohol to minors. The bill's sponsors argued that the legislation is needed because there is an enforcement loophole where businesses already cited for selling alcohol to underage minors do so again before the Board of License Commissioners is able to hold a hearing. Moreover, the Board's action is initiated by those authorized to investigate violations of the underage drinking laws. The immediate subsequent hearing, together with the ability of the license holder to seek injunctive or other relief, provide adequate safeguards to ensure that the Board does not act arbitrarily. *See Mackey v. Montrym*, 443 U.S. 1, 19 (1979)(holding that due process does not mandate "perfect, error-free determinations"; so long as there is "a reasonably reliable basis" to conclude that the facts are correct, the agency may suspend a license pending a prompt, post-deprivation hearing).

We also considered whether the bill was written with sufficient clarity to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and to "provide explicit standards for those who apply them." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). *See also Sullivan v. Board of License Commissioners*, 293 Md. 113 (1982). Article 2B, § 12-108 explicitly prohibits the selling or furnishing of alcohol to a person under age 21. The only question for a holder is how many times the licensee must violate that section before the Board may determine that the holder has done so "with such frequency and during such a limited time period so as to demonstrate a willful failure to comply" under Senate Bill 1036. So long as the Board does not act arbitrarily, "even though not accompanied by a specific delineation of the elements and factors required to be weighed and considered by the Board," we believe Senate Bill 1036 meets due process requirements. *Id.* at 124. *See also Bowers v. State*, 283 Md. 115, 122 (1978)(recognizing that merely because a statute allows officials some discretion does not make it void for vagueness and holding that "[i]t is only where a statute is so broad to be susceptible to irrational and selective patterns of enforcement that it will be held unconstitutional").

The Court of Appeals in *Bowers* also announced that an "attack on void-for-vagueness grounds must be determined strictly on the basis of the statute's application to the particular facts at hand," unless the case intrudes upon First Amendment rights. *Id.* It is our opinion that Senate Bill 1036 is constitutional on its face.

Sincerely,

Douglas F. Gansler
Attorney General

DFG:SBB:as
cc: Joseph Bryce
Secretary of State
Karl Aro

Due Process – Confiscation and Revocation of Permit before Hearing

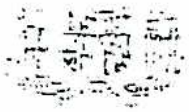
Bill/Chapter:	Senate Bill 733 and House Bill 420/Chapter 404 of 2007
Title:	Vehicle Laws – Exceptional Milk Hauling Permit – Raw Liquid Milk
Attorney General's Letter:	May 4, 2007
Issue:	Whether a statute that authorizes a State agency to confiscate a permit before a hearing is held violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution or Article 24 of the Maryland Declaration of Rights.
Synopsis:	Senate Bill 733 and House Bill 420/Chapter 404 of 2007 authorize the State Highway Administration (SHA) to issue an exceptional milk hauling permit that is valid only in specified counties. The bills establish requirements for issuance of the permit, prohibit a permit holder from engaging in specified activities, and establish sanctions for violations of the terms and conditions of the permit, including "immediate confiscation" of the permit if the vehicle being operated under the permit exceeds specified weight restrictions.
Discussion:	The Attorney General concluded that the exceptional milk hauling permit is a property interest within the realm of constitutional protection. *Goss v. Lopez*, 419 U.S. 565 (1975). For this reason, the Attorney General considered whether, by allowing confiscation of the permit prior to a hearing, the bills violate due process rights under the Fourteenth Amendment to the U.S. Constitution or Article 24 of the Maryland Declaration of Rights. The Attorney General noted that the Supreme Court has determined that due process does not always require a hearing before deprivation of property where there are adequate post-deprivation procedures that require the government to act quickly. The factors that must be assessed when determining a violation of due process rights include consideration of the private interests affected, the risk of erroneous deprivation, and any additional procedural safeguards available. *Matthews v. Eldridge*, 424 U.S. 319 (1976). The Attorney General concluded that a permit holder's due process rights are appropriately addressed in this legislation. The provisions of Senate Bill 733 and House Bill 420 serve the important governmental interests of ensuring highway safety and protecting travelers from overloaded trucks. Moreover, the vehicle weight limits are clearly stated in the bills, thereby limiting the discretion that government officials have in determining whether a violation has occurred. The post-deprivation procedures are

also clearly established. If a government official confiscates a permit, SHA is immediately notified. SHA is then required to verify that a violation occurred and, if so, revoke the permit. A permit holder is provided an appeal process to dispute SHA's decision to revoke the permit. The Attorney General noted that the Supreme Court has held that due process does not mandate error-free determinations as long as there is a "reasonably reliable basis" to determine whether the facts were correct and the post-deprivation hearing is promptly held. *Mackey v. Montrym*, 443 U.S. 1 (1979).

Drafting Tips: **When drafting legislation that includes a penalty requiring the immediate confiscation of property (including a permit) without a hearing, the drafter should be aware of the requirements of the Due Process Clause. Specifically, the drafter should consider the interests of the party affected by the confiscation as well as the State's interest in confiscating the property; the limits on the discretion of the official charged with determining whether confiscation is warranted; and the availability of additional procedural safeguards such as a prompt post-deprivation hearing.**

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 4, 2007

The Honorable Martin J. O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: Senate Bill 733 and House Bill 420

Dear Governor O'Malley:

We have reviewed and hereby approve the constitutionality and legal sufficiency of Senate Bill 733 and House Bill 420, which are identical and concern exceptional milk hauling permits. In our view, the bills do not violate due process or result in an unconstitutional taking of property.

Senate Bill 733 and House Bill 420, among other things, authorize the State Highway Administration (SHA) to issue an exceptional milk hauling permit that is valid in certain counties. The bills outline the requirements for the issuance of such a permit and list activities which the operator of a vehicle is prohibited from doing. The bills also provide sanctions for violations of the terms and conditions of the permit, including the "immediate confiscation" of the permit if the vehicle exceeds the weight restriction by 5,000 pounds.

Because the bills allow for confiscation of the permit before a hearing takes place, we considered whether the bills would violate the due process rights of the permit holder under the Fourteenth Amendment of the United States Constitution or Article 24 of the Maryland Constitution. In our opinion, the bills do not. The Supreme Court has recognized that due process does not always require a hearing before deprivation of property where there are adequate post-deprivation procedures that require the government to act quickly. "[A]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard under after the initial deprivation." *Gilbert v. Homar*, 520 U.S. 924, 930-931 (1988). *See also Matthews v. Eldridge*, 424 U.S. 319, 334-335

(1976)(setting forth the appropriate due process factors, namely the consideration of the private interest affected, the risk of erroneous deprivation, and any additional procedural safeguards available); *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972)(holding that due process is not "fixed in form" and there may be "extraordinary situations where some valid governmental interest that justifies postponing the hearing until after the event"); *Dept. of Transportation v. Armacost*, 299 Md. 392 (1984).

The permit in question is a property interest within the realm of constitutional protection. *See Goss v. Lopez*, 419 U.S. 565, 576 (1975)(as long "as a property deprivation is not *de minimus*, its gravity is irrelevant to the question [of] whether account must be taken of the *Due Process Clause*"). Nonetheless, the bills serve important governmental interests in ensuring highway safety and protecting travelers from overloaded trucks. In addition, the weight limitations are clear, thus government officials are not granted wide discretion in determining whether a violation has occurred.

Moreover, once a confiscation is made, the bills require that SHA be "immediately" notified and that SHA verify that the violation occurred. If so, SHA is instructed to revoke the permit. *See Mackey v. Montrym*, 443 U.S. 1, 19 (1979)(holding that due process does not mandate "perfect, error-free determinations"; so long as there is "a reasonably reliable basis" to conclude that the facts are correct, the agency may suspend a license pending a prompt, post-deprivation hearing). The bills further provide that the permit holder may appeal a revocation. SHA regulations already have procedures in place for appeal of a suspension and revocation of blanket hauling permits. COMAR § 11.04.10. While the bills explicitly provide exceptional milk hauler permit holders an opportunity to be heard, we recommend that the regulations be amended to further spell the procedures to be used when a confiscation occurs pursuant to the authority granted by Senate Bill 733 and House Bill 420.

It is also our opinion that there is no takings issue because the permit is confiscated, not the cargo. If an authority, such as the Commercial Vehicle Enforcement Division of the Maryland State Police, determines that the vehicle has exceeded its weight limit, the vehicle is put out of service, but the cargo is not seized. The owner may bring another vehicle to transport the cargo.

In sum, it is our view that Senate Bill 733 and House Bill 420 are constitutional and legally sufficient.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/RAZ/as
sb733 / hb 420
cc: Joseph Bryce
Secretary of State
Karl Aro

Warrantless Administrative Inspections

Bill/ Chapter:	Senate Bill 255/Chapter 539 and House Bill 282 of 2007
Title:	State Board of Physicians – Sunset Extension and Program Evaluation
Attorney General's Letter:	May 15, 2007
Issue:	Whether a bill that authorizes an agent or inspector of the State Board of Physicians to enter private premises without a warrant where the board, based on a formal complaint, suspects that a person not licensed by the board is practicing, attempting to practice, or offering to practice medicine without a license violates the Fourth Amendment to the U.S. Constitution.
Synopsis:	Senate Bill 255/Chapter 539 and House Bill 282 of 2007 amend § 14-206 of the Health Occupations Article to permit the Executive Director of the State Board of Physicians or an authorized agent or inspector of the board, on a formal complaint, to make a warrantless entry into private premises where the board suspects that a person is practicing, attempting to practice, or offering to practice medicine without a license from the board.
Discussion:	Since the unlicensed practice of medicine is a misdemeanor punishable by imprisonment, the Attorney General advised that an entry into a place of business to investigate a suspected violation of the prohibition against the unlicensed practice of medicine is, in part, an entry to detect evidence of a crime. It is well-settled law that an entry to determine evidence of a crime must be supported by the issuance of a warrant under the Fourth Amendment to the U.S. Constitution and Article 26 of the Maryland Declaration of Rights. The Attorney General stated that even if an entry is deemed to be solely for administrative purposes a warrant is generally required before entry. One exception to the administrative search warrant requirement is the regular inspection of a commercial property in which a "closely regulated business" is conducted. These types of inspections must meet three criteria: (1) there is a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made; (2) the warrantless inspections must be necessary to further the regulatory scheme; and (3) the inspection program must be applied with such certainty and regularity that it acts as a constitutionally adequate substitute for a warrant. *New York v. Burger*, 482 U.S. 791 (1987). "In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being

made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *Id.* at 703.

While the bills concern a regulatory scheme that clearly serves a substantial governmental interest, the Attorney General opined that it was less clear that a warrantless entry was necessary to further that interest. Authorizing the board's inspectors to enter individually selected private premises based on mere suspicion is very different from the type of regular inspection scheme allowed under *Burger*. The Attorney General determined that the type of inspections called for under the bills does not provide the necessary limits on the inspections or guidance to the inspectors in a way that "provides protection equivalent to those provided by a warrant." Therefore, the Attorney General recommended that the warrantless entry provision not be enforced and either be repealed during the next session of the General Assembly or amended to require warrants.

Drafting Tips: **If asked to draft legislation that would authorize a person to enter the premises of another to determine whether there is evidence of a crime or violation of law, even solely for administrative purposes, the drafter should be mindful of the Fourth Amendment's warrant requirement for such searches. The bill's sponsor should be advised that a warrantless search can only be justified under the "administrative search" exception if it serves a substantial governmental interest and takes place under an inspection program that is regular, predictable, and necessary to further that interest. The inspections must be limited in scope and the discretion of the inspecting agents must be clearly defined in the statute.**

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 15, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: Senate Bill 255 and House Bill 282

Dear Governor O'Malley:

We have reviewed Senate Bill 255 and House Bill 282, companion bills entitled "State Board of Physicians - Sunset Extension and Program Evaluation," for constitutionality and legal sufficiency.[1] While we approve the bill, we write to point out a severable portion of the bill that is unconstitutional and may not be given effect.[2]

Senate Bill 255 and House Bill 282 amend Health Occupations Article § 14-206(d)(1), which permits the Executive Director of the Board of Physicians or other authorized agent or inspector of the Board to enter the place of business of a licensed physician or public premises if that entry is necessary to carry out a duty under the Physicians Title. Specifically,

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[1] House Bill 282 and Senate Bill 255 are nearly identical. In Senate Bill 255 there is a reference to Health Occupations Article, § 14-316(e) in both the "repealing and reenacting, with amendments" and the "repealing and reenacting, without amendments" function paragraphs. It should be referred to only in the latter, as it is in the House bill. On page 28, line 15 of Senate Bill 255 there is a reference to "PARAGRAPH (I)." The House bill, on page 28, line 24, correctly refers to "SUBPARAGRAPH (I)."

[2] Senate Bill 255 and House Bill 282 make a series of changes to the provisions of law relating to the practice of medicine by physicians. These changes arise out of the latest sunset review of the State Board of Physicians. The changes are all related to the general subject of improving the regulation of physicians, but are not so interrelated that they must be seen as non severable. Therefore, it is our view that our recommendation that a single provision not be enforced does not require invalidation of the entire bill.

104 LEGISLATIVE SERVICES BUILDING · 90 STATE CIRCLE · ANNAPOLIS, MARYLAND 21401

the bills extend this right of entry to "private premises where the Board suspects that a person who is not licensed by the Board is practicing, attempting to practice, or offering to practice medicine, based on a formal complaint." Nothing in the bills, or in the existing provisions of § 14-206, require that a search warrant be obtained before this entry.[3]

The unlicensed practice of medicine is a misdemeanor punishable by a fine of up to $5000, imprisonment of up to 5 years, or both. Health Occupations Article §§ 14-601, 14-606(a). In addition, a person who engages in the unlicensed practice of medicine is subject to a civil fine of up to $50,000, levied by the Board of Physicians. Thus, an entry into a private place based on a suspicion that a person is engaged in the unlicensed practice of medicine is, at least in part, an entry to detect evidence of a crime. It is well-settled that such an entry must be supported by the issuance of a warrant. United States Constitution, Amendment IV; Maryland Declaration of Rights, Article 26.

Even if the entry is deemed to be solely for administrative purposes, an administrative search generally requires a warrant. *Michigan v. Clifford*, 464 U.S. 287, 291 (1984); *Cahill v. Montgomery County*, 72 Md.App. 274, 280 *cert. denied* 311 Md. 286 (1987). While there are certain exceptions to this requirement, none are applicable here. The primary exception permitting warrantless administrative searches is that for those allowing regular inspections of commercial property in which a "closely regulated business" is conducted. Such inspections are deemed reasonable only if three criteria are met. *New York v. Burger*, 482 U.S. 691, 702 (1987). First, it must be shown that there is "a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made." *Id.* Second, "the warrantless inspections must be 'necessary to further [the] regulatory scheme.'" *Id.* And third, "the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant." *Id.* at 703. "In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *Id.*

While the regulatory scheme in question clearly serves substantial governmental interests, it is less than clear that the warrantless entry is necessary to further those interests. More importantly, the ability to enter individually selected private premises, based on suspicion of specific activity, bears no relation to the type of regular inspection scheme

[3] Section 14-206(d)(2) and (3) make it a misdemeanor punishable by a fine of up to $100 to deny or interfere with an entry under the subsection.

envisioned in cases like *Burger*. Moreover, nothing in the statute provides protections equivalent to those provided by a warrant, in that it does not provide for regular, predictable inspections, or provide guidance to inspectors "either in their selection of establishments to be searched or in the exercise of their authority to search." *Donovan v. Dewey*, 452 U.S. 594, 601 (1981); *New York v. Burger*, 482 U.S. at 722. Thus, it is our view that the authorization to enter private premises without a warrant cannot be upheld under the exception for inspection schemes applicable to heavily regulated industries. To the extent that the bills might authorize entry of private homes, the barriers are even greater, as the Supreme Court has held that warrants are necessary for even administrative searches involving residences. *Camara v. Municipal Court*, 387 U.S. 523, 534 (1967); *Anobile v. Pelligrino*, 303 F.3d 107 (2nd Cir. 2002).

For these reasons, we recommend that the provision not be enforced as it stands, and that the statute be amended in the next session to remove the provision, or to authorize the issuance of warrants to the officers in question where they are able to show probable cause.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/KMR/kmr
sb255_hb282.wpd

cc: Joseph Bryce
Secretary of State
Karl Aro
The Honorable Joan Carter Conway
The Honorable Peter A. Hammen

Taking of Private Property for Public Use

Bill/Chapter:	Senate Bill 423/Chapter 554 and House Bill 875/Chapter 555 of 2007
Title:	Local Government – Street Lighting Equipment
Attorney General's Letter:	May 15, 2007
Issue:	Whether a bill that requires a private entity to sell property to a local government for fair market value violates Article III, § 40 of the Constitution of Maryland, which prohibits the taking of private property for public use without just compensation.
Synopsis:	Senate Bill 423/Chapter 554 and House Bill 875/Chapter 555 of 2007 require an electric company to sell to a local government, upon written request of the local government and for fair market value, some or all of its existing street lighting equipment that is located within the local jurisdiction. Any dispute between a local government and an electric company under the bill must be submitted to the Public Service Commission for resolution.
Discussion:	The Fifth Amendment to the U.S. Constitution and Article III, § 40 of the Constitution of Maryland prohibit the taking of private property for public use without the payment of just compensation. The Constitution of Maryland specifically provides that property may not be taken without compensation "as agreed upon between the parties, or awarded by a Jury." In addition to the constitutional provisions concerning the taking of property, all local governments have statutory condemnation powers to acquire property needed for a public purpose. In requiring an electric company to sell its property to a local government on request of the local government, Senate Bill 423 and House Bill 875 authorize a taking of the property of the electric company for which just compensation must be paid in accordance with Constitutional mandates. The bills require the local government to pay "fair market value" for the property, which the Attorney General notes has generally been understood to constitute "just compensation." *City of Baltimore v. Concord*, 257 Md. 132, 141 (1970). While the bills do not expressly require that, in accordance with the Constitution of Maryland, fair market value is to be determined by a jury in the event that an agreement on value cannot be reached by the electric company and the government, the Attorney General concludes that this omission does not render the bills "entirely unconstitutional." The Attorney General advises that the bills can be implemented in a constitutional manner if the local governments exercise

their condemnation powers to obtain street lighting equipment in instances in which the electric companies do not agree to the sale of the property.

Drafting Tips: **When drafting legislation that authorizes the government to obtain property from a private party, the drafter must always consider whether the act of obtaining the property under the legislation amounts to a "taking" subject to constitutional requirements. If the intent of the legislation is that the property be obtained under the constitutional authority to take private property for public use, the drafter should be aware of all of the requirements of Article III, § 40 of the Maryland Constitution, including the requirement that a jury determine just compensation in the absence of an agreement between the parties.**

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 15, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: Senate Bill 423 and House Bill 875

Dear Governor O'Malley:

We have reviewed Senate Bill 423 and House Bill 875, identical bills entitled "Local Government - Street Lighting Equipment," for constitutionality and legal sufficiency. While the bills may be signed into law, it is our view that they must be administered in a way that will protect the right to just compensation as guaranteed by the Maryland and federal constitutions.

Senate Bill 423 and House Bill 875 authorize a local government to request, and require an electric company to sell, street lighting equipment located within the local jurisdiction to the local government. The bills further provide that the local government must pay fair market value for the street lighting equipment.

Both the Fifth Amendment to the Federal Constitution and Article III, § 40 of the Constitution of Maryland prohibit the taking of private property for public use without the payment of just compensation to the property owner. *King v. State Roads Commission*, 298 Md. 80, 83 (1983). The Maryland provision has generally been read as *in pari materia* with the federal provision. *Id.* at 83-84. Article III, § 40 provides:

> The General Assembly shall enact no law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation.

Senate Bill 423 and House Bill 875, by requiring an electric company to sell its

104 LEGISLATIVE SERVICES BUILDING · 90 STATE CIRCLE · ANNAPOLIS, MARYLAND 21401

electric lighting equipment on request of a local government, provides for the taking of private property. This taking is for a public use, as required by Article III, § 40 and the Fifth Amendment. *Webster v. Pole Line Co.*, 112 Md 416, 429 (1910) (The planting of poles and stringing of wires for the purpose of street lighting is a public use). Moreover, the bills require the payment of fair market value, which is generally understood to constitute "just compensation." *City of Baltimore v. Concord*, 257 Md. 132, 141 (1970). However, the bills do not expressly provide for the amount of compensation to be determined by a jury, as required by the clear language of Article III, § 40.

It is our view that the failure to expressly include the requirement of a jury trial on the matter of just compensation does not render the bills entirely invalid. Instead, it is our view that the statutes can be implemented in a constitutional manner by use of the local governments' condemnation powers to gain possession of street lighting equipment when the electric company objects to the sale.[1] *Becker v. State*, 363 Md 77, 92 (2001); *Atlantic & P. Tel. Co. v. Chicago, R.I. & P.R. Co.*, 6 Biss. 158, 2 F.Cas. 176 (C.C.Ill. 1874) (Reading Act to require agreement or condemnation).

We note that both bills have been amended to provide that "[a]ny dispute between an electric company and a local government arising under this subsection shall be submitted to the Public Service Commission for resolution." The subsection in question, however, is § 5-101(e), which relates to the right to use space on a pole, lamppost or other mounting surface previously used in the local jurisdiction by the lighting company for street lighting purposes. Thus, the provision does not cover disputes relating to the taking of, and fair market value of, the street lighting equipment under § 5-101(b) and (c).[2]

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[1] All local governments have the authority to acquire property needed for a public purpose by condemnation. Article 23A, § 2(b)(24) (Municipal Corporations); Article 25 § 11A (Commissioner Counties); Article 25A § 5(B) (Charter Counties); Article 25B § 13 (Code Counties). The proceedings are governed by Maryland Rule 12-201 *et seq.*

[2] Because some of the discussion on the floor indicates that at least some members may have understood the Public Service Commission remedy to apply more broadly, *see* Senate Proceedings, March 13, 2007, at 32:43 and following, we further state that it is our view that extension of the remedy by appeal to the Public Service Commission to these matters would violate Article III, § 40 because no jury determination would be available at the Public Service Commission or on appeal from its decision. Public Utility Companies Article §§ 3-202 and 3-203. *See American Telephone and Telegraph v. Pearce*, 71 Md 535, 547 (1889) (Statute providing remedy in action for damages after taking would be unconstitutional).

For the above reasons, it is our view that where an electric company is unwilling to sell street lighting equipment under the provisions of these bills, the local government must proceed by way of a condemnation action.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/KMR/kmr
SB423_HB875.wpd

cc: Joseph Bryce
Secretary of State
Karl Aro
The Honorable Richard S. Madaleno, Jr.
The Honorable Jane E. Lawton

Contract Clause and Due Process – Retroactive Alteration of Remedy for Nonpayment of Ground Rents

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Bill/Chapter: Senate Bill 396/Chapter 286 and House Bill 463 of 2007

Title: Ground Rents – Remedies for Nonpayment of Ground Rent

Attorney General's Letter: May 4, 2007

Issue: Whether a bill that retroactively alters remedies for nonpayment of ground rent violates the Contract Clause of the U.S. Constitution or provisions of the Maryland Constitution concerning Due Process, takings, and access to courts.

Synopsis: Senate Bill 396/Chapter 286 and House Bill 463 of 2007 amend the Real Property Article to exclude residential leases from the provisions establishing procedures for the remedy of ejectment for nonpayment of rent, maintaining the remedy of ejectment only for leases of certain commercial and multifamily property. The bills specify that the action for possession under the Real Property Article does not apply to an action for nonpayment of ground rent under a ground lease on residential property, and provide that the establishment of a lien is the applicable remedy for such nonpayment. The bills establish procedures for imposing and releasing a lien and provide for the enforcement and foreclosure of a lien.

Discussion: Senate Bill 396 and House Bill 463 were introduced in response to reports that ejectment actions over ground rents were increasing at a high rate and that people were losing their homes over small amounts of past due rent. The bills are retroactive in that they affect ground leases entered into prior to the effective date of the bills. The Court of Appeals has held that "legislation which retroactively abrogates vested rights" is prohibited under Articles 19 and 24 of the Declaration of Rights, which guarantee access to the courts and Due Process, respectively, and Article III, § 40 of the Maryland Constitution, which prohibits the taking of property without just compensation. *Dua v. Comcast*, 370 Md. 604, 623 (2002). However, the Attorney General noted that the Court has also recognized that a person has no vested right in a particular remedy. *Baltimore & O. R. Co. v. Maughlin*, 153 Md. 367, 376 (1927); *Wilson v. Simon*, 91 Md. 1, 6 (1900). Thus, "the Legislature may retroactively abrogate a remedy for the enforcement of a property or contract right when an alternative remedy is open to the plaintiff." *Dua v. Comcast*, 370 Md. 604, 638 (2002). The Attorney General found that the Maryland courts have consistently

referred to ejectment as a remedy rather than a property right. *See, e.g. Porter v. Schaffer*, 126 Md.App. 237, 273 (1998); *Fett v. Sligo Hills Development Corp.*, 226 Md. 190, 196 (1961). The Attorney General concluded, therefore, that the Maryland Constitution does not prevent the General Assembly from abrogating the remedy of ejectment for nonpayment of rent on residential ground leases, and providing the remedy of a lien and foreclosure in its place.

The Attorney General also found that the alteration of remedies does not violate the Contract Clause of the U.S. Constitution, unless it "so affects that remedy as substantially to impair and lessen the value of the contract." *Pittsburg Steel Company v. Baltimore Equitable Society*, 113 Md. 77, 80 (1910), *affirmed* 226 U.S. 455 (1913); *Bronson v. Kinzie*, 42 U.S. (1 How.) 311, 315 (1843). Although the substituted remedy under the bills involves additional steps and is arguably less convenient, and may delay the recovery of debts, the Attorney General concluded that it does not impair the contract. The substituted remedy permits the ground lease holder to recover the full amount of the rent, and a ground lease holder is constitutionally entitled to no more than payment in full. *Gelfert v. National City Bank of New York*, 313 U.S. 221, 233-234 (1941).

The Attorney General noted that even if the altered remedy were found to be a substantial impairment of the contract between the parties, the constitutional prohibition against impairment of contracts is not absolute and "must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400, 410 (1983), *citing Home Building & Loan Assoc. v. Blaisdale*, 290 U.S. 398, 434 (1934). For example, a substantial impairment may be justified by a showing of a significant and legitimate public purpose and that the adjustment of the rights and responsibilities of the contracting parties is reasonable and appropriate to the public purpose. The Attorney General found that, under Senate Bill 396 and House Bill 463, the elimination of unforeseen windfall profits and the protection of leasehold tenants from the loss of their homes for minor debts are legitimate public purposes and the approach taken, which preserves the reasonable expectations of the ground lease holder, meets the requirements spelled out in the *Energy Reserves* case and other modern Contract Clause cases.

Drafting Tips: **In drafting retroactive legislation that arguably impacts existing contractual relationships between parties, the drafter must be mindful of the provisions of the Contract Clause of the U.S. Constitution, which prohibits the legislative impairment of a private contract. While the courts have held that a violation of the Contract Clause**

requires a "substantial impairment", even a substantial impairment can be justified if (1) the legislation furthers a significant and legitimate public purpose and (2) the adjustment of the rights and responsibilities of the contracting parties as a result of the legislation is reasonable and appropriate to the public purpose. Nonetheless, the drafter should be prepared to discuss potential contract impairment issues with the sponsor. Also, with respect to retroactive legislation, the drafter should be prepared to address with the sponsor any potential for challenges under the federal and State constitutions concerning due process and the taking of property.

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 4, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: Senate Bill 396 and House Bill 463

Dear Governor O'Malley:

We have reviewed and hereby approve Senate Bill 396 and House Bill 463, identical bills entitled "Ground Rents - Remedies for Nonpayment of Ground Rent." In the course of our review, we have considered whether the bills violate the Contract Clause of the United States Constitution, the Due Process Clauses of the Maryland and United States Constitutions, the guarantee of access to courts in the Maryland Constitution, or constitute an unconstitutional taking, and we have concluded that the bills are constitutional.

Senate Bill 396 and House Bill 463 amend Real Property Article § 8-402.2 which provides procedures for the remedy of ejectment for nonpayment of rent, to exclude residential leases from this provision, leaving the remedy of ejectment only for commercial leases and those for multifamily uses with four or more dwellings.[1] Section 8-402.3, which provides additional procedures for ejectment for nonpayment of rent, is repealed.[2] The bills also specify that the action for possession in Real Property Article § 14-108.1 does not apply to an action for nonpayment of ground rent under a ground lease on residential property, and repeal a provision limiting the ability of a ground lease holder to receive reimbursement for additional costs and expenses related to the collection of back rent in a suit or action to

[1] The ground rent bills consistently draw a line between smaller residential uses and multifamily uses with four or more dwellings. In this letter, we have used the term "residential property" to refer to the former.

[2] The bills use the term "ground lease holder" for the holder of the reversionary interest, and "leasehold tenant" for the holder of the leasehold interest.

104 LEGISLATIVE SERVICES BUILDING · 90 STATE CIRCLE · ANNAPOLIS, MARYLAND 21401
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recover back rent. The bills add a new Real Property Article § 8-402.3, applicable to ground rents on residential property, which provides for the establishment of a lien for past due rent on the property subject to the ground rent. The lien that is created has priority from the date that the ground lease was created. The bills further provide that the lien may be foreclosed in the same manner as a mortgage or deed of trust that contains neither a power of sale nor a consent to decree if the lien is not satisfied.[3] If the lien is foreclosed, the ground lease holder of a redeemable ground rent is to be paid the amount of the lien, including rent that has come due since it was established, and the redemption amount calculated under Real Property Article § 8-110(b)(2). In the case of an irredeemable ground rent, the ground lease holder is to receive the amount of the lien, including the rent that has come due since it was established, and the purchaser of the property takes the property subject to the ground rent. The bills also provide for the satisfaction of the lien in cases where the lienholder cannot be found.

These bills, and others related to ground rent, have been introduced in response to articles in the Baltimore Sun in December of 2006.[4] Those articles reflect that ejectment actions over ground rents were increasing at a high rate, and that people were losing their homes over small amounts of past due rent. The articles also reflect that by the time the homeowner gets notice of the suit, costs have risen to the point where many homeowners cannot afford to pay them to keep their home. In one case, a suit over $24 in ground rent ended up being settled for $18,000. Research of court records show that fewer than 2% of homeowners win their cases once sued, and that a high number do not attempt a defense. The articles also revealed that it was not always possible to find the ground lease holders in

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[3] Compare the procedures set out in Maryland Rule 14-204 with respect to foreclosure and sale under a power of sale or an assent to decree, with those in Maryland Rule 14-205 relating to foreclosure where the lien instrument or statutory lien contains neither a power of sale nor a consent to a decree.

[4] *See On shaky ground; An archaic law is being used to turn Baltimoreans out of their homes*, Baltimore Sun (December 10, 2006); *The new lords of the land: A small number of investors who own many Baltimore ground rents often sue delinquent payers, obtaining their houses or substantial fees*, Baltimore Sun (December 11, 2006); *Demands for Reform: Even as critics call for loosening ground rent's grip on Baltimore, new ones are being created*, Baltimore Sun (December12, 2006); *Family faces loss of home over suit*, Baltimore Sun (December 15, 2006); *Clerk of Court reviews suits on ground rent*, Baltimore Sun (December 19, 2006); *Ground rent case settled – for $18,000*, Baltimore Sun (December 21, 2006).

order to pay the rent, and that notice of ejectment actions often did not reach the leasehold tenants.

In the ground rent lease, as used in Maryland, the owner of the land in fee simple typically leases it for the period of 99 years, with a covenant for renewal from time to time forever upon payment of a small renewal fine, upon the condition that the lessee will pay a certain rent and that if the payment is in default the lessor may reenter and terminate the lease. *Kolker v. Biggs,* 203 Md. 137, 141 (1953). The lessee also covenants to pay all taxes on the property. *Id.* The annual rent reserved has traditionally been small, usually an amount which, if capitalized at a reasonable rate of interest, represented what was conceived to be the value of the land. *Heritage Realty, Inc. v. City of Baltimore*, 252 Md. 1, 3 (1969). Since the rent was categorized as a rent *service*, the remedy of distraint was available to the lessor. *Id.* The lessor also had a right to re-enter in the event that the rent was six months in arrears. *Id.*

The leasehold interest in the property is considered personalty, and is governed by the law that directs administration of the personal estate. *Myers v. Silljacks*, 58 Md. 319, 330 (1882). But it "so far partakes of the realty that the title can only pass by deed executed with all the solemnities which are prescribed by law for the sale and conveyance of real estate." *Bratt v. Bratt*, 21 Md. 578, 583 (1864). It has also been said that "in practical effect" the leasehold is "real property subject to payment of the ground rent and all taxes on the land and improvements." *Kolker v. Biggs,* 203 Md. 137, 141 (1953); *Moran v. Hammersla*, 188 Md. 378, 381 (1947), *see also City of Baltimore v. Latrobe*, 101 Md. 621, 640 (1905) (The leaseholder ... is the substantial owner of the property). Moreover, the leasehold tenant has the authority to "take down and build up, alter, remodel and reconstruct" the improvements on the property "at his own pleasure" so long as he does not render the reversioner's rent insecure. *Crowe v. Wilson*, 65 Md. 479, 484 (1886). In short, the absolute management and control of the property is in the leasehold tenant so long as the rent is paid. *Beehler v. Ijams*, 72 Md. 193 (1890); *Crowe v. Wilson*, 65 Md. 479, 481-482 (1886).

The interest in the reversion is deemed an interest in real property. *Myers v. Silljacks*, 58 Md. 319, 330 (1882); *Coombs v. Jordan*, 3 Bland 284 (1831). And it is treated as real property in probate. *Culbreth v. Smith*, 69 Md. 450, 454 (1888); 15 *Opinions of the Attorney General* 242 (1930). The nature of the interest in the reversion is not the same as that of an ordinary owner in fee simple. *Mayor and City Council of Baltimore v. Canton Company*, 63 Md. 218, 236 (1885). Instead, interest in the land is but a form of money investment, analogous to that secured by a mortgage. *Id.* at 237. *See also Heritage Realty Inc. v. City of Baltimore*, 252 Md. 1, 8 (1969) (The reversion is in effect a mortgage without a due date).

"All that the owner of the ground rent is concerned about is that his rent is secure, and in the great majority of leases made years ago in Baltimore, it is secure whether the property is improved or not, as they were made when the value of the ground was much less than it is now." *City of Baltimore v. Latrobe*, 101 Md. 621, 640 (1905). The owner of the reversion has no cause of action against one who damages any improvement to the land unless the damage imperils his security. *Whiting-Middleton Construction Company v. Preston*, 121 Md. 210, 216 (1913). He or she cannot consent to installation of telephone poles on the property, *Maryland Telephone Company v. Ruth*, 106 Md. 644, 657 (1907), or to petition for the paving of the street, *Holland v. Mayor and City Council*, 11 Md. 186 (1857). He or she may not build on or improve the property, *Beehler v. Ijams*, 72 Md. 193, 195 (1890), and in most cases, cannot sue the leasehold tenant for waste, *Crowe v. Wilson*, 65 Md. 479, 481 (1886).

There can be no question that Senate Bill 396 and House Bill 463 have retroactive effect, in that they reach ground leases entered into in advance of their effective date.[5] In *Dua v. Comcast*, 370 Md. 604, 623 (2002), the Court of Appeals held that the Constitution of Maryland, specifically Declaration of Rights Article 19, guaranteeing access to courts, and 24, guaranteeing Due Process and Article III § 40 of the Constitution, which prohibits taking without just compensation "prohibits legislation which retroactively abrogates vested rights."[6] However, the Court has also recognized that a person has no vested right in a particular remedy. *Baltimore & O. R. Co. v. Maughlin*, 153 Md. 367, 376 (1927); *Wilson v. Simon*, 91 Md. 1, 6 (1900). Thus, "the Legislature may retroactively abrogate a remedy for the enforcement of a property or contract right when an alternative remedy is open to the plaintiff." *Dua v. Comcast*, 370 Md. 604, 638 (2002).

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[5] In fact, in light of the passage of Chapter 1 of 2006, (Senate Bill 106), which prohibits the creation of new ground rents, these bills are likely to apply only to contracts entered into prior to their effective date.

[6] In contrast, Due Process analysis under the federal Constitution requires only that the retroactive application of the legislation independently meet the rational basis test, that is, that it be rationally related to the accomplishment of a legitimate State purpose. *Usery v. Turner Elkhorn Mining Company*, 428 U.S. 1, 15-17 (1976). In light of the problems identified in the Baltimore Sun articles, there can be no question that replacement of the remedy of ejectment with creation of a lien and the possibility of foreclosure is rationally related to the State's interest in protecting its citizens from the loss of their homes and all equity therein for debts as small as $24. Significantly more far-reaching changes in remedy have been held not to violate federal Due Process requirements. *See Duke Power v. Carolina Environmental Study Group*, 438 U.S. 59 (1978); *New York Cent. R. Co. v. White*, 243 U.S. 188 (1917).

There is no question that ejectment is a remedy rather than a property right. 9 M.L.E. *Ejectment* § 1.[7] It is consistently referred to as such in cases in which it is discussed. *Porter v. Schaffer*, 126 Md.App. 237, 273 (1998); *Fett v. Sligo Hills Development Corp.*, 226 Md. 190, 196 (1961); *Glorius v. Watkins*, 203 Md. 546, 549 (1954); *Lansburgh v. Donaldson*, 108 Md. 689, 691 (1908); *Carswell v. Swindell*, 102 Md. 636, 639 (1906); *Myers v. Silljacks*, 58 Md. 319, 331 (1882); *Lannay's Lessee v. Wilson*, 30 Md. 536, 546 (1869); *Fenwick v. Floyd's Lessee*, 1 H. & G. 172, 173, 1827 WL 753 (1827). Thus, the Maryland Constitution does not prevent the General Assembly from abrogating the remedy of ejectment for nonpayment of rent on residential ground rents, and providing the remedy of a lien and foreclosure in its place.

It is also established that the alteration of remedies does not violate the Contract Clause of the United States Constitution, unless it "so affects that remedy as substantially to impair and lessen the value of the contract." *Pittsburg Steel Company v. Baltimore Equitable Society*, 113 Md. 77, 80 (1910), *affirmed* 226 U.S. 455 (1913); *Bronson v. Kinzie*, 42 U.S. (1 How.) 311, 315 (1843). "[T]he new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional." *Wilson v. Simon*, 91 Md. 1, (1900), *citing Bronson v. Kinzie*, 42 U.S. (1 How.) 311, 316 (1843). This is true whether the remedy is expressly included in the lease, *Wilson v. Simon*, 91 Md. 1, 6 (1900); *Van Rensselaer v. Snyder*, 13 N.Y. 299, 1855 WL 6888 (N.Y. 1855), or included under the general rule that remedies existing at the time of the formation of the contract become part of the contract. *Pittsburg Steel Company v. Baltimore Equitable Society*, 113 Md. 77, 80 (1910), *affirmed* 226 U.S. 455 (1913). This is because "[n]ot only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 435 (1934); *Gelfert v. National City Bank of New York*, 313 U.S. 221, 231 (1941), *see also*, *Van Rensselaer v. Snyder*, 13 N.Y. 299, 1855 WL 6888 (N.Y. 1855) ("[T]he parties to the grant must be presumed to have contracted in reference to the power and right of the legislature to modify or annul that remedy in common with others."). Furthermore, not even the inclusion of specific remedies in the contract can

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[7] It has been argued that Senate Bill 396 and House Bill 463 work a taking because they destroy the right of re-entry. However, the substitution of the remedy of creation of a lien and the possibility of foreclosure, protects the interests that protected by the right of re-entry in the context of nonpayment of rent. In other contexts, such as failure to renew the ground rent, and equitable waste, *see Crowe v. Wilson*, 65 Md. 479 (1886) the right of re-entry survives, and can be enforced using the remedy of ejectment.

"bind the hands of the State" and prevent its abolition. *Wilson v. Simon*, 91 Md. 1, 6 (1900).

While Senate Bill 396 and House Bill 463 eliminate the ability to bring an action of ejectment for nonpayment of rent on a ground lease of residential property, they protect the interest protected by that remedy by providing for the establishment of a lien, and permitting foreclosure of the lien on complaint of the ground lease holder. The substituted remedy involves additional steps, and requires better notice to the holder of the leasehold interest. Thus, it is arguably less convenient, and may make the recovery of debts more tardy and difficult. But it does not impair the contract. Moreover, while the remedy eliminates the windfall profits that can be made by ejectment in the current market for real property, it permits the ground lease holder to recover the full amount of the rent, the security of which the right to re-enter is intended to protect. as well as the redemption value of the ground lease in the case of redeemable ground rents. A ground lease holder is constitutionally entitled to no more than payment in full. *Gelfert v. National City Bank of New York*, 313 U.S. 221, 233-234 (1941); *Honeyman v. Jacobs*, 306 U.S. 539, 544 (1939); *Richmond Mortgage & Loan Corp. v. Wachovia Bank & Trust Co.*, 300 U.S. 124, 130 (1937). In fact, it has been held that "state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment" requiring Contract Clause scrutiny. *Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400, 411 (1983). Since Senate Bill 396 and House Bill 463 do no more than restrict ground lease holders to the gains they could reasonably expect from their contracts - that is, the past due rent, costs, and redemption where appropriate - it does not substantially impair the contract.

Even if the alteration of remedy in Senate Bill 396 and House Bill 463 were found to substantially impair the contract between the parties, modern Contract Clause jurisprudence makes clear that the constitution prohibition on the impairment of contract is not absolute. Instead, "its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400, 410 (1983), *citing Home Building & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 434 (1934). Thus, a substantial impairment is not automatically invalid, but must be justified by a showing of "a significant and legitimate public purpose ... such as the remedying of a broad and general social or economic problem." *Allied Structural Steel v. Spannaus*, 438 U.S. 234, 247, 249 (1978). "One legitimate state interest is the elimination of unforeseen windfall profits." *Energy Reserves Group v. Kansas Power & Light*, 459 U.S. 400, 412 (1983) *citing United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977). Once such a public purpose is identified, the next inquiry is whether the adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." *Energy*

Reserves Group v. Kansas Power & Light, 459 U.S. 400, 412 (1983).

In this case, the State not only has the public purpose of the elimination of unforeseen windfall profits recognized in *Energy Reserves* and *United States Trust*,[8] but also the protection of leasehold tenants from the loss of their homes for minor debts, which is similar to the interests recognized in cases like *Blaisdell* and *Gelfert*. Moreover, the approach chosen, which preserves all of the reasonable expectations of the ground lease holder, is clearly one that meets the test stated in *Energy Reserves* and other modern contract clause cases. And the approach taken is especially appropriate with respect to long term leases, as the State would otherwise be foreclosed from taking any meaningful action to deal with the problem.

Finally, Senate Bill 396 and House Bill 463 amend two sections that are also amended by Senate Bill 755 and House Bill 458, identical bills entitled "Ground Rents - Property Owned by Baltimore City - Reimbursement for Expenses - Notices." Specifically, Senate Bill 755 and House Bill 458 amend Real Property Article § 8-111.1 to add, as a lead-in to subsection (c), "Except as provided under subsection (d) of this section, in." However, Senate Bill 396 and House Bill 463 repeal subsection (c) altogether, making the lead-in language unnecessary. Similarly, Senate Bill 755 and House Bill 458 amend Real Property § 8-402.3 to provide that the section does not apply to a ground rent on property owned by the City of Baltimore that is abandoned or distressed property, while Senate Bill 396 and House Bill 463 repeal Real Property § 8-402.3 and enact an entirely new section with that number thus making the application provision unnecessary. It is our view that the language in Senate Bill 755 and House Bill 458 that amends provisions of law that are repealed by Senate Bill 396 and House Bill 463 should properly be repealed along with those sections. As a result, we recommend that Senate Bill 755 and House Bill 458 be signed before Senate Bill 396 and House Bill 463.

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[8] Property values vary over time, and certainly will vary over the life of a lease that is, at least theoretically, perpetual. While windfall profits are currently the rule, rather than the exception, there have been times when the fair market value of reversionary interests were lower than the redemption amount. *Heritage Realty, Inc. v. City of Baltimore*, 252 Md. 1, 5 (1969). Thus, it is not unfair to refer to these profits as "unforeseen."

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/KMR/kmr
SB396_HB463.wpd

cc: Joseph Bryce
Secretary of State
Karl Aro
The Honorable Lisa A. Gladden
The Honorable Samuel I. "Sandy" Rosenberg

Retroactive Legislation – Income Tax

Bill/Chapter: Senate Bill 945/Chapter 583 and House Bill 1257/Chapter 584 of 2007

Title: Income Tax – Captive Real Estate Investment Trusts

Attorney General's Letter: May 7, 2007

Issue: Whether a bill limiting a corporate taxpayer's ability to avoid State income taxes that is to take effect on a future date may constitutionally apply retroactively to include the entire past taxable year.

Synopsis: Senate Bill 945/Chapter 583 and House Bill 1257/Chapter 584 of 2007 attempt to limit the ability of a corporation to use a captive real estate investment trust (REIT) to avoid State taxes. The bills provide that, for purposes of determining the Maryland modified income of a captive REIT, an amount equal to the dividends paid deduction allowed under the Internal Revenue Code for the taxable year be added to the amount of federal taxable income. The bills took effect July 1, 2007, but include a clause that makes the bills applicable to "all taxable years beginning after December 31, 2006."

Discussion: The Attorney General found that both the U.S. Supreme Court and the Maryland Court of Appeals have repeatedly upheld the modest retroactive application of tax changes against challenges based on the Due Process Clause. Declaring that a taxpayer has "no vested right in the Internal Revenue Code," the Supreme Court has consistently approved retroactive changes to the federal tax code. *United States v. Carlton*, 512 U.S. 26, 31-33 (1994); *Diamond Match Company v. State Tax Commission*, 175 Md. 234, 245-246 (1938). Similarly, the Court of Appeals has found that the retroactive application of taxes to the beginning of the year does not affect either vested or contractual rights. *Diamond Match Company v. State Tax Commission*, 175 Md. 234 (1938).

The Attorney General cautioned, however, that "while a tax is not invalid simply because it is retroactive, there are limits on how far the State may go." Specifically, if a retroactive tax change works a substantial injustice, is unanticipated at the time of the taxed transaction, is retroactively applied for a significant period, or represents a major change in the tax law, a Maryland court may strike the application as a violation of due process. *See, Comptroller v. Glenn L. Martin Co.*, 216 Md. 235 (1958) and *Washington National Arena v. Prince George's Co.*, 287 38, *cert. denied,*

449 U.S. 834 (1980) (multiple year lengths of retroactivity found unconstitutional). Taking these factors into account, the Attorney General concluded that the period of retroactivity under Senate Bill 945 and House Bill 1257 was modest (affecting only the current tax year), the change could not be said to work a substantial injustice since the goal was to ensure fair taxation, and the change could not be seen as unanticipated since the Comptroller already had statutory authority to address the problem. The Attorney General, therefore, found the retroactivity provision in the bills constitutional.

Drafting Tips: **In drafting legislation that includes a tax provision, the drafter should be aware that applying the provision retroactively, at least to the tax year immediately preceding the effective date of the legislation, is clearly constitutional under State and federal precedents. The drafter should work with the sponsor, however, to ensure that the retroactive provision is drafted to avoid potential constitutional challenges that could be based on a claim that the provision is likely to work a substantial injustice, includes major tax law changes that could not have been anticipated at the time of the taxed transaction, or has an overly lengthy period of retroactivity.**

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 7, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: Senate Bill 945 and House Bill 1257

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 945 and House Bill 1257, identical bills, entitled "Income Tax - Captive Real Estate Investment Trusts." We write to discuss our conclusion that the retroactivity provision of the bill is constitutional.

Senate Bill 945 and House Bill 1257 provide for the addition of an amount equal to the dividends paid deduction allowed under the Internal Revenue Code for the taxable year to the federal taxable income to determine the Maryland modified income of a captive REIT. The purpose of this change, as reflected by the Fiscal and Policy Note on the bill, is to limit the ability of corporations to use REITs to avoid State taxes. The note describes one way to use an REIT to avoid taxes as follows:

> The rental REIT method can be utilized by large multistate retailers. A retailer would form a REIT that would own the real property associated with its retail stores. The parent company subject to State income taxes makes rental payments to the REIT that owns the property, which reduces State income tax liabilities by shifting income from the parent company to the REIT. The REIT files a State income tax return, but claims the dividends paid deduction that a REIT is entitled to claim. The parent company deducts for State income tax purposes the amount of rent paid to the REIT. The dividends are ultimately distributed back to the parent company through a holding company located in a state such as Delaware, since this type of income is not taxed there. When the parent company receives the dividends, it is not taxed by the State as it is able

104 LEGISLATIVE SERVICES BUILDING · 90 STATE CIRCLE · ANNAPOLIS, MARYLAND 21401
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to deduct them since the dividends were received from a subsidiary.

Section 2 of the bill provides that the Act "shall take effect July 1, 2007, and shall be applicable to all taxable years beginning after December 31, 2006." Thus, the bill applies to the current taxable year although it was enacted and will take effect after the beginning of this year.

Both the United States Supreme Court and the Maryland Court of Appeals have repeatedly upheld retroactive application of tax changes against challenges based on the Due Process Clause. For example, in *United States v. Carlton*, 512 U.S. 26 (1994), the Supreme Court upheld an amendment to the federal estate tax, retroactive to the adoption of the provision in question in October of the prior year to close an inadvertent loophole in the original law. The Court held that the provision was adopted as a curative measure, *id.* at 31, that it established only a modest period of retroactivity, *id.* at 32, and that "[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code," *id.* at 33. *Cf., United States v. Hudson*, 299 U.S. 498 (1937) (Retroactivity for period that law was under consideration). And in *Stockdale v. Atlantic Insurance Company of New Orleans*, 87 U.S. (20 Wall.) 323, 331 (1874), the Court recognized that "the right of Congress to [impose a new tax] by a new statute, although the measure of it was governed by the income of the past year, cannot be doubted."

In *Diamond Match Company v. State Tax Commission*, 175 Md. 234 (1938), the Court of Appeals held that a special franchise tax passed in a special session in 1936, and applicable to companies in business in the State on January 1, 1936 was constitutionally applied to a company that dissolved on March 31, 1936. The Court specifically found that the retroactive application to the beginning of the year did not affect either vested or contractual rights. *Id.* at 245-246. And in *National Can Corporation v. Tax Commissioner*, 220 Md. 418, (1959) *app.dis.* 361 U.S. 534 (1960) the Court upheld brief retroactivity of a provision intended to provide authority for a method of assessment that had been held invalid in a previous case, saying that "if the legislature possessed the power in the first place to authorize the levy and collection of the taxes in question, then it had the power, by retrospective act, to cure any defect which may have obtained in the assessment and collection of such a tax." *Id.* at 440. However, while a tax is not invalid simply because it is retroactive, there are limits on how far the State may go. *See Comptroller v. Glenn L. Martin Co.*, 216 Md. 235 (1958) (Change made in 1957 to reverse 1956 decision could not be made retroactive to enactment of sales and use taxes in 1947); *Washington National Arena v. Prince George's Co.*, 287 Md. 38, *cert. denied*, 449 U.S. 834 (1980) (Authorization for

higher recordation tax could not be made retroactive to enactment of tax eight years earlier). As with retroactivity in other areas of the law, the primary consideration is whether retroactive application would violate vested rights, a determination that involves consideration of such factors as whether it works a substantial injustice, was anticipated at the time of the transaction, the length of time involved and whether the change in the law is a minor one. *Waters Landing Limited Partnership v. Montgomery County*, 337 Md. 15, 29 (1994).

Senate Bill 945 and House Bill 1257 have a modest period of retroactivity, affecting only the current tax year and those in the future. Moreover, the change cannot be said to work a substantial injustice where the aim is to ensure fair taxation and eliminate an unfair competitive advantage on the part of large chain stores. Nor can it be seen as unanticipated where the Comptroller already arguably has the authority to address this problem under Tax General Article §§ 10-109 and 10-306.1, and has announced the intention to use these sections for that purpose. Press Release, *Franchot Closes Corporate Tax Loophole* (March 6, 2007).

For these reasons, it is our view that the retroactivity provision of Senate Bill 945 and House Bill 1257 is constitutional.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/KMR/kmr
SB945_HB1257.wpd

cc: Joseph Bryce
Secretary of State
Karl Aro
The Honorable Richard S. Madaleno, Jr.
The Honorable Sheila Ellis Hixson

Special Laws and Establishment Clause – Special Alcoholic Beverages License for Local Religious Organization

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Bill/Chapter: Senate Bill 96/Chapter 127 and House Bill 195/Chapter 128 of 2007

Title: Frederick County – Alcoholic Beverages – Special Licenses

Attorney General's Letter: April 23, 2007

Issue: Whether a bill that authorizes a county to issue a one-day special alcoholic beverages license to a specific religious organization in the county violates the Establishment Clause of the First Amendment to the U.S. Constitution or the prohibition against special laws under Article III, § 33 of the Maryland Constitution.

Synopsis: Senate Bill 96/Chapter 127 and House Bill 195/Chapter 128 of 2007 authorize the Board of License Commissioners of Frederick County to issue a one-day special Class C beer and light wine license and a one-day special Class C beer, wine and liquor license to a local religious organization, Holy Family Catholic Community. The bills require that the net proceeds from alcoholic beverage sales under the licenses be used to fund building construction or for charitable purposes.

Discussion: Article III, § 33 of the Maryland Constitution provides that "the General Assembly shall pass no special Law, for any case, for which provision has been made, by an existing General Law." Although it has been argued that the purpose of this provision is to prevent or restrict the passage of "private acts" for the relief of particular parties or to provide for individual cases, the Attorney General concedes that the Court of Appeals has upheld laws that affect only single entities when there have been no general laws that apply. The Attorney General cites several cases in which the law in question names a specific person, entity, or project and provides specifically for that person, entity, or project. In each case, the validity of the statute was upheld on the ground that no general law provided specifically for the person, entity, or project that was involved in the legislation.

As to the bills under review, the Attorney General expresses concern that while there is no general law authorizing the type of licenses provided for in the bills, there is a general law that specifically provides that only Class A, B, or C beer licenses are authorized in the district where the religious organization is located. While this circumstance makes for a close case, the Attorney General concludes in light of the precedents that the bills are "not clearly unconstitutional." Nonetheless, the Attorney General

recommends that this type of authorization in the future be drafted as a general law.

The Attorney General also briefly considers whether Senate Bill 96 and House Bill 195 violate the Establishment Clause of the First Amendment to the U.S. Constitution. The Attorney General found no cases that address legislation expressly authorizing an alcoholic beverages license to a specific religious entity or that address the constitutionality of such licenses for religious entities. Since the licensing scheme in Frederick County authorizes licenses for a wide variety of entities, including nonreligious organizations, the Attorney General concludes that the provision does not violate the Establishment Clause.

Drafting Tips: **In drafting legislation that provides for a specific person, entity, or project , the drafter should be aware that a challenge to the bill could be made on the grounds that it is in violation of the prohibition against special laws contained in Article III, § 33 of the Maryland Constitution. Although there is precedent that such a statute can be justified by the absence of a general law that could apply, it would be less risky to draft the legislation as a general law instead.**

The drafter should always consider the implications of the First Amendment when drafting legislation involving religious organizations. However, the drafter should be aware that a bill that merely provides a license to a religious organization that is also generally available to non-religious organizations should not, in itself, be considered a violation of the Establishment Clause of the First Amendment to the U.S. Constitution.

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 23, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: Senate Bill 96 and House Bill 195

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 96 and House Bill 195, identical bills entitled "Frederick County - Alcoholic Beverages - Special License. This bill raises serious issues under Maryland Constitution Article III, § 33, which prohibits the passage of special laws. While we do not conclude that the bill is clearly unconstitutional, it is our view that the better practice is to draft this type of authorization as a general law, and we would recommend that this be done in the future. We have also considered whether the bill violates the Establishment Clause of the United States Constitution and have concluded that it does not.

Senate Bill 96 and House Bill 195 provide that notwithstanding the provisions of §§ 7-101(g) of Article 2B, the Board of License Commissioners of Frederick County may issue a one-day special Class C beer and light wine license and a one-day special Class C beer, wine and liquor license to Holy Family Catholic Community. The bill also requires that the net proceeds from the sale of alcoholic beverages be used to fund building construction or for charitable purposes. Section 7-101(g) provides that a Board of License Commissioners cannot issue a special license if the issuance of a regular license of the same class is not authorized. Section 8-211(d-1) limits the issuance of licenses in the Middletown election district to Class A, B or C beer licenses, but allows the issuance of a Class B beer, wine and liquor license to an entity within the municipal boundaries of Middletown if the entity derives at least 70% of its monthly gross revenue from the sale of food. The Fiscal and Policy Note on the bills reflect that the Holy Family Catholic Community is located in the district of Middletown and therefore can currently be issued only a Class C beer 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 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

104 LEGISLATIVE SERVICES BUILDING · 90 STATE CIRCLE · ANNAPOLIS, MARYLAND

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.

Last session we approved a bill to allow issuance to St. Katharine Drexel Roman Catholic Congregation, Inc., concluding that the bill was not a special law because St. Katherine's was in a dry district, so there was no general law that would permit it to obtain a special one-day license. See Bill Review letter on House Bill 725 of 2006. In this case, there is no general law permitting the issuance of a special Class C beer and light wine or special Class C beer, wine and liquor license in Middletown. However, there is a general law providing that in the Middletown election district, "the Board of License Commissioners may only issue Class A, B, or C beer licenses." Article 2B, § 8-211(d-1)(2). It is our view that this circumstance brings the bill closer to a violation of Article III, § 33 than was the case with House Bill 725 (Chapter 189) of 2006. However, in light of the *Police Pension Cases*, we cannot say that it is clearly unconstitutional. Nevertheless, it continues to be our view that situations like this should, where possible, be addressed by general laws. *See* Bill Review Letter on House Bill 427 of 2000.

Our research has revealed no case that has addressed legislation expressly authorizing an alcoholic beverages license to a specific religious entity. Nor have we found any case that generally addresses the constitutionality of such licenses for religious entities. It is our view that a licensing scheme that authorizes grants of licenses for religious entities along with other types of organizations would not violate the Establishment Clause. While this particular authorization is for a specific religious entity, the licensing scheme in Frederick County, taken as a whole, authorizes licenses for a wide variety of entities, and licenses have been authorized for non-religious organizations in dry areas. As a result it is our view that this provision does not violate the Establishment Clause.

Very truly yours,

Douglas F. Gansler

Douglas F. Gansler
Attorney General

DFG/KMR/kmr
SB96_HB195.wpd

cc: Joseph Bryce
Secretary of State
Karl Aro
The Honorable Richard B. Welson, Jr.
The Honorable Alex X. Mooney

U.S. Constitutional Issues

Equal Protection – Election Districts

Bill/Chapter: Senate Bill 657 and House Bill 1239 of 2007 (vetoed by Governor)

Title: Prince George's County – Board of Education

Attorney General's Letter: May 15, 2007

Issue: Whether the districts established for election of the members of the Prince George's County Board of Education violate the "one person – one vote" requirement of the Fourteenth Amendment to the U.S. Constitution.

Synopsis: Senate Bill 657 and House Bill 1239 of 2007 alter the method for the election of members of the Prince George's County Board of Education and establish nine school board election districts. The bills require that candidates for the board be residents of the district they seek to represent and be nominated and elected by residents of the district.

Discussion: The Equal Protection Clause of the Fourteenth Amendment requires that the "seats in both houses of a bicameral state legislature must be apportioned on a population basis . . . [and] that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as possible." *Reynolds v. Sims*, 377 U.S. 533 (1964). The population standard required of legislative districts has been found to extend to other local elected bodies, including school boards. Therefore, the nine election districts established under Senate Bill 657 and House Bill 1239 based on population figures from the last census must meet the population equality standards mandated by the Fourteenth Amendment. Of the nine election districts established under the bills, seven of the districts fall within 3% of the ideal population, a figure derived by dividing the overall population of the County by the number of districts created. Two districts, however, deviate significantly from the ideal population. District 8 is 14.74 % over the ideal district population and District 9 is 14.78% below the ideal district population. The overall or maximum deviation (*i.e*. the difference in population between the two districts with the greatest disparity) is 29.52%.

The Supreme Court has determined that deviations from strict equality may be permitted if they are based on "legitimate considerations incident to the effectuation of a rational state policy." *Mahan v. Howell*, 410 U.S. 315 (1973). The Attorney General notes that over time the U.S. Supreme Court has developed a "10% rule" regarding district population requirements. Under the 10% rule, while an overall deviation of less than 10% is not *prima facie* evidence of a violation of population equality

requirements, an overall deviation that exceeds 10% must be justified by the State. *Marylanders for Fair Representation v. Schaefer*, 849 F.Supp. 1022 (D.Md. 1994). The rule is not definitive, however, and an overall deviation of less than 10% does not guarantee that the plan will be upheld. Various deviations above and below 10% have been upheld or struck down based on an analysis of whether a rational state policy was served by the plan or whether the lines were drawn to promote an unconstitutional policy such as favoring certain regions or parties at the expense of others. The Attorney General notes that the U.S. Supreme Court "has never set a definite upper limit above which deviations could not be justified by any state policy."

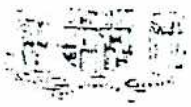
The primary justification recognized by the Court for overall deviations in excess of 10% is to the keep political subdivisions from being split between districts. *Brown v. Thomson*, 462 U.S. 835 (1983). Other reasons for deviations found to be legitimate include district compactness and contiguity, preserving the cores of prior districts, and avoiding contests between incumbents. In this case, the Attorney General states that no traditionally accepted justification or rational state policy has been put forth that justifies the overall deviation of 29.52% resulting under the bills.

Due to a lack of evidence to the contrary, the Attorney General concludes that the districts established under the bills are unconstitutional. Furthermore, since the establishment of the districts is the major substance of the bills and because the remainder of the bills cannot be given effect unless the districts are changed, the unconstitutional provisions are not severable and, therefore, the bills cannot be given effect.

Drafting Tips: **When drafting legislation that includes provisions establishing districts for the purposes of voting, the drafter should be aware of the requirements of the Equal Protection Clause of the Fourteenth Amendment regarding "one person – one vote" and the equal distribution of population among districts. The drafter should work with the sponsor to ensure that the proposed districts and the policies behind their establishment are reviewed for compliance with the Fourteenth Amendment.**

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 15, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: Senate Bill 657 and House Bill 1239

Dear Governor O'Malley:

We have reviewed Senate Bill 657 and House Bill 1239, identical bills entitled "Prince George's County- Board of Education," for constitutionality and legal sufficiency. Because it is our view that the districts for election of the members of the Board of Education, as set up in the bill, violate the one person/one vote requirement of the Fourteenth Amendment, we cannot approve the bill.

Senate Bill 657 and House Bill 1239 alter the method of election of the Prince George's County Board of Education ("the Board") from a system under which members of the Board are nominated by the voters of residence districts but elected by the voters countywide to a system in which the members are elected by the voters of their district. The initial districts are set out in the bill and are based on the election districts and precincts in effect as of the last census. Moreover, the last census provides the only source of population figures on which to judge the relative size of the districts. However, just as districts drawn under that census are presumed to stay within constitutional population limits throughout the ten years, *League of United Latin American Citizens v. Perry*, 126 S.Ct. 2594, 2611 (2006); *Georgia v. Ashcroft*, 539 U.S. 461, 488, n. 2 (2003), districts drawn as a later date are drawn according to and judged by those limits, *League of United Latin American Citizens v. Perry*, 126 S.Ct. 2594, 2611-2612 (2006).

According to the last census, the total population of Prince George's County is 801,515, making the ideal population for the nine districts 89,057. The majority of the districts created by the bill are within 3% of that ideal. Two, however, are significantly further off. Specifically, the 8th District has a population of 102,182, which is 14.74% over

the ideal district, while the 9th District has a population of 75,892, which is 14.78% below the ideal district. Thus, the overall deviation, also known as the maximum deviation, is 29.52%.[1]

In *Reynolds v. Sims*, 377 U.S. 533, 568 (1964), the Supreme Court held that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." Specifically, the Court found "that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Id.* at 577. Subsequently, the Court held that State legislative districts are not subject to the strict population equality standards applicable to congressional districts, and that "so long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature." *Mahan v. Howell*, 410 U.S. 315, 324 (1973).

Over time, the Supreme Court has developed a "10% rule," under which a showing of a overall deviation of less than 10% is not a prima facie evidence of a violation of population equality requirements, but a overall deviation of over 10% must be justified by the State. *Brown v. Thomson*, 462 U.S. 835, 842-843 (1983); *White v. Regester*, 412 U.S. 755 (1973); *Marylanders for Fair Representation v. Schaefer*, 849 F.Supp. 1022, 1031 (D.Md. 1994); *In re Legislative Redistricting*, 331 Md. 574, 594-595 (1993). However, a overall deviation under 10% is not a guarantee that a plan will be upheld. Instead, a plaintiff may still prevail if the deviation results solely from the promotion of an unconstitutional or irrational state policy, *Marylanders for Fair Representation v. Schaefer*, 849 F.Supp. 1022, 1032 (D.Md. 1994), or that the drafters ignored all the legitimate reasons for population disparities and created the deviations solely to benefit certain regions at the expense of others, *In re Legislative Redistricting*, 331 Md. 574, 597 (1993). Such a showing is difficult to make, but in *Larios v. Cox*, 300 F.Supp.2d 1320 (N.D.Ga.), *summarily affirmed Cox v. Larios*, 542 U.S. 947 (2004), the Court found a plan with a overall deviation of 9.98% invalid, holding that the drafters had ignored traditional redistricting criteria and instead concentrated on improving the electoral chances of Democrats over Republicans by creating districts with lower population in inner-city and rural districts and by selectively protecting Democratic incumbents while reaching out to place Republican incumbents in districts

[1] Overall population deviation is the difference in population between the two districts with the greatest disparity. *Abrams v. Johnson*, 521 U.S. 74 (1997).

together.

The Supreme Court has never set a definite upper limit above which deviations could not be justified by any state policy. In *Mahon v. Howell*, 410 U.S. 315, 329 (1973), the Court upheld Virginia districts with an overall deviation of 16.4% based on a finding that the variance was justified by a policy of maintaining the integrity of political subdivision lines, but suggested that "this percentage may well approach tolerable limits." And in *Gaffney v. Cummings*, 412 U.S. 735, 744 (1973), the Court stated that "it has become apparent that the larger variations from substantial equality are too great to be justified by any state interest so far suggested." The cases cited by *Gaffney* as having "much smaller, but nevertheless unacceptable deviations," include *Swann v. Adams*, 385 U.S. 440 (1967) (20.65% overall deviation in the Senate and 33.55% overall deviation in the House); *Kilgarlin v. Hill*, 386 U.S. 120, 122-123 (1967) (26.48% overall deviation), and *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971) (28.20% overall deviation in the Senate and 24.78% overall deviation in the House).

The population standards applicable to state legislative districts have been extended to other local elected bodies, including school boards. *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 327 (2000); *Hadley v. Junior College District of Metropolitan Kansas*, 387 U.S. 50, 54 (1970); *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996). Thus, the districts for election of the members of the Board must meet the population equality standards that have been set by the Courts.

The 29.52% deviation between the Board member districts as drawn by Senate Bill 657 and House Bill 1239 is in the range that the Court has suggested might be per se unconstitutional.[2] However, because there has been no definite decision on this ground, we cannot say that the plan is clearly unconstitutional on this ground.

The primary justification that has been recognized by the Supreme Court for overall deviations in excess of 10% is to keep political subdivisions from being split between districts. *Brown v. Thomson*, 462 U.S. 835, 842 (1983); *Mahan v. Howell*, 410 U.S. 315, 325-326 (1973); *Abate v. Mundt*, 403 U.S. 182, 185 (1971); *Reynolds v. Sims*, 377 U.S. 533,

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[2] It is true that the Supreme Court once upheld a plan giving a representative to a very small county, resulting in a overall deviation of 89%. *Brown v. Thomson*, 462 U.S. 835 (1983). However, in that case the challenge was made only to the single district, and not to the plan as a whole. *Id.* at 846. When the statewide redistricting was challenged after the next census, the new plan, which had a overall deviation of 83%, was found invalid. *Gorin v. Karpan*, 775 F.Supp. 1430 (D.Wyo. 1991).

578, 580 (1964). Other traditional redistricting criteria, such as compactness and contiguity, may provide a justification, *Reynolds v. Sims*, 377 U.S. 533, 578 (1964), as may preserving the cores of prior districts, and avoiding contests between incumbent Representatives, *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). Any of these justifications may be rejected, however, if they are not followed consistently, *Larios v. Cox*, 300 F.Supp.2d 1320 (N.D.Ga.), *summarily affirmed Cox v. Larios*, 542 U.S. 947 (2004), or they could have been achieved with a smaller deviation, *Kilgarlin v. Hill*, 386 U.S. 120, 123 (1967).

While this office lacks the time and resources to do a full analysis of the plan in the time allotted for bill review, it does not appear that any of the above criteria would serve to justify a overall deviation of this size. It does not appear that the deviation arises from the need to keep a municipality together, and municipalities are split in other parts of the County, including Bowie, College Park, Glenarden and New Carrollton. The plan as it appears in the final bills is not significantly more compact or contiguous than the plan that appeared in the bills as introduced. Moreover, the districts are not based to any great extent on the districts under current law. Thus, we are forced to conclude that the plan for the districts included in the bill is unconstitutional.

Because the plan is the major substance of the bill, and because the remainder of the bill cannot be given effect unless the plan is changed, it is our view that the unconstitutional plan is not severable from the remainder of the bill. Therefore, we cannot recommend that this bill be signed.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/KMR/kmr
SB657_HB1239B.wpd

cc: Joseph Bryce
Secretary of State
Karl Aro
The Honorable C. Anthony Muse
The Honorable Barbara A. Frush

First Amendment – Freedom of Speech

Bill/ Chapter:	Senate Bill 979 and House Bill 1344/Chapter 474 of 2007
Title:	Frederick County Commissioners – Zoning and Planning – Public Ethics
Attorney General's Letter:	May 4, 2007
Issue:	Whether a bill that prohibits a zoning applicant in a certain county from making a political contribution to a member of the board of county commissioners of that county during the pendency of the application is an unconstitutional infringement of the free speech guarantees of the federal and State constitutions.
Synopsis:	Senate Bill 979 and House Bill 1344/Chapter 474 of 2007 prohibit certain zoning applicants in Frederick County from making political contributions to members of the Board of County Commissioners of Frederick County during the pendency of the application. The bills also prohibit a board member from participating in the proceedings on an application if the member or the member's campaign received a contribution from an applicant during the pendency of the application.
Discussion:	The Attorney General notes that Senate Bill 979 and House Bill 1344 were patterned after the Prince George's County ethics law that, even though more widely drawn than the bills under review, survived constitutional challenges in the 90's. *See, Porten Sullivan Corp. v. State*, 318 Md. 387 (1990); *see also, State v. Prince Georgians for Glendening*, 329 Md. 68 (1993). In support of the bills, the Attorney General was able to point to a large number of courts that have upheld the constitutionality of total bans on individual contributions by various professions and persons whose political activity raised concerns of corruption or conflict of interest. Addressing the concerns raised by *quid pro quo* corruption (or its appearance) serves as a substantial government interest that survives First Amendment scrutiny.
Drafting Tips:	**Drafters should be aware that legislation with narrowly drawn limits on political contributions to an office holder by a person doing business with the governmental bodies served by the office holder will likely survive a constitutional challenge that is based on a claim that the restriction is violative of First Amendment rights. Courts have upheld this type of legislation on the grounds that it serves a legitimate governmental purpose of protecting against public corruption.**

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 4, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Dear Governor O'Malley:

We have reviewed for constitutionality and legal sufficiency SB 979 and HB 1344, identical bills which would prohibit certain zoning applicants in Frederick County from making a political contribution to a member of the Board of County Commissioners during the pendency of the application.[1] In our view, the legislation would not violate the free

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[1] The legislation defines:

(I) "Contribution" as "a payment or transfer of money or property worth at least $100, calculated cumulatively during the pendency of the application, to a candidate or a treasurer or political committee of a candidate" and

"Pendency of the application" as "any time between the acceptance by the County Department of Planning and Zoning of a filing of an application and the earlier of:

(1) 2 years; or
(2) the expiration of 30 days after:
(I) the Board has taken final action on the application; or

104 LEGISLATIVE SERVICES BUILDING · 90 STATE CIRCLE · ANNAPOLIS, MARYLAND 21401
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speech guarantees of the Federal and State constitutions.

Senate Bill 979 / House Bill 1344 not only prohibits "developer" contributions, but also provides that:

> After an application has been filed, a board member may not vote or participate in any way in the proceedings on the application if the board member or the treasurer or political committee of the board member received a contribution from the applicant during the pendency of the application.

The legislation is patterned in large party on the "Prince Georges Ethics Law", now codified at §§15-829 - 15-835 of the State Government Article, whose earlier versions were subjected to constitutional challenge in *Porten Sullivan Corp. v. State*, 318 Md. 387 (1990) and *State v. Prince Georgians for Glendening*, 329 Md. 68 (1993).[2]

In a number of respects, the Frederick County legislation is narrower than the Prince George's County statute. For example, the former does not affect zoning "agents", has a narrower definition of "contribution" and allows some contributions, *viz.*, those of less than $100. On the other hand, both legislative schemes do not attempt to regulate core political speech, *viz.*, independent candidate expenditures by developers and volunteer activity, *cf.* Election Law Article §13-322.[3] Nor do these measures affect contributions to nonincumbent candidates.

Senate Bill 979 / House Bill 1344 serves a substantial government interest by taking aim at a discreet class of contributors whose political activity raises concerns of *quid pro quo* corruption (or its appearance) and conflicts of interest on the part of incumbent office holders / zoning decision-makers. Thus, the legislation is not drawn into question by the U.S.

(II) the application is withdrawn".

[2] Although the Prince George's legislation was challenged on First Amendment grounds, both appellate decisions were decided on the basis of a one-subject violation. The only court to read free speech contentions was the Circuit Court for Prince George's County, which in 1989 rejected the plaintiff's challenge.

[3] The Frederick County legislation applies only to contributions of money and property, not any "other thing of value". *Compare* Election Law Article, §1-101(o).

Supreme Court's recent decision in *Randall v. Sorrell,* 126 S. Ct. 2479 (2006), which invalidated Vermont's strict and general contribution limits - - $200 - $400 for candidates for state office - - as too low to survive First Amendment scrutiny. *See* 2007 WL 778907 (Tenn. A.G.)(distinguishing *Randall* in upholding an in-session ban on contributions to members of the General Assembly).

On the other hand, most courts have upheld the constitutionality of total bans on individual contributions by various professions and persons whose political activity raised concerns of corruption or conflict of interest. *See e.g. North Carolina Right to Life Inc. v. Bartlett,* 168 F. 3d 705 (4th Cir. 1999), *cert. denied,* 528 U.S. 1153 (2000)(lobbyists); *Blount v. SEC,* 61 F. 3d 938 (D.C. Cir. 1997), *cert. denied,* 517 U.S. 1119 (1996)(municipal securities professionals); *Gwinn v. State Ethics Commission,* 426 S.E. 2d 890(Ga. 1993)(insurers); *Schiller Park Colonial Inn, Inc. v. Berz,* 349 N.E. 2d 61 (Ill. 1976)(liquor licensees); *In re. Petition of Soto,* 565 A. 2d 1088(N.J. Sup. 1989), *cert. denied* 583 A. 2d 310 (N.J. 1990), *cert. denied* 496 U.S. 937 (1990) and *Casino Association of Louisiana v. State of Louisiana,* 820 So. 2d 494 (La. 2002), *cert. denied,* 537 U.S. 1226 (2003)(casino officers and employees). *See also* 2 U.S.C. §441C (banning individual contributions by government contractors).

In our view, this array of authorities supports the constitutionality of SB 979 / HB 1344 as narrowly drawn and serving a substantial government interest.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/RAZ/as
(2007 BR) sb979 / hb 1344
cc: Joseph Bryce
Secretary of State
Karl Aro

First Amendment – Freedom of Speech

Bill/ Chapter:	Senate Bill 252/Chapter 537 of 2007
Title:	Anne Arundel County – Roadside Advertising or Solicitation of Money or Donations – Prohibition
Attorney General's Letter:	May 15, 2007
Issue:	Whether a bill that prohibits a person from standing in a highway to advertise a message is an unconstitutional infringement of the First Amendment to the U.S. Constitution.
Synopsis:	Senate Bill 252/Chapter 537 of 2007 includes a provision that prohibits a person in Anne Arundel County from standing in a highway to "advertise any message."
Discussion:	The First Amendment to the U.S. Constitution states that "Congress shall make no law … abridging the freedom of speech." This prohibition has been applied to state and local governments by way of the Fourteenth Amendment. *Eanes v. State*, 318 Md. 436, 445 (1990). A Maryland court will subject a restriction on the exercise of free speech to a "searching scrutiny." *Id.* at 446. First, the court will determine the nature of the forum at issue. *Id.* at 447. If a public forum, like a highway, the government may only restrict speech if the restriction is content neutral and narrowly tailored to serve a significant government interest. In addition, the restriction must "leave open ample alternative channels for communication of the information." *Warren v. Fairfax County*, 196 F.3d 186, 190 (4th Cir. 1999) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). The Attorney General concedes that the advertising prohibition in the bill is content neutral and that concern for public safety on the highways is a legitimate and significant State interest. The total ban on standing in a highway to advertise any message, however, is not narrowly tailored, according to the Attorney General. Since the advertising ban applies to *any* message rather than merely to advertising that distracts drivers or impedes them from seeing traffic controls or causes other safety hazards, the bills are overbroad and burden more speech than necessary to further the State's legitimate public safety concern. In the words of one court, the bills suppress "too much speech." *City of Ladue v. Gilleo*, 512 U.S. 43, 47 (1994). The Attorney General advises, therefore, that the advertising

provision will not survive a constitutional challenge and should not be enforced by local officials or the State's Attorney.

Drafting Tips: **When drafting a bill that limits speech in a public forum, the drafter should remember that it is insufficient that the restriction is content neutral and that the State has a significant purpose, such as public safety, for legislating in the area. Courts will scrutinize the legislation to ensure that it has been drafted as narrowly as possible. If a law disallows both speech that is included within the area of legitimate State concern and speech that is not, a court will likely void the statute as an infringement on the First Amendment.**

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 15, 2007

The Honorable Martin J. O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: Senate Bill 252

Dear Governor O'Malley:

We have reviewed the constitutionality and legal sufficiency of Senate Bill 252, which concerns highway advertising and solicitation of money or donations. While the bill may be signed into law, in our view a severable portion is unconstitutional and should not be enforced. While the provision banning highway solicitations is constitutional, the provision banning highway advertising is not because it is not narrowly tailored and it is overbroad, thus it violates the First Amendment.

The legislation provides that in Anne Arundel County, "A person may not stand in a highway to: (1) Solicit money or donations of any kind from the occupant of a vehicle; or (2) Advertise any message." Highway is defined as:

(1) "Rights-of-way, roadway surfaces, roadway subgrades, shoulders, median dividers, drainage facilities and structures, related stormwater management facilities and structures, roadway cuts, roadway fills, guardrails, bridges, highway grade separation structures, railroad grade separations, tunnels, overpasses, underpasses, interchanges, entrance plazas, approaches, and other structures forming an integral part of a street, road, or highway, including bicycle and walking paths; and

104 LEGISLATIVE SERVICES BUILDING · 90 STATE CIRCLE · ANNAPOLIS, MARYLAND 21401
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(2) Any other property acquired for the construction, operation, or use of the highway."[1]

The First Amendment states that "Congress shall make no law ...abridging the freedom of speech." U.S. Const. amend. I. "The command of the first amendment...is directed with equal force, by way of the fourteenth amendment, to state and local governments." *Eanes v. State*, 318 Md. 436, 445 (1990). The Court of Appeals further instructed that "[t]he fundamental importance of free speech in our constitutional scheme requires...that restrictions on its exercise be subjected to searching scrutiny." *Id.* at 446.

The analysis begins by determining the nature of the forum at issue. *Id.* at 447. The forum here is a public forum. "Public streets are the archetype of a traditional public forum... ." *Frisby v. Schultz*, 487 U.S. 474, 480-481 (1988). "Identifying public streets as traditional public fora are not accidental invocations of a "cliché, but recognition that '[w]hatever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public.'" *Id.* (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

In a public forum, the government may restrict speech if the restriction is content neutral and narrowly tailored to serve a significant government interest; in addition, the restriction must "leave open ample alternative channels for communication of the information." *Warren v. Fairfax County*, 196 F.3d 186, 190 (4th Cir. 1999)(quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Both the solicitation ban and the message ban in the legislation are content-neutral. In addition, concern for public safety is a significant state interest. Traffic and safety concerns have been upheld as valid state interests justifying "bans of certain speech in areas in close proximity to streets with moving traffic, including median strips, as reasonable time, place, or manner restrictions." *Warren*, 196 F.3d at 198. *See also Sun-Sentinel Co. v. Hollywood*, 274 F. Supp. 2d 1323, 1331 (S.D. Fla. 2003)("it is undisputed that the state has significant interests in vehicle and pedestrian safety and the free flow of traffic").

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[1] This definition was apparently taken from § 8-101(i) of the Transportation Article. Before the bill was amended in the House to add this definition, an advice letter concluded that the measure as it passed the Senate was constitutional. *See* Letter of Advice to the Honorable Janet Greenip and the Honorable Tony McConkey, dated March 20, 2007.

On the question of whether the legislation is narrowly tailored to meet the State's public safety concern, we analyzed whether it "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby*, 487 U.S. at 485. *See also Knowles v. Waco*, 462 F.3d 430 (5th Cir. 2006)(holding that city ordinance that prohibited all "street activities" and "public assemblage" in school zones "sweeps far more broadly than is necessary to further the city's legitimate concern of enhancing the safety and welfare of schoolchildren and others using Waco's public rights of way"). The prohibition need not be the least restrictive or least intrusive means; it is narrowly tailored "so long as the...regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799.

The ban on solicitation in Senate Bill 252 is narrowly tailored. As the court noted in *ACORN v. Phoenix*, a ban on solicitation from persons in vehicles is narrowly tailored to assure "free movement of vehicle traffic on city streets." 798 F.2d 1260, 1268-1269 (9th Cir. 1986). Moreover, "successful solicitation requires the individual to respond by searching for currency and passing it along to the solicitor....The direct personal solicitation from drivers distracts them from their primary duty to watch the traffic and potential hazards in the road, observe all traffic control signals or warnings, and prepare to move through the intersection." *Id.* at 1269. In addition, a person soliciting donations has ample alternative channels. *Id.* at 1271 ("with the myriad and diverse methods of fund-raising available in this country, including solicitation on the sidewalk from pedestrians, canvassing door-to-door, telephone campaigns, or direct mail, it strains credulity to believe that ACORN is left without ample alternatives"). *See also Sun-Sentinel*, 274 F. Supp. 2d at 1331-1332; Letter of Advice on H.B. 250, dated Feb. 21, 2007.

Unlike the solicitation ban, which targets activity at occupants of vehicles, the total ban on standing in a highway to advertise any message is not narrowly tailored. Rather than prohibiting advertising that distracts drivers or impedes them from seeing traffic controls or causes other safety hazards, the legislation prohibits the display of any message regardless of whether it furthers the State's legitimate public safety concern. Thus, it burdens more speech than necessary. "Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent – by eliminating a common means of speaking, such measures can suppress too much speech." *City of Ladue v. Gilleo*, 512 U.S. 43, 47 (1994)(banning all signs on private property, even if done without regard to content, violated the First Amendment). "Access to the 'streets, sidewalks, parks, and

other similar public places...for the purpose of exercising [First Amendment rights] cannot constitutionally be denied broadly..." *Grayned v. City of Rockford*, 408 U.S. 104, 117 (1972).

Although the State could legitimately prohibit the posting of signs in the public right-of-way, by equating humans with stationary signs, the legislation goes too far. In *City Council of Los Angeles v. Taxpayers for Vincent*, the Supreme Court upheld an ordinance banning the posting of signs on public property. 466 U.S. 789 (1984). In determining that the ordinance did not violate the First Amendment, the Court noted that the ordinance curtailed no more speech than necessary to protect the government's legitimate interest in stopping "the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property." *Id.* at 807-810. In doing so, the Court recognized that individuals were free to communicate "in the same place where posting of signs on public property is prohibited." *Id.* at 812. *See also Tucker v. City of Fairfield*, 398 F.3d 457 (6th Cir. 2005)(finding that city's ban on the display of a temporary and movable inflatable rat balloon during a protest by individuals that took place on the public right of way between two highways was not narrowly tailored).

To address the State's concerns about public safety, it would not violate the First Amendment to enact a specific and narrowly tailored statute that would prohibit messages that may cause safety and traffic hazards to drivers and pedestrians. But a justification for a total ban that "evokes images of freeways strewn with human carcasses and wrecked automobiles—the detritus of high-speed collisions between drivers distracted by activity on freeway overpasses—overpasses teeming with demonstrators competing to display their message to the motoring public. There is no basis for such wild imaginings." *Sanctity of Human Life Network v. California Highway Patrol*, 129 Cal. Rptr. 708, 719 (App. Ct. 2003)(concurring opinion arguing that an overpass was a public forum). The majority in that case determined that the highway patrol did not violate protesters' First Amendment rights by stopping them from displaying signs during rush hour at a busy highway where the display caused traffic congestion, but noted that there could be a situation where there would be a free speech violation. "Many variables, such as traffic congestion, safety, and the exercise of the [highway patrol]'s statutory authority, may combine to change whether the [highway patrol] may appropriately interfere with plaintiffs' activities in any given situation." *Id.* at 718.[2]

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[2] The court upheld the highway patrol's actions as a valid exercise of their statutory emergency powers to expedite traffic and ensure safety. But the court went on to add

We also considered whether each ban was overbroad. A statute that "seeks to prohibit such a broad range of protected conduct" is overbroad and thus, unconstitutional on its face. *Vincent*, 466 U.S. at 796. An overbroad statute could have a chilling effect on free speech. *Eanes*, 318 Md. At 464. But finding a statute overbroad "is 'strong medicine' and should be used sparingly. It should not be invoked when a limiting construction can be placed on the statute." *Id.* at 465 (quoting *Broderick v. Oklahoma*, 413 U.S. 601 (1973)). "There must be a realistic danger that the statute itself will significantly compromise recognized first amendment protections..." *Id.* (citing *Vincent*, 466 U.S. at 801). Such a danger is not present with regard to the ban on solicitation. *See Sun-Sentinel*, 274 F. Supp. 2d at 1330 (holding that plain language of ban on soliciting money from occupants in vehicles will not encompass protected activity).

On the other hand, it is our view that the ban on making any message from the broadly defined "highway" area[3] carries a significant risk that valid expressions that are clearly protected by the First Amendment will be chilled. The court in *Sun-Sentinel*, in fact, reasoned that the solicitation ban was not overbroad because it did not reach individuals who stand on the sidewalk or the median and who did not solicit occupants of vehicles. *Id.* at 1332. *See also Vincent*, 466 U.S. at 809 (distinguishing the ban on public signs, which was not overbroad, from ordinances that prohibited activities such as handbilling, which were overbroad). "There, individual citizens were actively exercising their right to communicate directly with potential recipients of their message. The conduct continued only while the speakers or distributors remained on the scene." *Id.* *See also Eanes*, 318 Md. at 456 (sound ordinance constitutional because speaker could still present his or her message a number of other ways in the street, including "use of placards"). The message ban in Senate Bill 252 will reach individuals who are doing no more than standing on the side of the road, expressing a message.

"[T]he mere fact that one can conceive of some impermissible applications is not sufficient to render [the legislation] susceptible to an overbreadth challenge," *Vincent*, 466 U.S. at 800. In this case, however, the number of permissible applications are dwarfed by the vast number of potential impermissible applications. While the ban could legitimately be applied to a situation akin to that in *Sanctity of Human Life Network*, that

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that if "expressive activities on freeway overpasses" were "the terrifying problem" suggested, then the legislature should enact a "specific and narrowly tailored statute".

[3] A more narrowly defined place restriction could include the one used in *Sun-Sentinel*, which prohibited the standing "in the portion of a roadway paved for vehicle traffic."

is, where the activity was causing traffic disruption, there are easily hundreds of other potential instances where the legislation bans protected, expressive speech. A few examples quickly come to mind: holding an American flag, walking in a group of political supporters with similar campaign t-shirts, holding a sign advertising a car wash to benefit a certain school, holding a sign that says "Repent," wearing a t-shirt that says "make levees, not war," wearing a peace symbol.

The ban at issue is similar to the situation in *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987). There the board banned all expression in the airport. In finding the statute overbroad, the Court reasoned that by banning all First Amendment activities in the terminal area, the ban was not limited to expressions that caused problems such as congestion or disruption but would include activities such as wearing campaign buttons or symbolic clothing. *Id.* at 575. The Court went on to conclude that the statute was unconstitutional on its face, stating "it is difficult to imagine that the resolution could be limited by anything less than a series of adjudications, and the chilling effect of the resolution on protected speech in the meantime would make such a case-by-case adjudication intolerable." *Id.* at 576.

In sum, it is our view that while the solicitation ban in Senate Bill 252 is constitutional, we do not believe that the total ban on advertising will survive a facial challenge to its constitutionality. Senate Bill 252 has a severability clause that if any provision is held invalid "for any reason in a court of competent jurisdiction, the invalidity does not affect other provisions or any other application of this Act." Thus, the bill may be signed into law and its solicitation provisions given effect. However, it is our view that the advertising provision should not be enforced by local officials or the State's Attorney.

Sincerely,

Douglas F. Gansler
Attorney General

DFG:SBB:as
cc: Joseph Bryce
Secretary of State
Karl Aro

First Amendment – Access to Information

Bill/Chapter:	House Bill 1409/Chapter 651 of 2007
Title:	Insurance – Fraud – Intentional Motor Vehicle Accidents, Creation of Documentation of Motor Vehicle Accidents, and Reports
Attorney General's Letter:	May 15, 2007
Issue:	Whether a bill that limits access to a report compiled by a law enforcement agency concerning a motor vehicle accident to only certain individuals for a specified period and requires such persons to present a statement that the person will not knowingly disclose the information in the report to a third party for commercial solicitation of an individual listed in the report is a violation of the First Amendment to the U.S. Constitution.
Synopsis:	House Bill 1409/Chapter 651 of 2007 includes provisions that, for 60 days following the filing of a report compiled by a law enforcement agency concerning a motor vehicle accident, access to the report is limited to the individuals involved in the accident, their legal representatives and insurers, a State's Attorney or other prosecutor, a representative of a victims' services organization, an employee of a newspaper or a radio or television station licensed by the Federal Communications Commission, and an authorized unit of the local, State, or federal government. A person granted access under these provisions must produce a valid driver's license or State-issued identification card, prove that the person is authorized to access the report, and present a statement that, during the 60-day restricted period, the person will not use the report for commercial solicitation of an individual listed in the report and will not knowingly disclose the information to a third party for commercial solicitation of such an individual.
Discussion:	In *Los Angeles Police Department v. United Reporting Publishing Corporation*, 528 U.S. 32 (1999), the Supreme Court addressed a constitutional challenge to a California statute that required a law enforcement agency to restrict access to the names and addresses of persons arrested by the agency and the names and addresses of victims of crimes. The statute required the requester to declare under penalty of perjury that the request was made for a scholarly, journalistic, political, or governmental purpose, or that the request was made for investigative purposes by a licensed private investigator. The statute further required a statement, under penalty of perjury, that the information obtained under

the provision would not be used for commercial purposes. In a 6 to 3 decision, the court upheld the statute, noting that the State "could decide not to give out arrestee information at all without violating the First Amendment." *Id.* at 40.

The Attorney General found that House Bill 1409 was significantly similar to the provisions of the law addressed in the *Los Angeles Police Department* case and other precedents allowing governmental limitation of access to certain information. The Attorney General did note, however, that the definition of "newspaper" under the bill would prevent a publication like the *Maryland Bar Journal* from obtaining access to a report for the purpose of preparing an obituary of a bar member. While this raises the possibility that particular applications of the statute could lead to successful challenges, the legislation is not facially invalid.

Drafting Tips: **When drafting a bill that restricts access to information in the hands of a governmental unit, the drafter can provide assurance to the sponsor that the First Amendment has been held not to be violated in cases where the restriction rationally serves a legitimate governmental purpose, like protecting the privacy of accident victims. Nonetheless, the drafter should consider the possibility that the legislation, as applied in particular cases, could be subject to a successful constitutional challenge. For example, a court might find a statutory restriction to be overly broad when applied to a particular challenger who has been denied access to information if the basis for the denial does not serve the stated governmental purpose. Of course, where the denial of access is shown to be based on some illegitimate factor, such as a person's political views, the likelihood of a successful constitutional challenge would be strong.**

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 15, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: House Bill 1409

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency, House Bill 1409, "Insurance - Fraud - Intentional Motor Vehicle Accidents, Creation of Documentation of Motor Vehicle Accidents, and Reports." In reviewing the bill, we have concluded that it does not present a facial violation of the First Amendment.

House Bill 1409 relates to the prevention of insurance fraud. It provides that it is a fraudulent insurance act for a person to organize, plan or knowingly participate in an intentional motor vehicle accident or a scheme to create documentation of a motor vehicle accident that did not occur, with the purpose of submitting a claim under a policy of motor vehicle insurance. The bill further places limitations on access to a report compiled by a law enforcement agency concerning a motor vehicle accident. Specifically, for the 60 days following the filing of the report, access is limited to the individuals involved in the motor vehicle accident, the legal representatives of individuals involved in the motor vehicle accident, the insurers of individuals involved in the motor vehicle accident, a State's Attorney or other prosecutor, a representative of a victim's services organization, an employee of a radio or television station licensed by the Federal Communications Commission, an employee of a newspaper, and a unit of local, State, or federal government that is otherwise authorized to have access to a report in furtherance of the unit's duties. A person who is granted access under these provisions must present a valid driver's license or other State-issued identification card, prove that the person is authorized to access the report, and present a statement that, during the 60 days that access to the report is restricted, the person will not use the report for commercial solicitation of an individual listed in the report and will not knowingly disclose the information in the report to a third party for commercial

104 LEGISLATIVE SERVICES BUILDING · 90 STATE CIRCLE · ANNAPOLIS, MARYLAND 21401

solicitation of an individual listed in the report. The bill further specifies that it "does not prohibit the dissemination or publication of news to the general public by any legitimate media entitle to access reports." A person who obtains a report in violation of the bill is guilty of a felony and subject to a fine not exceeding $10,000 and imprisonment not to exceed 15 years or both. An officer of a law enforcement agency who knowingly discloses a report to a person who is not entitled to access the report is guilty of a felony and is subject to a fine of up to $10,000 or imprisonment not exceeding 15 years or both. No penalty is provided for a person who uses a report for commercial purposes, or for a person who is not an officer of a law enforcement agency who discloses information in the report to a third person for the purposes of commercial solicitation.

The bill defines the term "newspaper" to include a newspaper of general circulation that is published at least once a week, includes stories of general interest to the public, and is used primarily for the dissemination of news. It further states that "newspaper" does not include a publication that is intended primarily for members of a particular profession or occupational group, with the primary purpose of advertising, or with the primary purpose of publishing names and other personal identifying information regarding parties to a motor vehicle accident.

This portion of the bill, including the definition of newspaper, comes from a proposed amendment to the Automobile Insurance Fraud Model Act, which already places a 60 day limitation on the availability of accident reports. The amendment proposes a new Section 5C, the draft of which, dated February 28, 2007, provides:

> Motor vehicle accident or crash reports, held by any law enforcement, state or local agency ... may be made immediately available to the parties involved in the crash, their legal representatives, their licensed insurance agents, their insurers or insurers to which they have applied for coverage, persons under contract with such insurers to provide claims or underwriting information, prosecutorial authorities, state licensed or state authorized victim services programs, radio and television stations licensed by the Federal Communications Commission, newspapers qualified to publish legal notices under applicable state law published once a week or more often, available and of interest the public generally for the dissemination of news. For the purposes of this section, the following products or publications are not newspapers as referred to in this section: those intended primarily for members of a particular profession or occupational group; those with the primary purpose of distributing advertising; and those with the primary purpose of publishing

names and other personal identifying information concerning parties to motor vehicle crashes.

Many cases have addressed the constitutionality of limits on access to information designed to prevent its use for commercial purposes. In *Los Angeles Police Department v. United Reporting Publishing Corporation*, 528 U.S. 32 (1999), the Supreme Court addressed a constitutional challenge to a California statute that required a law enforcement agency to restrict access to the names and addresses of persons arrested by the agency and the names and addresses of victims of crimes. California Government Code § 6254(f)(3). The statute required the requester to declare under penalty of perjury that the request was made for a scholarly, journalistic, political or governmental purpose, or that the request was made for investigative purposes by a licensed private investigator. The statute further stated that information obtained under the provision could not be used, or furnished to a third person, to sell a product or a service to any person, and required a declaration to that effect to be made under penalty of perjury.

In the decision of the Court, Justice Rehnquist held, joined by six other justices, held that the statute was not subject to facial challenge. The Court accepted the State's characterization of the statute as "a law regulating access to information in the hands of the police department," and noted that the State "could decide not to give out arrestee information at all without violating the First Amendment." *Id.* at 40. Thus, where plaintiff had not attempted to qualify for access to the information, and was not subject to threat of prosecution, cutoff of funds, or other harm, the Court took the view that a facial challenge was not viable.

While the decision of the Court leaves open the possibility that an as applied challenge to the statute could be successful, the concurring opinions give some reason to believe that an as applied challenge would also face significant hurdles. Justice Ginsburg, joined by three other justices, suggested that a limitation of this sort is legitimate so long as the determination of who gets access was not based on some illegitimate factor, such as persons whose political views agreed with the party in power, and described the statute as placing no prohibition on the use of the information to speak to or about arrestees. They also noted that, as a practical matter, a constitutional interpretation allowing selective disclosure made it less likely that a state would choose to allow no disclosure at all. Justice Scalia, joined by Justice Thomas, disagreed that the statute was necessarily immune from an as applied challenge, but did not address the issue on the merits. Only two justices would have found the statute facially unconstitutional, stating that while the State could refuse access altogether or allow access to a limited group of users with a special and legitimate need for the information,

where it allowed access to most and denied it to a small group it would constitute "unconstitutional discrimination."

Following the decision in *Los Angeles Police Department*, the Supreme Court summarily vacated a decision that had found a Kentucky statute restricting access to accident reports to be invalid. *Amelkin v. McClure*, 528 U.S. 1059 (1999). That statute, Ky.Rev.Stat.Ann. § 189.635, made accident reports confidential except when produced pursuant to a subpoena or court order, to the parties to the accident, to the parents or guardians of a minor who was a party to the accident, and to the insurers and attorneys of the parties to the accident. The statute also permitted the report to be made available to a news-gathering organization "solely for the purpose of publishing or broadcasting the news." On remand, the Sixth Circuit upheld the statute as applied to chiropractors and lawyers seeking access for purposes of solicitation. *Amelkin v. McClure*, 330 F.3d 822 (6th Cir. 2003), *cert. denied*, 540 U.S. 1050 (2004). The Court found that the statute, "insofar as it applies to the plaintiffs, does not restrict or even regulate expression. Rather, it simply restricts *access* to confidential information possessed by the government." *Id.* at 827. Deciding that the statute did not violate the First Amendment, the Court ultimately applied rational basis scrutiny under the Equal Protection Clause, holding that the provision was rationally related to the State's interest in protecting the privacy of accident victims.

In *Spottsville v Barnes*, 135 F.Supp.2d 1316 (N.D.Ga. 2001) *affirmed* 2002 WL 369911 (11th Cir. 2002) a federal district court upheld a Georgia statute, Ga.Code Ann. § 50-18-72(4.1) which restricted access to motor vehicle accident reports to a person whose name or identifying information appears in the report, an attorney or representative of that person, or a person who could show that he or she has a personal, professional or business connection with a person in the accident, own or lease an interest in property alleged to have been damaged in the accident, was injured in the accident, was a witness to the accident, is the insurer of a party to the accident, is a prosecutor or a publicly employed law enforcement officer, is alleged to be liable to another party as a result of the accident, is an attorney who needs the report for an investigation of a criminal matter or of a potential claim that the roadway, railroad crossing or intersection is unsafe, is gathering information as a representative of a news media organization, or is conducting research in the public interest for such purposes as accident prevention, prevention of injuries or damages in accidents, or other similar purposes.

The Court held that the Act is "at most nothing more than a governmental denial of access to information." *Id.* at 1322. As a result, the Court found that the statute did not implicate First Amendment rights, and that a "private investigator seeking information for

commercial solicitation has no First Amendment constitutional right of special access to motor vehicle accident reports." *Id.* at 1323. Some cases decided prior to the decision in *Los Angeles Police Department* had reached similar conclusions. *See Lanphere & Urbaniak v. Colorado*, 21 F.3d 1508 (10th Cir. 1994) (Barring access to criminal justice files where access sought for purpose of soliciting business for pecuniary gain); *DeSalvo v. Louisiana*, 624 So.2d 897 (1993), *cert. denied*, 510 U.S. 1117 (1994) (Prohibition on disclosure of accident records to any other than a party the press and certain contractors).

House Bill 1409 is significantly similar to the provisions of the California law that were held not to be susceptible to facial challenge in the *Los Angeles Police Department* case. It bars access except to certain persons for certain purposes, and requires a statement that the material will not be used for solicitation or provided to others for that purpose. Thus, it is our view that this provision, like the one involved in *Los Angeles Police Department*, is not susceptible to facial challenge. It is also our view that the law could be upheld in many of its possible applications. We note, however, that the definition of newspaper in the bill would prevent the Maryland Bar Journal from obtaining access to an accident report for the purpose of preparing an obituary concerning the death of a member. This type of application could lead to a successful challenge to particular applications of the statute, but would not render it facially invalid.

Moreover, it is our view that the definition of "newspaper" is not irrational in light of the interest in preserving the availability of this information for publications that are focused on the dissemination of timely news. *Cf. Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967) (Drawing distinction in level of care required for publication of "hot news."). Therefore, it is our view that the bill may be signed into law.[1]

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[1] In *Ficker v. Utz*, Civil Action No. WN-92-1466 (D.Md. September 30, 1992), Judge Nickerson granted a preliminary injunction against enforcement of State Government Article § 10-616(h), which then required a custodian to deny inspection of a record relating to police reports of traffic accidents and traffic citations filed in the Maryland Automated Traffic System to any attorney who was not the attorney of record of a person named in the record or a person employed by, retained by, associated with, or acting on behalf of an attorney who is not an attorney of record, if the purpose of the request was to solicit or market legal services. The State did not appeal from this decision. It is our view that the decision in *Ficker v. Utz* does not indicate that the provisions of House Bill 1409 must be found invalid as the section in that case worked a much more focused discrimination against specific commercial speech than is the case here. However, we also note that the subsequent cases raise significant questions about the continued viability of the decision in *Ficker v. Utz*.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/KMR/kmr
HB1409.wpd

cc: Joseph Bryce
Secretary of State
Karl Aro
The Honorable Dereck Davis

Federal Preemption – Human Trafficking

Bill/ Chapter:	Senate Bill 606/Chapter 340 and House Bill 876/Chapter 341 of 2007
Title:	Human Trafficking, Extortion, and Involuntary Servitude
Attorney General's Letter:	April 18, 2007
Issue:	Whether a bill that makes human trafficking a State criminal offense is void due to being preempted by earlier federal legislation addressing human trafficking.
Synopsis:	Senate Bill 606/Chapter 340 and House Bill 876/Chapter 341 of 2007 make human trafficking a criminal offense under Maryland law. The U.S. Congress in 2000 similarly made such conduct a federal crime by enacting the "Trafficking Victims Protection Act." The federal Act was amended and reauthorized in 2003. Neither of these federal acts contains a "preemption" clause expressly prohibiting state governments from legislating in this area.
Discussion:	Although a federal statute does not *expressly* preempt state laws, "when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law" the federal law can implicitly override state law. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63-64 (2002). In reviewing Senate Bill 606 and House Bill 876, the Attorney General did not find that the bills were implicitly preempted by the federal human trafficking statutes. The Attorney General noted that criminal law (the subject of the bills) is an area traditionally left to the states, and state police powers are "not to be superseded … unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The Attorney General concluded that such an intention is not manifest in the federal human trafficking legislation. Additionally, the Attorney General found nothing in the Maryland bills that creates a conflict with the federal law, noting that "conflict preemption" occurs when the State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Volt Info. Science, Inc. v. Bd of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 477 (1989). Not only is there no preemption by the federal law, but the Attorney General concluded that Congress intended that the federal government work with the states regarding human trafficking, even pointing to the issuance of a model *state* law in this area made available by the U.S. Department of Justice.

Drafting Tips: **A legislative drafter should always consider and understand the potential impact of federal law on legislation being drafted. Not only should the sponsor of the bill be apprised if a federal law expressly preempts State action in the area, but it is good practice to raise the possibility of implied preemption if the bill conflicts in any way with the federal legislative scheme or falls into an area that suggests Congress intends to "occupy the field" completely. In the criminal law area, states retain their police power to legislate unless Congress expressly preempts a matter.**

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 18, 2007

The Honorable Martin J. O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: Senate Bill 606 and House Bill 876

Dear Governor O'Malley:

We have reviewed and hereby approve the constitutionality and legal sufficiency of Senate Bill 606 and House Bill 876, identical bills, which make human trafficking a State criminal offense. Because the federal government has also passed legislation addressing human trafficking, we examined whether the bills are preempted. It is our opinion that they are not preempted.

Federal legislation addressing human trafficking include the Trafficking Victims Protection Act of 2000, Pub. L. 106-386 and the Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. 108-193. Neither of these acts contains an express preemption clause, but federal law can implicitly override state law "when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively, or when state law is in actual conflict with federal law." *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63-64 (2002)(citations omitted).

Criminal law is an area traditionally left to the States. The Supreme Court has explained that "we start with the assumption that the historic police powers of the States were not to be superceded...unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). In addition, conflict preemption occurs when the State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Volt Info. Science, Inc. V. Bd. of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 477 (1989).

Federal legislation addressing human trafficking provided protections and assistance for victims of trafficking, expanded activities of the United States on an international level to prevent trafficking at the outset, and created new offenses and penalties for human trafficking. Nothing in Senate Bill 606 and House Bill 876 create a conflict with the federal law. In fact, federal legislation contemplates that the federal government work with state and local authorities to combat "this deeply troubling, violent and often hidden crime." *See* Dept. of Justice Press Release, Jan. 31, 2007. To help States enact legislation criminalizing human trafficking, the Department of Justice has made available a model State law. At the end of 2006, 27 other States have adopted anti-trafficking laws. *See* Patrick McGee, "Human-trafficking bills would toughen law," *Ft. Worth Star-Telegram*, April 5, 2007.

Nor do the bills present any conflict with federal immigration law by making it a crime to obtain labor services with, among other things, the threat to destroy, conceal, remove, confiscate, or possess "any immigration or government identification document with intent to harm the immigration status of another person."[1] "Power to regulate immigration is unquestionably exclusively a federal power. But the Court has never held that every State enactment which in any way deals with aliens is a regulation of immigration and thus per se preempted by this constitutional power, whether latent or exercised." *DeCanas v. Bica*, 424 U.S. 351, 354-355 (1976). "[T]he fact that aliens are the subject of a State statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id.* at 355.

For these reasons, it is our view that Senate Bill 606 and House Bill 876 are not preempted by federal law.

Sincerely,

Douglas F. Gansler
Attorney General

DFG:SBB:as

[1]Under the bills that provision "does not apply to legitimate efforts by employees or their representatives to obtain certain wages, hours, or working conditions."

Maryland Constitutional Issues

Title Defect

Bill/ Chapter:	House Bill 352/Chapter 392 of 2007
Title:	Washington County – Public Facilities Bonds
Attorney General's Letter:	April 25, 2007
Issue:	Whether a provision of a bill that requires a county to present to certain members of the General Assembly a plan to implement a specified program can be constitutionally given effect when the title of the bill fails to include any description of that requirement.
Synopsis:	House Bill 352/Chapter 392 of 2007 authorizes the County Commissioners of Washington County to borrow money to finance the costs of construction, improvement, or development of certain public facilities in the county. These provisions of the bill are described in the title of the bill. However, Section 11 of the bill requires the county to present a detailed plan to implement a county land preservation and landowner equity program to members of the General Assembly representing the county. This requirement is not addressed in the title of the bill.
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 in its title." This provision generally requires that a title "should not only fairly indicate the general subject of the Act, but should be sufficiently comprehensive in its scope to cover, to a reasonable extent, all its provisions and must not be misleading by what it says or omits to say." *Somerset County v. Pocomoke Bridge Co.*, 109 Md.1 (1908). The Attorney General points out that while all the other provisions of the bill are adequately described in the title, the provisions of Section 11 were omitted completely. Although this omission does not render the title "clearly misleading or underinclusive", the provisions of Section 11 "may not be read as mandatory or given legal effect." The Attorney General recommends that the failure to include the study and presentation provisions of Section 11 in the title be remedied through the annual curative bill in 2008.
Drafting Tips:	**The strict legislative title requirements spelled out in Article III, § 29 of the Maryland Constitution are intended to ensure that each bill's title provides to the General Assembly, the public, and the persons that may be subject to the requirements of the bill adequate notice**

regarding the legal effect of the bill. When drafting a bill for the Maryland General Assembly, it is critical that the drafter take care to ensure that the bill's title accurately addresses each element of the bill and, thereby, provides the notice mandated by the State Constitution.

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 25, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: House Bill 352

Dear Governor O'Malley:

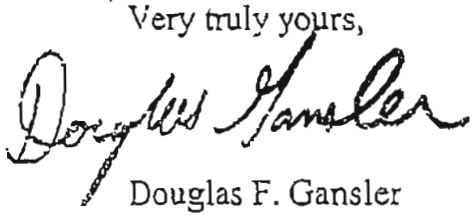
We have reviewed for constitutionality and legal sufficiency House Bill 352, "Washington County - Public Facilities Bonds. While we approve the bill for signing, a portion of the bill is not reflected in the bill's title as required by Maryland Constitution Article III, § 29. As a result, we recommend that the title be revised in next year's curative bill.

HB 352 authorizes and empowers the County Commissioners of Washington County to borrow not more than $80,000,000 to finance the costs of the construction, improvement, or development of certain public facilities in the County. In addition to spelling out requirements relating to the issuance, sale, and proceeds of the bonds, the bill in Section 11 contains a provision requiring the County Commissioners to present a plan to implement a County land preservation and landowner equity program to the members of the General Assembly representing the County, such plan to establish annual goals for financial support and acres of land preserved.

Article III, § 29 of the Maryland Constitution provides, in relevant part, that "every Law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title." Generally, this provision requires that the title "should not only fairly indicate the general subject of the Act, but should be sufficiently comprehensive in its scope to cover, to a reasonable extent, all its provisions and must not be misleading by what it says or omits to say." *Somerset County v. Pocomoke Bridge Co.*, 109 Md.1 (1908).

While the short title and purpose paragraph of HB 352 adequately describe the portions of the bill relating to public facilities bonds, the provisions of Section 11 are not set out or otherwise described in the purpose paragraph. Further, while it is our view that this omission does not render the title clearly misleading or underinclusive, that portion encompassed in Section 11 may not be read as mandatory or given legal effect. Of course, there is nothing that would prohibit the County Commissioners from undertaking such a study and presenting the plan as described in Section 11. Finally, we recommend that the title be revised in next year's curative bill.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG:BAK:as

Title Defect – Misleading Provision

Bill/Chapter: Senate Bill 752/Chapter 350 and House Bill 1117/Chapter 351 of 2007

Title: Workers' Compensation – Benefits for Dependents

Attorney General's Letter: April 23, 2007

Issue: Whether the title of a bill permitting dependents to receive the full amount of a workers' compensation award of a deceased employee even if they are also receiving benefits under the employee's retirement plan is constitutionally defective when it states that it is clarifying that a dependent is eligible to receive the same benefit amount as the deceased employee.

Synopsis: Senate Bill 752/Chapter 350 and House Bill 1117/Chapter 351 of 2007 seek to make clear that surviving dependents of certain firefighting personnel, police officers, correctional officers, and deputy sheriffs are eligible to collect the full amount of a workers' compensation award even if they are also receiving retirement benefits under the employee's retirement plan. The titles of the bills, however, state that the bills' purpose is to "clarif[y] that surviving dependents … are eligible to receive *the same* workers' compensation benefits as the individual received at the time of death." (Emphasis added.)

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 in its title." The title of a bill should not only indicate the general subject of the legislation, but should be sufficiently comprehensive to cover all its provisions and "must not be misleading by what it says or omits to say." *Somerset County v. Pocomoke Bridge Co.*, 109 Md. 1 (1908).

In analyzing this legislation, the Attorney General found that the title of each bill is close to violating the requirements of the Maryland Constitution. The Attorney General points out that, although the short titles and generally relating clauses adequately describe the provisions of the bills, since the titles also imply that all dependents would receive the same benefit amount as the deceased employee in all cases, they are affirmatively misleading. The Attorney General concludes, however, that, since the bills do make the benefits paid to dependents more like those available to the employee, the titles are not so clearly misleading as to be

constitutionally violative and the misleading language can therefore be disregarded as surplusage. The Attorney General recommends, however, that the potentially misleading language be addressed in the next curative bill.

Drafting Tips: **Legislative drafters must take great care when drafting the language in the title of a bill to ensure that it does not violate the requirements of Article III, § 29 of the Maryland Constitution by being inaccurate or misleading. A full understanding of the purpose of the legislation as well as the current law being affected is vital in order to draft a title that provides constitutionally adequate notice to the public and the legislature of the legal effect of the legislation.**

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND

OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 23, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: Senate Bill 752 and House Bill 1117

Dear Governor O'Malley:

We have reviewed Senate Bill 752 and House Bill 1117, identical bills entitled "Workers' Compensation - Benefits for Dependants," for constitutionality and legal sufficiency. While we approve the bills, it is our view that the title is close to violating the title requirements of Maryland Constitution Article III, § 29. As a result, we recommend that the bill be included in next year's curative bill.

Senate Bill 752 and House Bill 1117 were apparently introduced in response to the holding in *Johnson v. City of Baltimore*, 387 Md. 1 (2005) where the Court of Appeals held that two women entitled to benefits under Labor and Employment Article ("LE") § 9-503 as a result of the deaths of their firefighter husbands were subject to the set off provisions of LE § 9-610, and thus could collect Workers' Compensation benefits only to the extent that the Workers' Compensation benefit amount exceeds the amount of the retirement benefit. Employees eligible for benefits under § 9-503 are not subject to the set off provision, but their weekly benefits are limited to the amount of their weekly salary. The bill does not alter the amount of benefits to be awarded to dependents, which is set by the continuation provisions relating to the particular benefit in question if the employee dies of an unrelated cause, LE §§ 9-632, 9-640 and 9-646, or under LE § 9-678 if the employee dies of the compensable injury or illness. This amount may or may not be the same as that received by the employee at the time of death. What the bill does is permit dependents to receive the full amount of the award even if they are also receiving benefits under the employee's retirement system.

Maryland Constitution Article III, § 29 provides, in relevant part, that "every Law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title." Generally, this provision requires that the title "should not only fairly indicate the general subject of the Act, but should be sufficiently comprehensive in its scope to cover, to a reasonable extent, all

its provisions and must not be misleading by what it says or omits to say." *Somerset County v. Pocomoke Bridge Co.*, 109 Md. 1 (1908).

The short title to Senate Bill 752 and House Bill 1117 states that it is an act concerning "Workers' Compensation - Benefits for Dependents." The remainder of the title states that the bill is:

> FOR the purpose of clarifying that surviving dependents of certain individuals are eligible to receive the same workers' compensation benefits as the individual received at the time of death; and generally relating to Workers' Compensation benefits for dependents.

It is our view that the provisions of Senate Bill 752 and House Bill 1117 are adequately described by the provisions of the short title and the generally relating clause. However, the other sentence of the title could be read to indicate that a dependent would in all cases receive the same benefit amount as the deceased employee, rather than simply having the same protection from set off under § 9-610 as is available to employees under § 9-503. To that extent it could be argued that the title is affirmatively misleading. However, since the bill does in fact make the pay out of benefits to dependents more like that available to the employee, it is our view that the title is not clearly misleading and that the inaccurate provision can be disregarded as surplusage. *Leonardo v. County Commissioners*, 214 Md. 287, *cert. denied* 355 U.S. 906 (1957). However, we do recommend that the bill be included in next year's curative bill.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/KMR/kmr
SB752_HB1117_1.wpd

cc: Joseph Bryce
Secretary of State
Karl Aro
The Honorable Nathaniel Exum
The Honorable Ruth M. Kirk

KMR/kmr
SB752_HB1117_1.wpd

Single Subject Rule

Bill/Chapter:	House Bill 723/Chapter 429 of 2007
Title:	Montgomery County – Maryland-Washington Metropolitan District – Boundaries
Attorney General's Letter:	May 4, 2007
Issue:	Whether a bill adjusting the boundaries of the Maryland-Washington Metropolitan District and, after amendment, requiring a report from the county councils of Prince George's County and Montgomery County and the Maryland-National Capital Park and Planning Commission on the fee schedule for the use of the counties' parks and recreation facilities and services violates the single subject requirement of Article III, § 29 of the Maryland Constitution.
Synopsis:	House Bill 723/Chapter 429 of 2007 alters the boundary of the Maryland-Washington Metropolitan District to exclude the areas within the corporate boundaries of Gaithersburg, Rockville, and Washington Grove as they exist on October 1, 2007, and any area annexed into one of these municipalities on any subsequent date. The bill was amended to require the county councils of Prince George's County and Montgomery County and the Maryland-National Capital Park and Planning Commission to report to the delegations of Prince George's County and Montgomery County on the fee schedule for the use of each county's parks and recreation facilities and services, including those within municipalities, as it applies to residents of each county. The report was required to include an analysis of the rationale for any nonresident fees.
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 test of whether a bill complies with the one subject rule is whether the different provisions of the bill are "germane" to one another. *Migdal v. State*, 358 Md. 308, 317 (2000). The one subject rule requires that the elements of the bill be "in close relationship, appropriate, relative, pertinent." *Porten Sullivan Corporation v. State*, 318 Md. 387, 402 (1990). In determining compliance with the one subject rule, the courts have generally taken a liberal approach in order to not unduly interfere with the legislature in the discharge of its duties. *Parkinson v. State*, 14 Md. 184, 194 (1859).

The Attorney General concluded that the reporting requirement amended onto House Bill 723 does not violate the one subject rule. The original provisions of the bill relate both to the boundaries of the metropolitan district and the tax that is paid by the residents of the district for parks and recreational facilities within the district. The report relates to fees paid in the counties for parks and recreational facilities. According to the Attorney General, the amount of the fees set by each county for residents is impacted by the amount of tax paid by the residents of the county for the acquisition and operation of parks and recreational facilities. This correlation among the provisions of the bill is enough to satisfy the requirements of the one subject rule.

Drafting Tips: **When drafting legislation in Maryland, the drafter must always consider the mandate of the State Constitution's one subject rule. Article III, § 29 of the Maryland Constitution requires that all provisions included within a single bill be germane to a single subject. When amending legislation during its passage through the legislative process, the drafter must continue to consider the single subject rule and, if necessary, advise the sponsor of an amendment that is not germane to the subject of the bill being amended that the proposed amendment raises potential constitutional problems.**

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 4, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: House Bill 723

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 723, "Montgomery County - Maryland-Washington Metropolitan Districts - Boundaries." In approving the bill, we have concluded that it does not violate the single subject requirement of the Maryland Constitution.

House Bill 723 adjusts the boundaries of the Maryland-Washington Metropolitan District ("Metropolitan District") to exclude areas that have been annexed or are annexed in the future by municipalities that have historically not been included in the District. Under current law, only areas that were within the municipality as of a certain date have been excluded from the District. The bill further provides that the metropolitan district tax does not apply to the areas located within the corporate boundaries of the excluded municipalities as they exist on the effective date of the Act or to areas subsequently annexed to those municipalities. Section 5 of the bill, added by committee amendment, provides that:

> the county councils of Prince George's County and Montgomery County and the Maryland-National Capital Park and Planning Commission shall report to the delegations of Prince George's County and Montgomery County of the General Assembly on or before November 1, 2007, on the fee schedule for the use of each county's parks and recreation facilities and services, including parks and recreational facilities and services located within municipalities, as it applies to individuals who reside within Prince George's County and individuals who reside within Montgomery County. The report shall include a historical analysis of the origin and rationale for any nonresident fees.

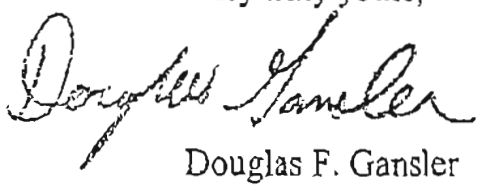
104 LEGISLATIVE SERVICES BUILDING · 90 STATE CIRCLE · ANNAPOLIS, MARYLAND 21401

Maryland Constitution Article III, § 29 provides in relevant part that "every Law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title." The purposes of this provision are to prevent logrolling, and to protect the veto power of the Governor. *Porten Sullivan Corporation v. State*, 318 Md. 387, 402 (1990). It has traditionally been given a liberal reading, so not to unduly interfere with the Legislature in the discharge of their duties. *Parkinson v. State*, 14 Md. 184, 194 (1859). This liberal approach "is intended to accommodate not only a 'significant range and degree of political compromise that necessarily attends the legislative process in a healthy, robust democracy,' but also the fact that 'many of the issues facing the General Assembly today are far more complex than those coming before it in earlier times and that legislation needed to address the problems underlying those issues often must be multifaceted." *Delmarva Power and Light v. Public Service Commission*, 371 Md. 356, 369 (2002), *citing MCEA v. State*, 346 Md. 1, 14 (1997).

The test as to whether a law violates the single subject requirement looks to whether the provisions of the bill are all "germane" to one another. *Migdal v. State*, 358 Md. 308, 317 (2000). That is, whether they are "in close relationship, appropriate, relative, pertinent." *Porten Sullivan Corporation v. State*, 318 Md. 387, 402 (1990). "A measure contains distinct subjects when there is engrafted upon a law of a *general* nature, some subject of a private or local character." *Id.* at 406.

The original provisions of House Bill 723 relate, not only to the boundaries of the Metropolitan District, but also to the tax that is paid by the residents of the Metropolitan District for parks and recreational facilities within the Metropolitan District. Article 28, § 6-106. The effect of the legislation was to reduce the number of persons paying this tax in Montgomery County. This fact gave rise to discussions of an ongoing issue regarding the treatment of residents of the two counties involved in the district with respect to fees. As we understand it, facilities in Prince George's County offer a discount to residents of both counties, while facilities in Montgomery County provide a discount only for Montgomery County residents. The availability of the discounted fees for residents is germane to the payment of taxes by those residents for the acquisition and operation of these facilities. Thus, it is our view that the provisions of the bill all relate to a single subject as required by Article III, § 29 of the Maryland Constitution.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/KMR/kmr
HB723.wpd
cc: Joseph Bryce
Secretary of State
Karl Aro

Supplementary Appropriations – Single Work, Object, or Purpose

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Bill/Chapter: House Bill 51/Chapter 488 of 2007

Title: Maryland Consolidated Capital Bond Loan (Capital Budget)

Attorney General's Letter: May 16, 2007 (discussed, in part, below), also citing an attached bill review letter on House Bill 340 of 2005 (Capital Budget Bill), dated May 19, 2005

Issue: Whether the Capital Budget bill, as a supplementary appropriation, violates the single work, object, or purpose requirement of Article III, § 52(8) of the Maryland Constitution by including a provision raising the total principal amount of bonds that may be issued by a local governing body of a code county.

Synopsis: The Capital Budget bill is enabling legislation for the creation of State debt through the issuance of State of Maryland obligation bonds, the proceeds of which are used to fund certain capital projects. The Capital Budget bill for 2007, House Bill 51/Chapter 488, also included a provision raising the total principal amount of bonds that may be issued by the local governing body of a code county.

Discussion: The single work, object, or purpose rule is found in Article III, § 52(8) of the Maryland Constitution and provides that every supplementary appropriation, including the Capital Budget bill, "shall be embodied in a separate bill limited to some single work, object or purpose therein stated." The Court of Appeals has held that even though the Capital Budget "embraces a variety of projects, it falls squarely within the requirements of § 52(8) ...." *Mayor and City Council of Baltimore v. State of Maryland*, 281 Md. 217, 228 (1977).

The Attorney General found that the provision raising the total principal amount of bonds that may be issued by the local governing body of a code county, while related to the financing of capital projects generally, was not related to the financing of *State* capital projects and the creation of *State* debt. The Attorney General, therefore, suggests that the General Assembly should reenact legislation during the next session providing for the increase in bond authority in code counties.

Drafting Tips: **When drafting supplementary appropriation legislation, including the Capital Budget bill, the drafter should take the single work, object, or purpose rule into consideration. Since, for example, the Capital**

Budget bill's object and purpose is to create a State debt to finance State capital projects, the drafter should avoid including provisions with a local purpose or object. Separate legislation should be drafted instead.

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 16, 2007

The Honorable Martin J. O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: House Bill 51

Dear Governor O'Malley:

We have reviewed for constitutionality and legal sufficiency House Bill 51, the Maryland Consolidated Capital Bond Loan bill. While we approve the vast majority of the bill for constitutionality, one provision is of doubtful validity. We also write to address several other issues relating to the bill.

"One Subject" and "Single Work, Object or Purpose" Requirements

Section 13 of HB 51 raises the total principal amount of bonds that may be issued by the local governing body of a Code County. Section 14 of the bill amends the Education Article to require the Interagency Committee on School Construction to provide certain recommendations on public school construction projects that comprise 90% of the school construction allocation included in the capital budget submitted by the governor for the following fiscal year.

Article III, § 29 of the Maryland Constitution provides "[e]very Law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title." This Office has taken the position that Art. III, § 29 does not apply to supplementary appropriation bills. The Court, in *Panitz v. Comptroller,* 247 Md. 501, 511 (1967) did not decide the issue, but, assuming that it did, agreed that § 29 was satisfied. As a comprehensive bill relating to the financing of capital projects, this office has concluded that the Capital Budget bill is "unlikely to be vulnerable to challenge on the basis of Article III, § 29. *See* Bill Review letter on HB 340, dated May 19, 2005, a copy of which is attached.

However, the Capital Budget bill, as a supplementary appropriations bill, is subject to a more stringent requirement under Maryland Constitution Article III, § 52(8), which provides that every supplementary appropriation, which the Capital Budget bill is, "shall be embodied in a separate bill limited to some single work, object or purpose therein stated." The Court of Appeals has held that even though the Capital Budget "embraces a variety of projects, it falls squarely within the requirements of § 52(8)(a) as interpreted in *Panitz*." *Mayor and City Council of Baltimore v. State of Maryland*, 281 Md. 217, 228 (1977). In the May 19, 2005 Bill Review letter, we stated that:

> [P]rincipally, the Capital Budget bill is the enabling legislation for the creation of State debt through the issuance of State of Maryland general obligation bonds, the proceeds of which are used to fund certain capital projects, just as the Budget Bill is principally for making operating appropriations for the coming fiscal year. But the notion that a budget bill or capital budget bill may only contain items of appropriations may misread the constitutional limitations placed on and long history of both. Both bills historically contain budget-related provisions, which are not items of appropriations, included by both the Governor and the General Assembly.

However, in that same letter, we also cautioned against including provisions not directly related to the issuance of State general obligation bonds. We said

> The Capital Budget bill holds a unique place and plays a unique role in the overall scheme of the State's finances. It is the enabling legislation for the issuance of State of Maryland general obligation bonds. Its legal sufficiency is relied upon by many, from the individuals who will benefit from local projects to those in the bond markets...[and it] should only be used for lawmaking that is tied closely and directly to the general obligation bond program of the State.

We concluded in 2005 that "the provisions included in HB 340, while embracing a variety of projects, all could be viewed as relating to the financing of capital projects and thus, do not clearly violate either Art. III, § 29 or § 52(8). Should one of the provisions discussed above be held to be invalid, it is clearly severable from the rest of the bill. Md. Const., Article III, 52(15)." It is our view that the provisions of Section 14 concerning the procedures of the Interagency Committee on School Construction (similar to provisions which were included in the last two Capital Budget bills) may be viewed as relating to the financing of capital projects included in the bill and thus do not clearly violate either Article III, §29 or §52(8). However, Section 13, while related to the financing of capital projects generally,

is not related to the financing of State capital projects and the creation of State debt. Thus, it is our view that the provision does not satisfy the single work, object or purpose requirements of Md. Const., Article III, §52(8). The General Assembly should reenact legislation during the next session providing for the increase in bond authority in Code counties.

Line 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. House Bill 51, Sections 13 and 14, include amendments to the Annotated Code of Maryland, as described above. They are not attached to a sum of money and would not be considered an "item of appropriation" and thus are not subject to item veto. For the past two years we have said "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." However, Section 14 is related to the allocation of public school construction funds, which unlike the subject of Section 13, is an integral part of the Capital Budget bill.

Capital Debt Affordability Committee (CDAC)

HB 51 includes a provision expressing the intent of the General Assembly that the CDAC authorize $30,000,000 in Academic Revenue Bonds for the University System of Maryland in fiscal 2009 (page 14, lines 19-27)(emphasis added). Under State Finance and Procurement Article, § 8-112(e), the CDAC is to review on a continuing basis the size and condition of any debt of the USM and other segments of higher education. The CDAC also submits to the Governor and General Assembly the Committee's estimate of the amount of new bonds for academic facilities that prudently may be authorized for the next year, but does not authorize debt. This estimate is advisory and does not bind the Governor, General Assembly or Board of Public Works.

Title Requirement

Section 12 of HB 51 makes authorization for four projects, two of which are

specifically mentioned in the bill's purpose paragraph and two of which are not. Because the purpose paragraph normally is written now in more general terms than in the past and includes a clause stating "and generally relating to the financing of certain capital projects," the requirements of Article III, § 29 of the Maryland Constitution are satisfied. *See* attached Bill Review letter on HB 340.

Technical Correction to Maryland Consolidated Capital Bond Loan of 2006

Finally, we note that HB 51 makes a technical correction to the 2006 Capital Budget, Chapter 46 of the Acts of 2006. On page 61, line 26, the total principal amount authorized in 2006 is adjusted downward by $1,940,000. This reflects the deauthorization of $1,870,000 for the Clifton T. Perkins Center authorized in Chapter 445 of the Acts of 2005 (HB 51, page 61, line 7) and the deauthorization in the 2006 Capital Budget of $70,000 for the Respite Home on South Haven which was not reflected in the 2006 Capital Budget amended total.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG:BAK:as
cc: Joseph Bryce
Secretary of State
Karl Aro

J. Joseph Curran, Jr.
Attorney General

Donna Hill Staton
Deputy Attorney 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 19, 2005

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

Re: House Bill 340 - Capital Budget

Dear Governor Ehrlich:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 340, the Maryland Consolidated Capital Bond Loan bill,[1] which, among other things, is the enabling legislation for the creation of State debt through the issuance of State of Maryland general obligation bonds to fund certain capital projects.

Several questions have arisen with regard to Section 2 of the bill, which places certain financing, construction and operational requirements on a parking facility constructed on State property in Annapolis and "financed using any combination of cash, revenue bonds, or other debt." The bill also requires the State Police to submit a plan for the scheduled replacement of the Dauphin Med-Evac helicopters; authorizes the Maryland Stadium Authority (MSA) to use certain non-budgeted MSA funds for feasibility studies; requires the Department of General Services (DGS) and the Department of Public Safety and Correctional Services (DPSCS) to meet with a community coalition regarding concerns over the renovation of 2100 Guilford Avenue and requires the DGS to submit a report; [2] alters the membership and meeting procedures of the Interagency Committee on School Construction; and alters the membership of the Capital Debt Affordability Committee.

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[1] The Maryland Consolidated Capital Budget Bill is also referred to as the "MCCBL" or the "Capital Budget."

[2] We note that the bill requires that DGS and DPSCS meet with the committee of the Old Goucher Barclay Midway Coalition by June 1, 2005; however, the bill does not go into effect until June 1, 2005.

In approving the bill, we have considered: 1) whether inclusion in the bill of these provisions violates the one-subject requirement under Article III, § 29 of the Maryland Constitution; 2) whether the bill's title fails to describe one of these projects in violation of Article III, § 29; and 3) whether certain provisions are subject to gubernatorial item veto under Article II, § 17(e). We have concluded that inclusion of the above provisions in the bill does not clearly violate the one-subject requirement and that the bill's title is constitutionally sufficient. In addition, we believe that even if the above provisions were challenged, it would not affect the bill's authorization of the creation of State debt through the issuance of general obligation bonds. We further have concluded that certain provisions of the bill are not "items of appropriation" and thus are not subject to item veto. However, we caution that the question of whether provisions that are not "items of appropriation" or related to the administration of the State debt program are appropriately included in a supplementary appropriation bill may arise in the future. We discuss each of these issues below.

I. "One Subject" Requirement / "Single Work, Object, Purpose" Requirement

Article III, § 29 of the Maryland Constitution provides "[e]very Law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title." Nearly 40 years ago, Attorney General Francis Burch took the position that Art. III, §29 did not apply to supplemental appropriation bills. *Panitz v. Comptroller*, 247 Md. 501, 511 (1967).[3] The Court of Appeals in *Panitz* assumed, without deciding, that it did, but agreed that § 29 was satisfied, reiterating from *Mayor of Baltimore v. Reitz*, 50 Md. 574, 579 (1879) that "if several sections of the law refer to and are germane to the same subject matter, which is described in its title, it is considered as embracing but a single subject, and as satisfying the requirements of the Constitution in this respect." Since then, the Court has noted that the rule is to be liberally construed but is intended to prevent wholly unrelated matters from being embodied in the same law. *Porten Sullivan Corp. v. State*, 318 Md. 387, 402 and 407 (1990). Moreover, it has been recognized that a comprehensive measure which deals with various aspects of a matter can survive a one-subject objection more easily than one which is narrowly focused. *Porten Sullivan*, 318 Md. at 407.

However, as we noted in our April 20, 2005 bill review letter to you regarding House

[3] West Virginia's highest court, upon examining similar provisions of that state's constitution, concluded that supplementary appropriation bills were not subject to requirements such as those specified in Article III, §29. *State ex rel. Key v. Bond*, 118 SE 276 (1923).

Bill 1110, "in recent years the Court of Appeals has taken a stricter approach to single subject challenges, and has found violations in four cases, more than it had found the preceding hundred plus years." The Court has found particularly objectionable the combination of two narrow provisions related only by a very broad general subject. We believe the Capital Budget bill can be viewed as a comprehensive bill. Further, we believe that a provision relating to the construction, financing and operation of a capital project, all or a portion of the funding for which is to be made available from the issuance of Maryland general obligation debt authorized by the Capital Budget could be considered to be related to the overall subject of the Capital Budget bill. Thus, even if Art. III, §29 applies, we conclude that HB 340 is unlikely to be vulnerable to challenge on that basis.

It is clear that the Capital Budget bill, as a supplementary appropriation bill, is subject to the requirement of the Md. Const., Art. III, § 52(8) which provides that every supplementary appropriation "shall be embodied in a separate bill limited to some single work, object or purpose therein stated." *See City of Baltimore v. State,* 281 Md. 217 (1977). The subject of that case was the Capital Budget, and the Court held that even though it "embraced a variety of projects, it falls squarely within the requirements of § 52(8)(a) as interpreted in *Panitz." Id.* at 228.[4] We note, however, that the Court in both cases approved "a bill which created a debt of the State and provided for the payment of the interest and principal as specified was a separate appropriation bill, a single package, which in the later words of § 52(8)(a), stated therein the 'single work, object or purpose' the obtention of funds

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[4] In *Panitz,* the Court found a "single, object, purpose" violation in omnibus legislation containing in a supplementary appropriation bill various grant and aid programs, and a revenue raiser. The remedy ordered by the Court was a declaration that those portions of the bill that were intended to be a supplementary appropriation were "invalid and ineffective." 247 Md. at 503. However, the Court said that the portion of the legislation "dealing with taxes and revenues of the State ... is otherwise prima facie valid and effective as legislation." *Id.* The Court distinguished capital budget or "debt" legislation as not violating Article III, §52(8). 247 Md. at 512-16.

The *City of Baltimore* case, often referred to as the "Continental Can" case, involved a constitutional challenge to a Capital Budget containing the creation of new debt and the amendment of prior year authorizations to change dollar amounts and to attach or eliminate various conditions. The Court reaffirmed its conclusion that multi-purpose debt legislation was consistent with the "single work, object, purpose" requirement. In addition, the court rejected the contention that the General Assembly could not "legislate" in the Capital Budget by "amend[ing] or repeal[ing] existing legislation." 281 Md. at 228.

for State purposes from lenders to which it was limited." *City of Baltimore,* 281 Md. at 227, quoting *Panitz,* 247 Md. at 513-514. These decisions did not specifically address the question of provisions included in an appropriation of funds that do not relate to the "obtention of funds for State purposes."

Principally, the Capital Budget bill is the enabling legislation for the creation of State debt through the issuance of State of Maryland general obligation bonds, the proceeds of which are used to fund certain capital projects, just as the Budget Bill is principally for making operating appropriations for the coming fiscal year. But the notion that a Budget Bill or Capital Budget bill may only contain items of appropriations may misread the constitutional limitations placed on and long history of both. Both bills historically contain budget-related provisions, which are not items of appropriation, included by both the Governor and the General Assembly.[5]

In 2004, this Office reviewed Senate Bill 191, the Capital Budget, and an amendment that prohibits the Board of Public Works from approving the sale of certain State-owned real or personal property until several conditions are met, and concluded that it did not violate the "single work, object, purpose" clause of the Md. Const. Art. III, Sec. 52 (8). See Bill Review letter dated May 5, 2004. That Capital Budget bill also made changes to Program Open Space among other things.[6]

It is our view that the provisions included in HB 340, while embracing a variety of projects, all could be viewed as relating to the financing of capital projects and thus, do not clearly violate either Art. III, § 29 or § 52(8). Should one of the provisions discussed above be held to be invalid, it is clearly severable from the rest of the bill, Md. Const., Article III,

[5] For a history of certain substantive budget-related provisions unrelated to an item of appropriation and included in the budget bill, *see Judy v. Schaefer,* 331 Md. 239, 252-55 (1993). Examples of non-items historically included in the Capital Budget bill include non-dollar amendments to prior capital budget items; boilerplate provisions on procedures; restrictions and debt ceilings; and a property tax.

[6] Earlier Capital Budget bills also have included similar provisions, both codified and uncodified, relating to capital projects. *See, e.g.,* Chapters 112 of 2001, 138 of 1998, 131 of 1995, 115 of 1994, and 73 of 1993.

§ 52(15) and see Bill review letter on House Bill 376 dated May 24, 1990. Such invalidity would have no effect on the general obligation bond authorization provisions of the bill.[7]

These conclusions notwithstanding, we believe it is important to sound a cautionary note with regard to the bill. The Capital Budget bill holds a unique place and plays a unique role in the overall scheme of the State's finances. It is the enabling legislation for the issuance of State of Maryland general obligation bonds. Its legal sufficiency is relied upon by many, from the individuals who will benefit from local projects to those in the bond markets. Thus, it is our view that the Capital Budget bill should only be used for lawmaking that is tied closely and directly to the general obligation bond program of the State.

II. Title Requirement

Article III, § 29 of the Maryland Constitution requires that the contents of a bill be described in its title. A question has been raised about the constitutionality of a provision amended into HB 340 relating to conditions on the use of a State parking garage "financed using any combination of cash, revenue bonds, or other debt" that is not expressly included within the bill's purpose paragraph.[8]

A title must simply advise the reader of the nature of the proposed legislation. *Porten Sullivan* at 402. It need not be an abstract of its contents. *City of Baltimore* at 225. The fact that a title mentions some but not all projects is not fatal so long as the reader is informed of the nature of the legislation. *Id.* at 226. In the discussion of the 1992 Capital Budget bill, this Office advised that a provision in the Capital Budget bill could not be given effect because it was not reflected in the title. *See* Letter of Advice to the Honorable Richard Rynd from Assistant Attorney General Richard E. Israel, dated November 25, 1992. However, that Capital Budget bill was passed during a period when every provision and project was specifically referenced in the purpose paragraph. Two years later, the purpose paragraph of the Capital Budget bill was drafted in a more general way and included at its end "and generally relating to the financing of certain capital projects." The clause has been included

[7] Article III, §52(15) is a constitutionally imposed severability provision for supplementary appropriation bills. In light of this provision and the special solicitude of the Court of Appeals for Capital Budget bond issuances in *Panitz and City of Baltimore*, we doubt that a court would find general obligation bond authorization provisions to be invalid on one-subject grounds.

[8] As with any other potential error in a bill's title, we suggest that this be included in next year's curative bill, to remove any possible cloud.

in the Capital Budget bill since then. A portion of the State parking garage project referred to in Section 2 of the bill was financed with proceeds from general obligation bonds.

We note that the last successful challenge to a bill's title occurred nearly 40 years ago in *Clark's Brooklyn Park v. Hranicka*, 246 Md. 178 (1967). To succeed in such a challenge, a plaintiff must show that the title is underinclusive or misleading beyond a "reasonable doubt", *see McBriety v. Mayor of Baltimore*, 219 Md. 223, 241 (1959). Even assuming the application of Article III, §29 to HB 340, the provisions included in the bill satisfy this standard.

III. Line Item Veto

Article II, § 17(e) gives the Governor the "power to disapprove of any item or items of any Bills making appropriations of money embracing distinct items." And Article III, §52(15) makes clear that an appropriation bill's legality is not affected if "any item of any appropriation bill" is held to be invalid. 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.[9] Attorney General O'Conor made this distinction clear in advising that the Governor had no authority to "eliminate any of the taxing provisions" in a supplemental appropriation bill, stating that the item veto power "undoubtedly refers to *items of appropriations* and not to taxing provisions." 22 *Opinions of the Attorney General* 200 (1937), *see also* 24 *Opinions of the Attorney General* 364 (1939). Several provisions in HB 340 are not attached to a sum of money and would not be considered "items of appropriation" as defined above: Section 2 of the bill places certain conditions on a parking facility financed using any combination of cash, revenue bonds, or other debt and constructed in Annapolis; Section 3 requires the Department of State Police to submit a plan for the replacement of the Dauphin Med-Evac helicopters; Section 4 authorizes the Maryland Stadium Authority to use certain funds for feasibility studies relating to capital projects; Section 5 alters the membership of and makes other changes relating to the Interagency Committee on School Construction; Section 6 places a limitation on school construction projects that may be approved by the BPW prior to May 1, 2006; and Section

[9] *See also Green v. Rawls*, 122 So. 2d 10, 16 (Fla. 1960); *Reardon v. Riley*, 76 P. 2d 101 (Cal. 1938); and *Commonwealth v. Barnett*, 48 A. 976, 977 (Pa. 1901).

7 alters the membership of the Capital Debt Affordability Committee.[16] We caution again, however, 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, particularly when these same provisions may arguably fall outside the single work, object, purpose requirement applicable to a supplementary appropriation bill.

In summary, it is our view that HB 340 does not violate Md. Const., Art. III, § 29 or § 52(8), that the bill's title sufficiently describes the bill's contents, and that, although there is no Maryland case addressing the issue, the provisions in the bill that are not "items of appropriation" are not subject to the Governor's item veto authority.

Very truly yours,

J. Joseph Curran, Jr.
Attorney General

JJCJr/BAK/as
cc: Kenneth H. Masters
Secretary of State
Karl Aro

[16] It is well established that an amendment to the Budget Bill cannot have the effect of amending substantive law. *Bayne v. Secretary of State*, 283 Md. 560, 574 and 576 (1978). However, the Court of Appeals has said that this prohibition does not apply to supplementary appropriations bills, like the Capital Budget. *City of Baltimore v. State of Maryland*, 281 Md. 217, 228-229 (1977).

District Court – Uniform Jurisdiction

Bill/Chapter:	House Bill 509/Chapter 411 of 2007
Title:	Prince George's County – Railroad Grade Crossings – Automated Enforcement Systems
Attorney General's Letter:	May 4, 2007
Issue:	Whether a bill that gives the District Court jurisdiction over proceedings for a civil citation for speeding issued to an owner of a vehicle that is recorded by a speed monitoring system in one particular county violates the State constitutional requirement that the jurisdiction of the District Court be uniform throughout the State.
Synopsis:	House Bill 509/Chapter 411 of 2007 authorizes the placement of automated enforcement systems at railroad crossings in Prince George's County, and provides that the owner of a vehicle that is recorded by a speed monitoring system while violating a speed limit law is subject to a civil penalty. The bill also amends the jurisdiction of the District Court to include a proceeding for a civil infraction under the statute.
Discussion:	Article IV, § 41A of the Maryland Constitution provides that the "[j]urisdiction of the District Court shall be uniform throughout the State." Although there are no published judicial decisions regarding this provision, the Attorney General has previously warned that potential uniformity problems are raised by bills that authorize traffic control monitoring systems in various local jurisdictions and expand District Court jurisdiction to cover cases arising under the bills' county-specific provisions. In the absence of controlling judicial authority regarding the uniformity provision, however, the Attorney General cannot conclude that the constitution precludes the General Assembly from trying out, in a single county, new enforcement programs of the sort authorized in House Bill 509. In reviewing House Bill 509, the Attorney General concludes that even though the method of enforcement allowed under the bill, and the resulting civil citations, are only authorized in a single county, the bill can be defended because "the effect of the expansion of the jurisdiction of the District Court is as if it applied to all similar cases statewide." The Attorney General states, however, that it would be preferable that such an expansion be stated in more general terms, and recommends that the law be amended in the future to accomplish this aim.

Drafting Tips: **In drafting legislation that alters the jurisdiction of the District Court, the drafter should be aware that the Maryland Constitution requires that the jurisdiction of the District Court be uniform throughout the State. While a statute that creates a new offense only in a specified county and assigns the jurisdiction of the offense to the District Court may be constitutionally defensible in the absence of judicial interpretation of the uniformity requirement, the drafter should endeavor to avoid potential constitutional issues by providing for the amended jurisdiction of the District Court in general, statewide terms.**

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 4, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: House Bill 509

Dear Governor O'Malley:

We have reviewed for constitutionality and sufficiency and hereby approve House Bill 509, "Prince George's County - Railroad Grade Crossings - Automated Enforcement Systems." We write to discuss issues raised by the bill with respect to the requirement that jurisdiction of the District Court be uniform.

House Bill 509 adds Transportation Article § 21-704.1, which authorizes the placement of automated enforcement systems at railroad grade crossings in Prince George's County, and provides that the owner of a vehicle that is recorded by a speed monitoring system while being operated in violation of the laws with respect to speeding is subject to a civil penalty. It also amends the jurisdiction of the District Court to include a "proceeding for a civil infraction under ... § 21-704.1 of the Transportation Article."

Maryland Constitution Article IV, § 41A provides that the "District Court shall have the original jurisdiction prescribed by law. Jurisdiction of the District Court shall be uniform throughout the State." There are no published judicial decisions regarding this provision, which has been part of the law since 1970. The Court of Appeals did not reach the issue in *State's Attorney v. City of Baltimore*, 274 Md. 597 (1975), which was decided on Charter Home Rule grounds. However, the issue in that case was the subject of an Opinion of the Attorney General in which Attorney General Burch opined that a statute making violations of the Building and Electrical Code civil actions at law in the District Court when the City Code made them criminal and the District Court had criminal jurisdiction over similar violations in all other jurisdictions "appears to fly in the face of the mandate for uniformity embodied in Section 41A of Article IV ... and hence raises a very serious constitutional

104 LEGISLATIVE SERVICES BUILDING · 90 STATE CIRCLE · ANNAPOLIS, MARYLAND 21401

question." 58 *Opinions of the Attorney General* 110 (1973). *See also* 61 *Opinions of the Attorney General* 291 (1976) (Creation of housing court for Baltimore City in District Court would present uniformity problems).

The legislative office has also issued advice on this provision on a number of occasions. However, the advice has not always been completely consistent. An advice letter to the Honorable D. Bruce Poole dated February 25, 1997, raised questions about three bills that would have authorized traffic control monitoring systems in various jurisdictions. Each bill would have authorized a civil penalty for violations in an amount to be set by local ordinance, and two of them would have expanded jurisdiction of the District Court to cover cases arising under the County specific provision. After noting that running a red light is an offense everywhere, the letter concluded that the bill would violate the uniformity provision. Among the suggestions for avoiding uniformity problems were to allow the local jurisdictions to create the civil offense and use the jurisdictional provision found in Courts and Judicial Proceedings § 4-401(10)(iv), or to amend § 4-401 to include proceedings for adjudication for a civil penalty in charter home rule jurisdictions where the amount of the penalty is set by ordinance.

Earlier letters, however, have suggested that similar uniformity problems could be resolved by broader authorizations of District Court jurisdiction or by looking to the practical effect of the legislation. For example, the bill review letter on House Bill 528 of 1985, which authorized the St. Mary's County Metropolitan Commission to prosecute civil infractions in the District Court, states that the bill raises serious uniformity issues, but notes that no other sanitary commission in the State had the power to prosecute civil infractions, so the practical effect was as if the District Court's jurisdiction were amended to apply to all civil infractions, and concludes that "[v]iewed in such a light, the bill would not violate Article IV, § 41A." The letter recommended, however, that the district court jurisdictional provision be amended to "couch such power over sanitary commission civil infractions in general terms."[1] We took a similar position in the bill review letter on Senate Bill 791 of 2005, which gave the District Court jurisdiction over civil infractions related to the storage of tobacco products in Carroll County and Garrett County. Similarly, in a letter to the Honorable Ida Ruben dated October 27, 1981, we advised that a bill authorizing Montgomery County to make violations of county ordinances civil infractions, and expanding jurisdiction of the District County to cover violations of Montgomery County ordinances which are punishable by a civil penalty, should be amended to give these District Court jurisdiction of these offenses throughout the State,

[1] Section 4-401 was subsequently amended to include proceedings involving a civil infraction that is authorized by law to be prosecuted by a sanitary commission. Chapter 36 of 1986.

and took the position that this would satisfy the uniformity requirement, "even though only one county might be authorized to enact such penalties for its ordinances."

Other states have uniformity provisions,[2] but for the most part, they have not been the subject of litigation in recent years. Out-of-state cases have generally found that a general state law that authorizes, but does not require, local governments to adopt a provision that falls within the jurisdiction of a court does not violate uniformity even if not all jurisdictions adopt the provision. *People ex rel. Rusch v. Ladwig*, 7 N.E.2d 313 (Ill. 1937) (City Election Act); *Van Horn v. State*, 64 N.W. 365 (Neb. 1895) (Number of justices of the peace in counties with township organization); *McTigue v. Commonwealth*, 35 S.W. 121 (Ky.App. 1896) (Suggesting that local option is permissible). *Cf., Gleason v. Weber*, 159 S.W. 976 (Ky.App. 1913). However, states have differed on whether laws affecting the law and penalties in a single jurisdiction violate uniformity. For example, in *McTigue v. Commonwealth*, 35 S.W. 121 (Ky.App. 1896) it was held that a statute imposing a higher fine for violation of alcoholic beverage restrictions in a single dry county violated uniformity, while in *Rogers v. People*, 12 P. 843 (Colo. 1887), a statute suspending the statewide laws against dance and disorderly houses in a single city and giving exclusive regulatory authority in these areas to the city was held not to violate the uniformity requirement.

House Bill 509 does not affect the existing statewide jurisdiction of the District Court over offenses committed at railroad crossings where a citation is issued by a police officer at the time of the violation. It instead permits a new method of enforcement of this offense which the General Assembly has determined should lead to a civil, rather than a criminal, penalty. And it permits the use of this new method in a single county. Because this method of enforcement, and the resulting civil citations, are only authorized in a single county, the effect of the expansion of the jurisdiction of the District Court is as if it applied to all similar cases statewide. We believe that it is preferable that this expansion be stated in more general terms, and recommend that it be amended in the future to accomplish this aim. However, the practical effect is the same so long as this authority exists in a single county. In the absence of controlling judicial authority, we cannot conclude that Article IV, § 41A should be interpreted in a way that would prevent the General Assembly from trying out new programs of this sort in a single county. *See also* Bill Review letter on House Bill 443 of 2005 (Speed cameras in Montgomery County).

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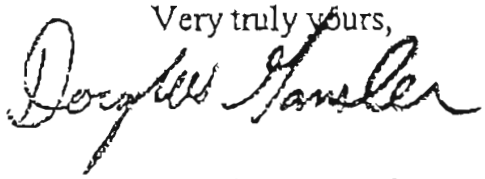
[2] *See, e.g.*, Colorado Constitution Article VI, § 19; Georgia Constitution Article VI, § 1.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/KMR/kmr
HB509.wpd

cc: Joseph Bryce
Secretary of State
Karl Aro
The Honorable Barbara A. Frush

District Court – Uniform Jurisdiction

Bill/ Chapter:	Senate Bill 577/Chapter 336 and House Bill 677 of 2007
Title:	Harford County – Nuisance Abatement and Local Code Enforcement – Enforcement Authority
Attorney General's Letter:	April 25, 2007
Issue:	Whether a bill that expands the jurisdiction of the District Court for a certain cause of action only in a single county violates the constitutional requirement that the jurisdiction of the District Court be uniform throughout the State.
Synopsis:	Senate Bill 577/Chapter 336 and House Bill 677 of 2007 authorize the State's Attorney to seek injunctive and equitable relief in the District Court for the abatement of nuisances in Harford County.
Discussion:	Article IV, § 41 of the Maryland Constitution requires that the jurisdiction of the District Court be uniform throughout the State. By granting jurisdiction to the District Court regarding injunctive and equitable relief for nuisance abatement in one county, Senate Bill 577 and House Bill 677 raise the issue of whether the bills comply with the uniformity requirement. In reviewing the bills, the Attorney General looked back to Chapter 553 of 2001, which gave the District Court jurisdiction over nuisance abatement cases in Anne Arundel County, thus raising the same issues of uniformity of jurisdiction raised by Senate Bill 577 and House Bill 677 of 2007. In 2001, the Attorney General found that since there were no court decisions providing judicial interpretation of the uniformity requirement, it could not be conclusively stated that the bill was unconstitutional. The Attorney General advised in 2001 that the bill could be signed into law but suggested that the General Assembly consider moving jurisdiction to the circuit court. In 2007, with respect to Senate Bill 577 and House Bill 677, the Attorney General advises once again that, by granting to the District Court jurisdiction over abatement of nuisances in Harford County, the bills raise serious concerns; however, in light of the fact that there has been no further judicial interpretation of the uniformity requirement in the last six years, the bills cannot be said to be clearly unconstitutional.
Drafting Tips:	**In drafting legislation that provides for the jurisdiction of the District Court, the drafter should strive to ensure that the jurisdiction of the Court is uniform throughout the State. However, in the absence of**

judicial interpretation of the Maryland Constitution's uniformity of jurisdiction requirement, it is not clear that legislation granting jurisdiction over nuisance abatement in one county is unconstitutional.

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 25, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: Senate Bill 577 and House Bill 677

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 577 and House Bill 677, identical bills entitled "Harford County - Nuisance Abatement and Local Code Enforcement - Enforcement Authority." We write to address the issue of whether the imposition of civil duties on the State's Attorney for Harford County violates the Maryland Constitution. In addition, while this bill raises issues concerning the uniformity of District Court jurisdiction, we cannot say that it is clearly unconstitutional on that basis. Finally, it is our view that the bill does not violate the Charter Home Rule provisions of the Constitution.

Senate Bill 577 and House Bill 677 authorize the State's Attorney for Harford County to bring a nuisance action and to seek injunctive and other equitable relief in the District Court for abatement of nuisances in the County. Among the nuisances that can be the basis of an action under the section are local code violations that negatively impact the well-being of other residents and are injurious to public health, safety or welfare or obstruct the reasonable use of property; violations of Criminal Law Article §§ 10-201 and 10-202 that take place on the property; four or more complaints or calls to law enforcement within a thirty day period that negatively impact the well-being of other residents and are injurious to public health, safety or welfare or obstruct the reasonable use of property; violations of criminal law related to the activity of a criminal gang, or a building that contains defects due to inadequate maintenance, obsolescence, or abandonment that increase the hazard of fire, accident or other calamity, or that is unsafe, unsanitary, dangerous, detrimental to the health, safety or general welfare of the community due to lack of maintenance, inadequate ventilation, light, sanitary facilities or other conditions.

It has been suggested that the constitution prohibits the General Assembly from imposing duties on the State's Attorney to represent the County and municipalities in civil, as opposed to criminal matters.

Maryland Constitution Article V, § 9 provides that the "State's Attorney shall perform such duties and receive such salary as prescribed by the General Assembly." While the primary duties of the State's Attorney involve criminal prosecution, Article 10, § 34,[1] the State's Attorney has historically been given duties with respect to civil matters as well.

Under the 1851 Constitution the State's Attorneys performed all of the common law and statutory duties of the Attorney General. *Murphy v. Yates*, 276 Md. 475, 491 (1975). Some of these statutory duties, transferred from the Attorney General to the State's Attorneys under the 1851 Constitution, remain statutory duties of the State's Attorney under current law. For example, Courts and Judicial Proceedings Article § 2-305, which provides that the State's Attorneys may seek a judgment against a Sheriff for failure to bring a criminal defendant into court, was enacted as Chapter 60 of the Laws of 1793, and gave that duty to the Attorney General. The duty had been transferred to the State's Attorneys by 1860. *See* Code of 1860, Article 87, § 13. Similarly, Article 10, § 38, which provides that the State's Attorneys shall aid the Comptroller and Treasurer in the adjustment of the accounts of the clerks, registers and sheriffs in their counties, was enacted as Chapter 90 of 1829 and gave that duty to the Attorney General. The duty had been transferred to the State's Attorneys by 1860. *See* Code of 1860, Article 11, § 21.

Other civil duties have been assigned to the State's Attorneys for long periods of time. *See* State Government Article § 17-104, enacted by Chapter 16 of 1856, which allows the State's Attorneys to bring a mandamus action against an officer who fails to pay money into the treasury, and Article 25, § 159, enacted by Chapter 41 of 1894, which authorizes the State's Attorneys to enforce the terms of trusts relating to funds granted to counties. More recently, the State's Attorneys have been given authority to bring civil enforcement actions

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[1] Under the 1867 Constitution, Article V, § 9 provided that the "State's Attorney shall perform such duties and receive such fees and commissions as are now, or may hereafter be, prescribed by law." In *Murphy v. Yates*, 276 Md. 475 (1975), the Court of Appeals held that this provision vested the State's Attorneys with the common law powers and duties of the Attorney General to prosecute criminal charges at the trial level. The 1976 amendment, which altered the source of power to that prescribed by the General Assembly, rather than that provided by common law, was adopted to allow the creation of the office of a State Prosecutor with the ability to conduct prosecution at the trial level. 61 *Opinions of the Attorney General* 166 (1976)

with respect to alcoholic beverages violations, Criminal Law Article § 10-119, municipal infractions, Article 23A, § 3(b)(14), and civil infractions of county ordinances, Article 25, § 10K(j) and Article 25B, § 13C. Other provisions authorize the State's Attorneys to bring injunction actions to prevent violations of law. Business Regulations Article § 14-304 (Multilevel distribution company); Business Regulations Article § 18-202 (Blue law violations in Wicomico County); Criminal Law Article § 8-302 (Sale of blank identification cards); Criminal Law Article § 11-202 (Sale of obscene materials); Environment Article § 5-1105 (Pollution of Chesapeake Bay). *See also* Agriculture Article § 5-307, which provides that the State's Attorney shall recover the expenses of the Secretary of Agriculture in destroying or treating infested or infected plants following failure of commercial owner to do so.

Nothing in the Constitution restrains the General Assembly from providing these, or any other duties with respect to civil cases, to the State's Attorneys. Rather, Article V, § 9 expressly authorizes the General Assembly to impose new statutory duties on the State's Attorneys and those duties can be civil as well as criminal.

Senate Bill 577 and House Bill 677 are clearly modeled on Real Property Article, § 14-125.1, which provides similar authority in Anne Arundel County and provides that the cases are to be brought in the District Court. As noted in our bill review letter concerning that provision, application of this provision in a single county, and the corresponding expansion of the jurisdiction of the District Court for this type of case in a single county, raise the issue of whether there is a violation of the constitutional require that "[j]urisdiction of the District Court shall be uniform throughout the State." Md. Const., Article IV, Section 41A. *See* Bill Review letter on Senate Bill 587 and House Bill 1344 of 2001. In the earlier bill review letter, we suggested that this provision raised serious enough uniformity issues that the General Assembly should give consideration to moving these suits back to the Circuit Court. However, in light of the absence of case law interpreting Article IV, § 41A, we did not find that leaving jurisdiction in the District Court would be clearly unconstitutional. As there have been no cases in the last six years, we reach the same conclusion with respect to Senate Bill 577 and House Bill 677.

Finally, we conclude that this bill does not violate either Charter or municipal home rule as it relates to the duties of a State officer, the State's Attorney, and the jurisdiction of the District Court. *See* Bill Review letter on Senate Bill 587 and House Bill 1344 of 2001 and letters cited therein.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/KMR/kmr
SB577_HB677.wpd

cc: Joseph Bryce
Secretary of State
Karl Aro
The Honorable Nancy Jacobs
The Honorable Barry Glassman

Retroactive Legislation – Redemption of Residential Ground Leases

Bill/Chapter: Senate Bill 623 and House Bill 489/Chapter 291 of 2007

Title: Ground Rents – Redemption

Attorney General's Letter: May 4, 2007

Issue: Whether, in the absence of a clear expression of legislative intent regarding applicability, a bill relating to when ground leases may be redeemed should be applied retroactively or given only prospective effect.

Synopsis: Senate Bill 623 and House Bill 489/Chapter 291 of 2007 repeal the waiting period for redeeming certain residential ground leases. The bills require, *inter alia*, the transferee of a ground lease to notify the leasehold tenant of the transfer within 30 days after the transfer and require the notification to include the name and address of the new ground lease holder and the transfer date. If the property is subject to a redeemable ground rent, the notification must also include a specified notice about the right to redeem the ground rent.

Discussion: Senate Bill 623 and House Bill 489 make a variety of changes to the law related to the redemption of residential ground leases, including the repeal of provisions specifying when ground leases created in various years could be redeemed. The bills are silent, however, as to whether the General Assembly intended for those provisions to be applied retroactively or to be given only prospective effect. Typically, in the absence of a clear expression of legislative intent in this regard, the legislation would be presumed to have only prospective effect. This presumption is supported in this instance by the fact that all previous amendments to the provisions establishing redemption time limits were given only prospective effect, *i.e*. the changes applied only to leases entered into after the effective date of the legislation. However, the Attorney General found that the effect of the changes made by these bills with respect to most leases would merely be to remove confusing and obsolete language. Thus, the changes would have virtually no substantive effect if interpreted to apply only prospectively.[1]

[1] On page 2 of the letter dated May 4, 2007, the Attorney General states that "since the change in language would have virtually no effect if it were interpreted to be only *retroactive*, there is also reason to believe that the intent was that the provision be given retroactive effect." (Emphasis added). The Attorney General's office notes that the italicized word "*retroactive*" in the preceding sentence was used mistakenly in place of the intended word "prospective".

Therefore, the Attorney General considered whether the legislative intent must have been that the bills be given retroactive effect.

The Attorney General noted that whether a change in the law is to be given retroactive or prospective effect ultimately is a "question of legislative intention subject to the requirements of procedural due process and noninterference with vested rights." *Becker v. Anne Arundel County*, ___Md.App.___(April 9, 2007). The Attorney General found, however, that it has been generally recognized that legislation that makes irredeemable ground rents redeemable does interfere with vested rights, constitutes a taking without just compensation, and impairs contracts. *Marburg v. Mercantile Bldg. Co.*, 154 Md. 438, 441 (1928). While the cases typically relate to ground leases that were entirely redeemable, the Attorney General concluded that "it is not unlikely that a court would conclude that a shortening of the current five year term of irredeemability would also constitute a taking or impair the contract." The Attorney General, therefore, found that "it is entirely possible that a court might hold that [the legislation] should be given only prospective effect," notwithstanding its minimal legal effect when so applied.

Drafting Tips: **In striving for clarity and precision in legislative drafting, the drafter of a bill should consider including an applicability provision to clearly express the legislative intent regarding the retroactive or prospective application of the bill. In the absence of such a provision, legislation is generally given only prospective effect. If the intent is to apply the legislation retroactively, the drafter should make that intention clear. In such a case, however, the drafter should also be prepared to discuss with the sponsor the possibility that the inclusion of the retroactivity provision could render the legislation vulnerable to a constitutional challenge if, arguably, it impairs vested rights.**

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 4, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: Senate Bill 623 and House Bill 489

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency, Senate Bill 623 and House Bill 489, identical bills entitled "Ground Rents - Redemption." We write to discuss whether provisions of the bill relating to when a ground lease may be redeemed should be given only prospective effect.

Senate Bill 623 and House Bill 489 make a variety of changes in the law related to the redemption of residential ground leases.[1] Among these changes are amendments to Real Property Article 8-110 that delete provisions setting out the times at which ground leases created in various years could be redeemed, and alter current language to provide that "any reversion reserved in a lease for longer than 15 years is redeemable AT ANY TIME, at the option of the tenant, after 30 days' notice to the landlord." Since all of the time limits set under current law have run, with the exception of the five year limit for a ground lease created with after July 1, 1982, which still has effect as to leases created in the past five years, the effect of these changes for most leases is simply to remove confusing and obsolete language from the Code. However, if the change is given retroactive effect, it will shorten the period of time during which the ground lease holder is protected against redemption of the property without his or her consent for ground leases entered into after July 1, 2002.

[1] Existing language in the provision specifies that a lease of an entire property improved or to be improved for multiple-family use on the property constitutes a business and not a residential purpose, and further provides that the term "multiple-family use" does not apply to any duplex or single-family structure converted to a multiple-dwelling unit. RP § 8-110(a)(1).

104 LEGISLATIVE SERVICES BUILDING · 90 STATE CIRCLE · ANNAPOLIS, MARYLAND 21401

Ultimately, the issue of whether a change in the law is to be given retroactive or prospective effect is a "question of legislative intention subject to the requirements of procedural due process and noninterference with vested rights." *Becker v. Anne Arundel County*, __ Md.App. __ (April 9, 2007). Generally, a statute is presumed to operate prospectively unless a contrary intent appears, or the statute is limited to procedure or remedy. *State Ethics Commission v. Evans*, 382 Md. 370 (2004). However, if the legislative intent to make the statute retroactive is clear, it will be given retroactive effect unless retroactive application "would impair vested rights, deny due process, or violate the prohibition against *ex post facto* laws." *Id.*

Real Property Article § 8-110 was originally adopted by Chapter 485 of 1884, which provided that "all leases or subleases of land hereafter made in this State, for a longer period than fifteen years, shall be redeemable at any time after the expiration of fifteen years at the option of the tenant." As indicated by the language, this provision had only prospective effect. *Poultney v. Emerson*, 117 Md. 655 (1912). Subsequently, Chapter 395 of 1888 amended the section to allow redemption after the passage of ten years from the date of the lease. Although the Act was silent, this provision was also given only prospective effect. *Flook v. Hunting*, 76 Md. 178, 180 (1892). In 1900, the provision was again amended to allow redemption after five years from the date of the lease. This change was also given prospective effect. *Heritage Realty, Inc. v. City of Baltimore*, 252 Md. 1, 5 (1969); Chapter 207 of 1900. In 1971 the time period was shortened to three years, and an uncodified section specified that the change was to be given only prospective effect. Chapter 682 of 1971. Finally, in 1982, the time was again extended to five years, with the bill specifically setting out the various times depending on the year in which the lease was created, thus reflecting the prospective effect. Chapter 317 of 1982.

Senate Bill 623 and House Bill 489 contain no express provision with respect to whether they are to be given prospective or retrospective effect. Thus, ordinarily they would be presumed to have only prospective effect. This conclusion is supported by the fact that all previous changes in the time limit have been given effect only prospectively, that is, they have applied only to leases entered into after the effective date. However, since the change in language would have virtually no effect if it were interpreted to be only retroactive, there is also reason to believe that the intent was that the provision be given retroactive effect.[2]

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[2] Chapter 1 of 2007 prohibits the creation of new residential ground leases after January 22, 2007. However, because that Chapter, as amended by Senate Bill 396 and House Bill 463 of 2007, defines the limitations of "residential" differently than Senate Bill 623 and House Bill 489, it is possible that some ground leases could be created in the future that would be subject to § 8-110 and

It has generally been recognized that a law that simply makes irredeemable ground rents redeemable interferes with vested rights, works a taking without just compensation, and impairs contracts. *Appeal of Palairet*, 3 Leg.Gaz. 169, 1871 WL 10920 (Pa. 1871), *cf.*, *Marburg v. Mercantile Bldg. Co.*, 154 Md. 438, 441 (1928). And Maryland courts holding that statutory changes with respect to ground rents should be given prospective effect have recognized that a redeemable ground lease "of course, would be of much less value" than one that is irredeemable. *Flook v. Hunting*, 76 Md. 178, 180 (1892). While all of these cases relate to ground leases that were entirely irredeemable, it is not unlikely that a court would conclude that a shortening of the current five year term of irredeemability would also constitute a taking or impair the contract.[3]

For these reasons, it is entirely possible that a court might hold that Senate Bill 623 and House Bill 489 should be given only prospective effect.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/KMR/kmr
SB623_HB489.wpd

cc: Joseph Bryce
Secretary of State
Karl Aro
The Honorable Lisa A. Gladden
The Honorable Cheryl Glenn

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immediately redeemable.

[3] In fact, the Court of Appeals has held that an act could not be given retroactive effect to eliminate a right of redemption once the time has run to allow it. *Brager v. Bigham*, 127 Md 148, 159 (1915).

Retroactive Legislation – Workers' Compensation

Bill/Chapter: House Bill 1006/Chapter 446 of 2007

Title: Workers' Compensation – Benefits – Cost of Living Adjustment

Attorney General's Letter: April 26, 2007, citing Letter of Advice, discussed below, dated March 8, 2007

Issue: Whether a bill that requires a certain annual cost of living adjustment and authorizes another certain annual cost of living adjustment can be constitutionally given retroactive effect.

Synopsis: House Bill 1006/Chapter 446 of 2007 requires governmental units and quasi-public corporations to provide a certain annual cost of living adjustment when an employee is entitled to compensation from the Injured Workers' Insurance Fund for claims arising from events occurring on or before January 1, 1988. The bill also authorizes certain employers, counties, and municipal corporations to provide an annual cost of living adjustment for compensation paid for claims arising from events occurring on or before January 1, 1988.

Discussion: The Attorney General concluded that the bill was not facially unconstitutional, but that there were instances in which it would be unconstitutional as applied. House Bill 1006 imposes liability on governmental units and quasi-public corporations. The Attorney General indicated that a governmental unit has no rights that can be violated by a statute requiring it to pay a cost of living adjustment. The same is true of a quasi-public corporation as that term is used in the workers' compensation statutes. Since nongovernmental employers are given the authority to choose to pay a cost of living adjustment to covered employees injured before January 1, 1988, the Attorney General concluded that the authority to pay the benefit cannot violate those employers' rights.

The Attorney General indicated that the only invalid application could be with respect to private insurers. However, the Attorney General concluded that any violation of rights argument could be overcome since (1) workers' compensation is a heavily regulated business and therefore amounts payable are subject to change and (2) the statute is a reasonable and appropriate means of achieving a significant and legitimate public purpose. The legislation is limited to actual increases in the cost of living,

and the liability of each employer is limited to the benefits for its own employees. The Attorney General noted, however, that if a single private insurer had a high number of employers electing to pay retroactive benefits, and as a result had unusually high liability under the bill, it is possible that the bill would be unconstitutional as applied to that insurer.

Drafting Tips: **When drafting a bill that includes a provision that is to be applied retroactively, the drafter should consider whether that provision deprives an individual of a vested right that existed before the legislation would take effect. If the retroactive application of the legislation does impact a vested right of an individual, the drafter should discuss with the sponsor the possibility that the inclusion of the retroactivity clause could render the legislation vulnerable to a constitutional challenge.**

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 26, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Dear Governor O'Malley:

We have reviewed the following bills and hereby approve them for constitutionality and legal sufficiency:

HOUSE		SENATE	
327[A]	910[D]	412	717[H]
447	930[E]	413[E]	817[I]
473	949	525[C]	851
515[B]	971[F]	557[B]	
538[C]	1006[G]	572[F]	
745		705[A]	

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/RAZ/as
Enclosures
cc: Joseph Bryce
Secretary of State
Karl Aro
2007br\fm21

104 LEGISLATIVE SERVICES BUILDING · 90 STATE CIRCLE · ANNAPOLIS, MARYLAND 21401

Footnotes

A. HB 327 is identical to SB 705.

B. HB 515 is identical to SB 557.

C. HB 538 is identical to SB 525.

D. Enclosed is an April 26, 2007 memorandum on HB 910.

E. HB 930 is identical to SB 413.

F. HB 971 is identical to SB 572.

G. Enclosed is a March 8, 2007 letter of advice on HB 1006.

H. HB 601, approved by form letter on April 16, 2007, like SB 717 amends Natural Resources Article §10-410(a). The bills are not inconsistent and both can be given effect regardless of the order of signing.

I. Enclosed is a February 28, 2007 letter of advice on SB 817.

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND

OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

March 8, 2007

Ann Marie Maloney
230 Taylor House Office Building
Annapolis, Maryland 21401-1991

Dear Ms. Maloney:

You have asked for advice concerning House Bill 1006, "Workers' Compensation - Benefits - Cost of Living Adjustment." Specifically, you have also asked whether there is any constitutional objection to the bill. You have also asked whether the bill could constitutionally be given retroactive effect going back a year or two. It is my view that the bill is not facially unconstitutional. However, there may be instances in which it would be unconstitutional as applied.

House Bill 1006 requires governmental units and quasi-public corporations to pay an annual cost of living adjustment to a covered employee who is entitled to compensation for claims arising from events occurring on or before January 1, 1988 and authorizes nongovernmental units to provide annual costs of living adjustments to a covered employee who is entitled to compensation for claims arising from events occurring on or before January 1, 1988.[1] Section 2 of the bill provides that "this Act shall be construed to apply only prospectively and may not be applied or interpreted to have any effect on or application to any compensation paid on or before the effective date of this Act.

The only decisions that I have found expressly addressing the retroactive application of cost of living adjustments in the workers' compensation context arose in Rhode Island. In the first, *Liberty Mut. Ins. Co. v. Paradis*, 764 F.Supp. 13 (D.R.I. 1991), the Court refused to enter an injunction against the law and held that it should abstain from hearing the case after concluding that it was not clear whether, as a matter of State law, the insurance company plaintiff would be able to recover its costs in its rates.

In the second decision, *Liberty Mut. Ins. Co. v. Whitehouse*, 868 F.Supp. 425 (D.R.I. 1994), the Court concluded that retroactive application would not violate the Contracts, Due Process or Taking Clause of the United States Constitution. In the interim between the two decisions, the Rhode Island Director of Business Regulation had ruled that insurers could recoup their costs via surcharges on future premiums, but Liberty Mutual argued that the law would be unconstitutional

[1] Compensation payable for claims arising after January 1, 1988 has been subject to annual cost of living adjustments since January 1, 1981. Chapter 591 Laws of Maryland 1987.

as applied to them because they had withdrawn from the Rhode Island market and would not be able to recover those costs.

With respect to the Contract Clause, the Court found that there was no contract relating to the matter that was the subject of the statute because the contract between Liberty and its insureds gave no indication of an agreement that Liberty's obligation would be limited to the benefits amounts prescribed in law when the policies were issued, and the policies appeared to contemplate the possibility that the amounts Liberty would be required to pay could be affected by subsequent amendments to the law. The Court further found that the benefit levels in the law at the time the contract was made did not become part of the policies by law. The Court relied on the decision in *General Motors Corp. v. Romein*, 503 U.S. 181 (1992) to conclude that the law did not create a "vested right" to the provisions of law as they were set at that time, and that reading it to do so would "severely limit the ability of state legislatures to amend their regulatory legislation." The Court also noted that if the policy did limit the payments to those set by law at the time of the injury, the contract would not be impaired because the law required only that adjustments be paid to some employees of Liberty's insureds, not that Liberty would have to make those payments if its contract provided otherwise. In any event, the Court found that even if the rates as set at the time of the injury were part of the contract, the cost of living adjustment would not work a substantial impairment, because it would not adversely affect the insurer's "reasonable expectations under the contract." Since workers' compensation is a heavily regulated business and insurers were on notice that the amounts payable are subject to change, the Court held that they could not have had reasonable expectations that the amounts to be paid would not increase, especially in light of legislative activity on the subject in the State and nationwide. And the Court found that even if a contract were substantially impaired, the statute could be upheld as a reasonable and appropriate means of achieving a significant and legitimate public purpose.

The Court went on to hold that the Due Process Clause imposed a lesser burden on the State in the context of economic legislation than does the Contract Clause, and that the law could be upheld on a showing that it had a rational legislative purpose and that it did, as "[t]here is a strong public interest in ensuring that benefits paid to workers who are totally disabled for long periods are not eroded by inflation. That interest is even more compelling with respect to workers who became disabled before the amendment was adopted because those workers already have suffered an erosion of their benefits that cannot be rectified by future COLAs."

Finally, the Court held that the statute did not violate the Takings Clause, noting that the statute did not result in an appropriation of Liberty's assets for the State's own use, but adjusted the benefits and burdens of economic life to promote the common good, that the effect of the impact was mitigated by other factors in the bill including the fact that the insurer could recoup the expenses in its rates, and that the insurer had no reasonable investment-backed expectation that the State would never require cost of living adjustments to previously injured employees.

The Supreme Court has considered a number of cases related to the retroactive imposition of costs for previously injured employees. With one exception, this type of imposition has been upheld. In *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), the Court reviewed the provisions of the Black Lung Benefits Act of 1972, 30 U.S.C. § 901 et seq., which required coal operators to compensate certain miners and their survivors for death or disability due to black lung disease caused by employment in coal mines. The Court applied rational basis analysis and concluded that the law was "justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor." In *Pension Benefit Guaranty Corporation v. R.A. Gray & Co.*, 467 U.S. 717 (1984), the Court considered the constitutionality of a statute that imposed a payment obligation upon any employer withdrawing from a multiemployer pension plan and applied to withdrawals for five months preceding the enactment of the statute. The Court found that it was rational to impose liability on those who withdrew during the period that the bill was being considered by Congress. In *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211 (1986) the Court considered whether the same statute considered in *R.A. Gray & Co.* constituted a taking and concluded that it did not, but that it was an adjustment of burdens that reasonably reflected the experience of the employer with the plan. The same statute was challenged again on Due Process and Takings grounds in *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602 (1993). The Court relied on *Turner Elkhorn* and *R.A. Gray & Co.* to reject the Due Process claim, and on *Connelly* to reject the Takings Claim.

In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the Court considered Due Process and Takings challenges to the Coal Industry Retiree Health Benefit Act of 1992, which established a mechanism for funding health care benefits for retirees from the coal industry and their dependents and concluded that, as applied to Eastern Enterprises, the statute effected an unconstitutional taking. In this decision, the Court discussed its decisions in the earlier cases, and reiterated its view that Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties. The Court also repeated that Congress could impose retroactive liability to some degree, but stated that their decisions have left open the possibility that legislation might be unconstitutional "if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties's experience." Looking to the amount of the burden placed on Eastern ($50 to $100 million), the length of time that it had been out of the industry (33 years), the fact that it was not involved in the negotiations on the industry benefit plans that had first provided benefits for retirees and their families, and the fact that the allocation of fund premiums was "not calibrated either to Eastern's past actions or to any agreement ... by the company, the Court concluded that the statute worked a taking as applied to Eastern."

House Bill 1006 imposes liability on two groups of employers: governmental units and quasi-public corporations. *Cf.*, Labor and Employment Article § 9-201 (Workers' Compensation title applicable to each person who has at least one covered employee and each governmental unit or

quasi-public corporation that has at least one covered employee). Clearly, a governmental unit has no rights that can be violated by a statute requiring them to pay a cost of living adjustment. *Baltimore County v. Churchill, Ltd.*, 271 Md. 1, 13, *app. dis.*, 417 U.S. 902 (1974); *Hagerstown v. Sehner*, 37 Md. 180 (1872). And, to the extent that the governmental units have chosen to self-insure, there is no insurer who could have any rights to assert either. *See* Labor and Employment Article § 9-404. Since the term "quasi public corporation" as used in the workers' compensation title has been held to apply only to those of a governmental nature, *Potter v. Bethesda Fire Department*, 309 Md. 347, 358 (1987), the same is true of them. This is also true if the bill is amended to provide for retroactive payments.

House Bill 1006 also permits nongovernmental employers to choose to pay a cost of living adjustment to covered employers injured prior to January 1, 1988. Clearly, the mere authority to pay this benefit cannot violate any right of those employers. This is the case even if the bill is amended to provide for some retroactive payments.

Labor and Employment Article § 9-402(a) provides that each employer shall secure compensation for covered employees of the employer by maintaining insurance with Injured Workers' Insurance Fund ("IWIF"); by maintaining insurance with an authorized insurer; by participating in a governmental self-insurance group; by participating in a self-insurance group of private employers; by maintaining self-insurance for an individual employer, or by having a county board of education secure compensation under § 8-402(c) of the Education Article. Clearly, since no right of an employer is violated by the bill, there would also be no violation of their rights as self-insurers.

Since IWIF is an instrumentality of the State, *Central Collection Unit v. DLD Associates*, 112 Md.App. 502 (1996), it also has no rights that can be violated by passage of this statute. Thus, if the bill is to have any invalid application, it could only be with respect to private insurers.

In the Rhode Island cases, the Court held that the cost of living adjustment was reasonable for a variety of reasons, including that it was directed at the accomplishment of a significant state purpose, that it was limited to actual increases in the cost of living, and that it applied to the employees of the specific employer, with the result that it was proportional to that employer's experience with the plan.[2] The Court also noted that the law made little impact on reasonable investment backed expectations in light of the number of states that had already adopted cost of living provisions, and the fact that it had been the subject of legislation in Rhode Island for years. The Court also looked to the fact that the law permitted insurers to recoup their expenses in their

[2] In this context, the Court in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) noted that Eastern could have been made "responsible for employment-related health problems of all former employees whether or not the cost was foreseen at the time of employment, but there is no such connection here."

rates, and held that the fact that Liberty had chosen to withdraw from the market did not alter the fact that a "reasonable, certain and adequate provision for obtaining compensation" was provided at the time of the alleged taking.

House Bill 1006 serves the same valid purposes as the Rhode Island law. It is also limited to cost of living increases rather than a general increase in benefits, and, if it is given retroactive effect at all, the intention is apparently that it be limited to the past couple of years. Furthermore, the liability of each employer is limited to the benefits for its own employees, so that the liability of the insurers should also reflect their experience in the market. Moreover, as was the case in Rhode Island, it is unlikely that insurers could have any reasonable expectation that no cost of living adjustment would ever be imposed for these employers as the legislature has discussed their plight in past sessions and the problem has only increased as inflation has gone up. There is the issue, however, of recoupment. The fiscal note on House Bill 1006 states that the "retroactive adjustment would not affect insurance rates for employers because rates would not increase to compensate for past unfunded liabilities; however, the bill would create a significant unfunded liability for insurers."

As discussed above, when Rhode Island decided to give retroactive application to its cost of living adjustment, it was eventually determined that insurers could recover the costs in their rates. If the Maryland Insurance Administration were to make a similar determination, it could have no unconstitutional effect, even on private insurers. Moreover, to the extent that the burden on insurers is minor, it could be that it would still not be found unconstitutional, in light of the heavy regulation of the industry, and the predictability of this change. *Cf., Allstate Ins. Co. v. Kim*, 376 Md. 276, 300 (2003) (Holding that retroactive statutory elimination of parent-child immunity in automobile torts did not violate the contract clause). However, if a single private insurer had a high number of employers electing to pay retroactive benefits, and as a result had unusually high liability under the bill, it is possible that the bill would be unconstitutional as applied to that insurer, just as the Coal Industry Retiree Health Benefit Act was found unconstitutional as applied to Eastern Enterprises.

Sincerely,

Kathryn M. Rowe
Assistant Attorney General

KMR/kmr
maloney07.wpd

Extra Compensation of a Public Officer – Legal Fees

Bill/Chapter: Senate Bill 247 and House Bill 492/Chapter 610 of 2007

Title: Prince George's County – Board of License Commissioners – Attorney Compensation

Attorney General's Letter: May 15, 2007, citing Letter of Advice to Senator Gwendolyn Britt dated March 1, 2007, and Letter of Advice to Senator Nathaniel Exum dated October 17, 2005

Issue: Whether a statute that authorizes a county council to pay the attorney for the county's board of license commissioners for legal fees that were approved by the board but not paid in prior fiscal years violates Article III, § 35 of the Maryland Constitution, which prohibits extra compensation for public officers after the service has been rendered.

Synopsis: Senate Bill 247 and House Bill 492/Chapter 610 of 2007, among other provisions, require the County Council of Prince George's County to pay the attorney for the Board of License Commissioners of Prince George's County, in addition to the annual salary authorized by statute, legal fees approved by the board for representing the board in court. This amount includes fees approved by the board and not paid in prior fiscal years.

Discussion: Article III, § 35 of the Maryland Constitution provides that "[e]xtra compensation may not be granted or allowed by the General Assembly to any public Officer, Agent, Servant or Contractor, after the service has been rendered, or the contract entered into …." The Attorney General has determined that, by authorizing the county to make payment of legal fees to the board's attorney for prior years' representation above the amount of the salary set by statute, the new law violates this provision of the Maryland Constitution.

The Attorney General states that, although there is surprisingly little judicial construction of Maryland's "extra compensation" prohibition, other states have similar prohibitions in their constitutions, and the case law and state Attorney General opinions from those jurisdictions offer guidance. Specifically, the Maryland Attorney General looked at two Attorney General opinions from Florida and New York. According to the Florida Attorney General in an opinion disapproving payments for legal services not authorized under an original contract with a school board, "[e]xtra compensation generally refers to an additional payment of

retroactive compensation, lump sum allowances or other forms of compensation not provided for by law or contract [and] is generally prohibited …." 2003 WL 22513550 (Fla. AG). The New York Attorney General took a similarly negative view toward extra compensation above a statutorily-fixed salary for litigation that was to be undertaken by a city attorney. 1952 WL 81860 (N.Y.A.G.). The Maryland Attorney General, therefore, viewed the portion of the legislation authorizing the payment of previous legal fees over salary as unconstitutional, and suggested that it was severable from the remainder of the statute and should not be given effect. The Attorney General advised that the better alternative would be for the General Assembly to increase the statutory salary of the board's attorney "even for a brief period" during the next session to resolve the problem.

Drafting Tips: **In drafting legislation relating to compensation of public officers, a drafter must be mindful of the applicability of Article III, § 35 of the Maryland Constitution. Because Article III, § 35 prohibits extra compensation for services already rendered or after a contract has been entered into, a sponsor who asks for legislation to be drafted that authorizes or provides fees to a public officer for previous services over and above a salary established by statute should be warned of this constitutional barrier. The drafter should instead suggest a provision that prospectively increases the salary (even for a brief period) to resolve the problem and remedy any inequity.**

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 15, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: Senate Bill 247 / House Bill 492

Dear Governor O'Malley:

We have reviewed for constitutionality and legal sufficiency Senate Bill 247 and HB 492, identical bills relating to the compensation of the attorney for the Prince George's County Board of License Commissioners. While the bills may be signed into law, we note that a severable portion of the legislation may be in conflict with Article III, §35 of the Maryland Constitution, which provides in relevant part that "[e]xtra compensation may not be granted or allowed by the General Assembly to any public officer, agent, servant or contractor, after the service has been rendered, or the contract entered into...".

Background

Section 15-109(r)(5)(ii) of Article 2B of the Maryland Code provides that the attorney for the Prince George's Board "shall receive an annual salary of $15,500 and the County Council shall pay all court costs and expenses incurred thereon by the attorney to the Board."[1] Senate Bill 247 / House Bill 492 would amend this law to provide that the council pay the Board's attorney legal fees approved by the Board for representing it in court. This amount would include "fees approved by the Board and not paid in prior fiscal years." In

[1] Previously, this office advised that certain payments to the attorney above the statutory salary would constitute compensation and would not be permissible. *See* Letters of Advice to the Hon. Nathaniel Exum, dated October 17, 2005 and the Hon. Gwendolyn Britt, dated March 1, 2007, copies of which are attached. This office was not asked for, nor did it render advice on the constitutionality of legislatively mandating payment for prior years' service.

104 LEGISLATIVE SERVICES BUILDING · 90 STATE CIRCLE · ANNAPOLIS, MARYLAND 21401

addition, the legislation contains provisions of prospective operation, requiring the Board to establish the fee rate for the attorney's representation in court and the Council to budget for this compensation. These latter provisions raise no constitutional issue. However, the additional payment for prior year's representation raises a question under Article III, §35.

> The Fiscal and Policy Note for the legislation states that:
>
> In addition to the salary of $15,500, the board attorney has been receiving a contractual income of $26,500 annually. Current law does not provide that the board attorney be compensated for legal fees...
>
> The Prince George's County Board of License Commissioners advises that the $26,500 annual contractual compensation for the board's attorney was approved by the county council for fiscal 2006 and 2007. The board has budgeted an amount of $26,500 for fiscal 2006.

Analysis

There is surprisingly little construction of Maryland's "extra compensation" prohibition.[2] However, similar prohibitions appear in the constitutions of more than 20 states and caselaw and State Attorney General opinions in these jurisdictions offer more guidance. Particularly relevant are two State Attorney General opinions.

In a 2003 opinion the Attorney General of Florida concluded that state "extra compensation"prohibition would be violated by a school board's ratification of previous payments for legal services not authorized under the original contract between the board and its lawyer. 2003 WL 22513550 (Fla. AG). Attorney General Crist also noted that "[e]xtra compensation generally refers to an additional payment of retroactive compensation, lump sum allowances or other forms of compensation not provided for by law or contract is general prohibited...". Similarly, in a 1952 opinion the Attorney General of New York concluded that extra compensation could not be paid for litigation to be undertaken by a City

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[2] In *State v. Dashiell,* 195 Md. 677, 693 (1950), the Court of Appeals said that Article III, §35 should be construed broadly, but concluded that the extra compensation prohibition did not apply to damages for breach of contract. In 78 *Opinions of the Attorney General* 296 (1993), Attorney General Curran said that the constitutional restriction did not apply to a benefit change in a pension plan.

Attorney above the salary fixed by law for services rendered. 1952 WL 81860 (N.Y.A.G.). The opinion also noted that: "[a]s a practical matter ... you might consider requesting an increase in your salary for a particular year or years because of the additional labor."

In accordance with these authorities, we believe SB 247 / HB 452 authorizes extra compensation for services that have already been rendered when pay was limited to $15,500. Thus this portion of the legislation - - which we view as severable - - should not be given effect. As the Attorney General of New York has suggested in the above cited opinion, it would be possible for the Legislature next session to increase the salary of the Board's attorney even for a brief period to resolve this problem and remedy any inequity.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/RAZ/as
Attachments
cc: Joseph Bryce
Secretary of State
Karl Aro

Douglas F. Gansler
Attorney General

Katherine Winfree
Chief Deputy Attorney General

John B. Howard, Jr.
Deputy Attorney General

Robert N. McDonald
Assistant Attorney General
Counsel to the General Assembly

Sandra Benson Brantley
Bonnie A. Kirkland
Kathryn M. Rowe
Assistant Attorneys General

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

March 1, 2007

The Honorable Gwendolyn Britt
222 James Senate Office Building
Annapolis, Maryland 21401-1991

Dear Senator Britt:

You have asked for advice on whether the attorney for the Board of License Commissioners for Prince George's County may receive payments above the statutory salary pursuant to a separate contract that compensates the attorney for the Board at a rate of $100.00 per hour for preparing and presenting any appeal before any forum. It is my view that such payments would constitute compensation and, to the extent they exceed the salary cap set by statute, would not be permissible.

Article 2B of the Annotated Code, § 15-109(r)(5) provides:

> (i) The attorney for the Board shall be appointed by, and serve at the will of, the Board.
>
> (ii) The attorney shall receive an annual salary of $15,500 and the County Council shall pay all court costs and expenses incurred therein by the attorney to the Board.

In a separate letter of advice to Senator Exum, dated October 17, 2005, I advised that the reimbursement for expenses actually incurred in the performance of an official's duties is not considered compensation, but that a flat allowance for expenses is compensation, and thus, the court costs and expenses are separate from the salary and are not subject to the salary cap. However, a separate contract providing for an hourly rate for performing the duties of attorney for the Board is clearly compensation. As such, it is my view that, to the extent such compensation exceeds the $15,500 salary cap set by statute, it would not be

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permissible.[1]

I hope this is responsive to your inquiry.

Sincerely,

Bonnie A. Kirkland
Assistant Attorney General

BAK:as

[1] I note that SB 247 / HB 492 have been introduced to address this issue. HB 492 passed third reading today.

J. Joseph Curran, Jr.
Attorney General

Donna Hill Staton
Deputy Attorney 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

October 17, 2005

The Honorable Nathaniel Exum
1891 Brightseat Road
Landover, MD 20785-4256

Dear Senator Exum:

You have requested advice on whether court costs and expenses incurred by the attorney to the Prince George's County Board of License Commissioners and paid by the County Council are separate and distinct from the attorney's salary or are part of the salary and subject to the annual salary cap of $15,500. For the reasons below, it is my view that the court costs and expenses are separate from the salary and are not subject to the salary cap.

Article 2B of the Annotated Code, § 15-109(r)(5) provides:

(i) The attorney for the Board shall be appointed by, and serve at the will of, the Board.

(ii) The attorney shall receive an annual salary of $15,500 and the County Council shall pay all court costs and expenses incurred therein by the attorney to the Board.

The plain language of subparagraph (ii) above appears to contain two distinct provisions: one setting the salary of the Board's attorney at $15,500; and the other requiring the County Council to pay expenses incurred by the attorney in the performance of duties to the Board. (emphasis added). Further, this Office has articulated when payment for expenses is compensation. A flat allowance for expenses is compensation. 42 *Opinions of the Attorney General* 316 (1957); 20 *Opinions of the Attorney General* 217 (1935). However, the reimbursement for expenses actually incurred in the performance of an official's duties is not considered compensation. *See* Bill Review Letter on House Bill 361, dated April 22, 2004. Because there is a requirement that the County Council pay for all court costs and expenses, there is no indication that a flat expense allowance is used. Thus, it is my view that the court costs and expenses are separate from the salary and are not subject to the salary cap.

Sincerely,

Bonnie A. Kirkland
Assistant Attorney General

Separation of Powers – Executive Power

Bill/Chapter:	Senate Bill 50/Chapter 516 and House Bill 161 of 2007
Title:	Governor's Appointments Office and Appointing Authorities – Duties
Attorney General's Letter:	May 15, 2007, citing Letter of Advice to Senator Thomas Middleton (discussed below) dated January 31, 2007, addressing the First Reader versions of the bills. (Note that the bills, as ultimately passed, addressed concerns raised in the Letter of Advice discussed below, and, in the Bill Review Letter of May 15, 2007, the Attorney General found the bills to be constitutional.)
Issue:	Whether a bill that prohibits the Governor from delegating to the Governor's Appointments Office the power to terminate certain employees of the Executive Branch and provides that the unit that hired an employee retains the power to terminate that employee violates Article II, § 1 of the Maryland Constitution, which vests executive power in the Governor, or Article 8 of the Maryland Declaration of Rights, which requires a separation of powers among the branches of government.
Synopsis:	Senate Bill 50/Chapter 516 and House Bill 161 of 2007 seek to limit the influence of the Governor and the Governor's Appointments Office in the firing of at-will employees of the Executive Branch. Toward that end, the bills prohibit the Governor from delegating to the Governor's Appointments Office the authority to terminate certain categories of at-will employees in the Executive Branch. The bills also prohibit the Appointments Office from "superseding" or "interfering" with functions assigned by law to a department or unit of the Executive Branch or the State Department of Budget and Management. Executive Branch departments are granted the exclusive right under the bills to manage and terminate their employees and are prohibited from delegating this power to another department within the Executive Branch.
Discussion:	Article II, § 1 of the Maryland Constitution states that "the executive power of the State shall be vested in the Governor," while Article II, § 9 provides that the Governor "shall take care that the laws are faithfully executed." The Maryland Declaration of Rights, Article 8, states the "the Legislative, Executive, and Judicial powers of Government ought to be forever separate and distinct from each other." The Attorney General notes that the courts have determined that these provisions, along with more

specific statutory provisions, confer on the Governor a "significant role in setting policies to govern the management and supervision of State employees." *McCulloch v. Glendening*, 347 Md. 272 (1997). *See also, MCEA v. Schaefer*, 325 Md. 19 (1991). The Attorney General finds that "because these cases recognize constitutional authority in the Governor to control State employment," arguably, any statutory alteration of that authority is constitutionally questionable.

However, the Attorney General cautions that the cited State court decisions are not precisely "on point." Senate Bill 50 and House Bill 161 amend a *statute* regarding the Governor's power to terminate Executive Branch personnel, while the cases cited by the Attorney General do not involve a statute impinging on the Governor's powers; nor do they rely solely on constitutional, as opposed to statutory, provisions. Therefore, in the absence of specific legal precedents, and consistent with the presumption of constitutionality normally accorded legislation of this type, the Attorney General deems the legislation constitutional.

The Attorney General notes that, under federal law, the issue is clearer. The U.S. Supreme Court has upheld the power of Congress to insulate independent agency officers from Presidential control, as long as "purely executive officers" were subject to executive control and removal. *Executor v. United States*, 295 U.S. 602 (1935). Senate Bill 50 and House Bill 161 are in accord with this holding in that the bills preserve the power of the Governor to delegate termination authority over those in "purely executive" positions, *i.e.* personnel in the executive pay plan, direct appointees (not provided for in the Constitution), the Governor's staff, and those assigned to Government House. Furthermore, the bills do not preclude the Governor from directing an appointing authority to fire an at-will employee or exercising the executive budget power to de-fund or abolish positions within the Executive Branch. Because the bills preserve the Governor's authority over core executive functions, the bills do not violate separation of powers requirements or intrude on the Governor's constitutional authority concerning State employment.

Drafting Tips: **In drafting legislation that arguably limits or alters the powers of the Governor as the head of the Executive Branch, the drafter should always consider potential issues arising under the Separation of Powers doctrine. The drafter should consider whether the proposed legislation impermissibly infringes on the Governor's powers under the Maryland Constitution and, specifically, whether the executive's authority over core executive functions has been affected.**

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 15, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: Senate Bill 50 / House Bill 161

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 50 and House Bill 161, identical bills which prohibit the Governor's Appointments Office from directing or overruling certain employment decisions of state appointing authorities and which restrict the ability of those appointment authorities to delegate to others employment decisions, including the decision to terminate an employee. We have considered whether the legislation unconstitutionally interferes with the Governor's authority over Executive Branch officers and employees in violation of Article 8 of the Declaration of Rights and Article II, §1 of the Maryland Constitution. In our view SB 50 / HB 161, properly construed, is constitutional.

This legislation is based on recommendations of the Special Committee on Employee Rights and Protections. As introduced, the measure was more sweeping in its restrictions on Executive authority, particularly with respect to the functions of the Governor's Appointments Office and the Governor himself. *See* SB 50 and HB 161 at pages 2-4. Specifically, as to the Governor, the bills stated that:

> (1) Except as provided in paragraph (2) of this subsection, the Governor may not delegate to the Office or any other office, unit, or individual in the Office of the Governor or the Executive Branch of State government any authority or duty regarding the termination of any employee, including management service and special appointments employees, who are in the principal departments or in any other unit in

the Executive Branch of State government.

(2) The Governor may delegate to an individual in the Office of the Governor or the Executive Branch of State Government any authority or duty regarding the termination of at will employees, including special appointments, who are:

(I) In the Executive Pay Plan;
(II) Directly appointed by the Governor by an appointment that is not provided for by the Maryland Constitution;
(III) Appointment by or who are on the staff of the Governor or Lieutenant Governor; or
(IV) Employees assigned to the Government House or the Office of the Governor.

In an advice letter requested by the sponsor, Assistant Attorney General Robert A. Zarnoch addressed the constitutionality of the First Reader version of the bills and looked for guidance from federal decisions dealing with Congress' ability to limit the President's authority over Executive Branch officials and employees except for "purely executive officers". *See Humphrey's Executor v. U.S.*, 294 U.S. 602 (1935); and *U.S. v. Perkins*, 116 U.S. 483 (1886).[1] The letter noted that:

> SB 50 / HB 161 carves out an exemption to its prohibition on delegation of removal power for a class of individuals closely associated with executive power and therefore allows the Governor to retain control over "purely executive officers." The bill permits the Governor to delegate termination authority over those in the executive pay plan, direct appointees (not provided for in the Constitution), the Governor's staff, and those assigned to Government House. Under this arrangement the Legislature has left the Governor broad control over those reasonably deemed "purely executive." In addition, the legislation would also not prevent the Governor from directing a cabinet head / appointing authority to fire an at-will employee upon pain of removal..... Nor does this legislation affect the Governor's budget powers with respect to funding or not funding positions or his authority to abolish them.

[1] A copy of this January 31, 2007 advice letter to the Hon. Thomas McLain Middleton is attached.

* * * * * * * * *

Because of the exemptions in the legislation and because it might not be read to affect core Executive powers and although the issue is not completely free from doubt, it is my view that SB 50 / HB 161 would not violate separation of powers or intrude on the Governor's constitutional authority with regard to State employment.

Subsequent to this advice and after the Governor's Office noted policy objections to the measure, the legislation was substantially amended in committee to eliminate a number of prohibitions with respect to the Appointment's Office and to delete all of the above-quoted restrictions regarding the Governor - - so too were the exemptions tied to the restrictions and relied on in the January 31, 2007 advice letter.

Given the Legislature's attempt to accommodate the Executive and address constitutional issues involving SB 50 / HB 161 and the fact that no provision in the legislation expressly restricts the actions of the Governor himself, we believe the Chief Executive retains his constitutional authority over "purely executive officers". This would include the power to delegate to others authority over the termination of employment of these individuals.

For these reasons, we believe SB 50 and HB 161 are constitutional.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/RAZ/as
Attachment
cc: Joseph Bryce
Secretary of State
Karl Aro

Douglas F. Gansler
Attorney General

Katherine Winfree
Chief Deputy Attorney General

John B. Howard, Jr.
Deputy Attorney General

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

Bonnie A. Kirkland
Kathryn M. Rowe
Assistant Attorneys General

The Attorney General of Maryland

Office of Counsel to the General Assembly

January 31, 2007

The Honorable Thomas McLain Middleton
Co-Chairman, Special Committee on State
Employee Rights and Protections
3E Miller Senate Building
Annapolis, Maryland 21401-1991

Dear Chairman Middleton:

You have requested advice on the constitutionality and legal sufficiency of SB 50 / HB 161 and SB 2 / HB 162, legislation recommended for General Assembly consideration by a majority of the Special Committee on State Employee Rights and Protections, a committee charged with examining political firing of at-will employees in the Executive Branch.

SB 50 / HB 161, in essence, would prevent the Governor from delegating the firing of certain categories of at-will employees to a unit of his office charged with recommending appointments of officers and would limit the termination function to the employee's appointing authority. In my view, this bill, properly understood and considered in light of its exemptions, would not unconstitutionally interfere with the powers of the Executive. SB 2 / HB 162, among other things, would extend greater protection from political firings to certain categories of at-will employees and confer greater remedies for violations of those protections. Most significantly, this legislation would authorize an at-will employee to appeal an arbitrary or capricious firing and require notice to certain at-will employees of the reasons for their termination. In my view, most of the provisions of SB 2 / HB 162 raise no constitutional problem. In addition, it is certainly constitutionally permissible for the Legislature to transform at-will employees into "tenured" employees, such as those in the skilled and professional services. However, it is not clear that this is the intention of this proposed measure. And, if this were the intent, the fact that this class of employees would be effectively limited to an after-the-fact appeal, rather than receiving the "pre-termination" due process accorded tenured employees raises a substantial due process issue.

SB 50 / HB 161

This legislation seeks to limit the influence of the Governor's Appointments Office and the Governor in at-will firing decisions of Executive Branch employees by confining such decisions to an "appointing authority". The bill defines "appointing authority" as any individual or Executive Branch department that has the power to make appointments and terminate employment. The bill precludes such decisions by the Appointments Office as well as any other department or unit that serves a similar purpose in making recommendations for the appointment of State officials.

The bill would prohibit the Appointments Office from "superseding" or "interfering" with functions assigned by law to a department or unit of the Executive Branch or the State Department of Budget and Management (DBM). The Appointments Office would similarly be prevented from being "involved with any decisions made by" a department of the Executive Branch or DBM.

The legislation would preclude the Governor from delegating authority to terminate employees in the Executive Branch, including management service and special appointments employees. However, the measure would retain the Governor's power to delegate to an Executive Branch official the authority to terminate employees who are (1) in the executive pay plan; (2) directly appointed by the Governor but not provided for in the Constitution; (3) on the staff of the Governor or Lieutenant Governor; or, (4) employees assigned to Government House of the Office of the Governor.

The bill would grant Executive Branch departments the exclusive right to manage and terminate their employees. Each department or unit within the Executive Branch would be prohibited from delegating the power to manage employees to any other department within the Executive Branch. The final decision regarding termination of an employee could not be delegated outside the respective department.

The legislation raises several potential constitutional issues. The Maryland Declaration of Rights, Article 8, states that "That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other." Article II, §1 of the Maryland Constitution states that "the executive power of the State shall be vested in a Governor." Additionally, according to Article II, §9, the Governor, "shall take

care that the laws are faithfully executed."[1] In *McCulloch v. Glendening*, 347 Md. 272 (1997), the Court of Appeals noted that these provisions, as well as more specific statutes, conferred upon the Executive "a significant role in setting policies to govern the management and supervision of State employees". *Id.* at 283.[2] Similarly, in *MCEA v. Schaefer*, 325 Md. 19 (1991), the Court of Appeals relied upon the same constitutional and statutory provisions to support the Governor's "broad powers with regard to Executive Branch State employees". *Id.* at 34.[3] Because these cases recognize constitutional authority in the Governor to control State employment, it can be argued that SB 50 / HB 161 infringes on that power. On the other hand, neither case involved a statute alleged to impinge on the Governor's constitutional powers or relied entirely upon constitutional as opposed to statutory provisions. Thus, in light of the lack of specific authority and the presumption of constitutionality to be accorded legislation such as SB 50 / HB 161, this Office would ordinarily conclude that the measure is not unconstitutional.

This issue has been resolved more definitively on the federal level. In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the U.S. Supreme Court upheld the power of Congress to insulate independent agency officers from Presidential control, as long as "purely executive officers" were subject to Executive control and removal. An earlier Supreme Court decision, *U.S. v. Perkins*, 116 U.S. 483, 485 (1886), limited the President's power over *personnel* of Executive departments and upheld legislation protecting such employees. *See also* Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev., 573, 608 (1984). (As a

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[1] Not affected by this legislation is the Governor's appointment removal or control of civil officers. Thus, the recent decision of the Court of Appeals on the removal and reappointment of Public Service Commissioners, *Schisler v. State*, 394 Md. 519 (2006), is not relevant here. Troubling the splintered *Schisler* court from a Separation of Powers perspective was the Legislature's attempt to remove an official of the Executive Branch and, at the same time, dictate the appointment of his successor. Neither piece of legislation here raises a similar issue.

[2] *McCulloch* upheld the power of the Governor to administratively establish a system of collective bargaining for certain State employees that was not inconsistent with State law.

[3] *MCEA* upheld the Governor's authority to administratively lengthen the State employee work week.

result of *Perkins*, "[:]he constitutionality of the civil service was thus assured - - and with it, recognition of a sharp limitation of the President's power over the personnel of executive government.")

SB 50 / HB 161 carves out an exemption to its prohibition on delegation of removal power for a class of individuals closely associated with executive power and therefore allows the Governor to retain control over "purely executive officers." The bill permits the Governor to delegate termination authority over those in the executive pay plan, direct appointees (not provided for in the Constitution), the Governor's staff, and those assigned to Government House. Under this arrangement the Legislature has left the Governor broad control over those reasonably deemed "purely executive." In addition, the legislation would also not prevent the Governor from directing a cabinet head / appointing authority to fire an at-will employee upon pain of removal. *See* Strauss, *supra*, 84 Columbia L. Rev. at 607 (The power of the Executive to control subordinates "may be substantially a function of his ability to enforce his wishes to remove persons in which he lacks political confidence or, less broadly, who disobeys his valid directives.") Nor does this legislation affect the Governor's budget powers with respect to funding or not funding positions or his authority to abolish them.

Because of the exemptions in the legislation and because it might not be read to affect core Executive powers and although the issue is not completely free from doubt, it is my view that SB 50 / HB 161 would not violate separation of powers or intrude on the Governor's constitutional authority with regard to State employment.

I have also considered whether SB 50 / HB 161 would interfere with the Governor's power to reorganize government under Article II, §24 of the Maryland Constitution. Article II, §24 of the Maryland Constitution grants the Governor the power to "make changes in the organization of Executive Branch of the State Government, including ... the reallocation or reassignment of functions, powers, and duties among the departments, offices, agencies, and instrumentalities of the Executive Branch." Similar to the general executive power, the power to reorganize has limitations. Section 24 goes on to state: "Where these changes are inconsistent with existing law, or create new governmental programs they shall be set forth in executive orders in statutory form which shall be submitted to the General Assembly within the first ten days of the regular

session."[4] The text of §24 itself indicates that the General Assembly has final authority over executive reorganization that changes existing law. In addition, SB 50 / HB 161 would not prevent the Governor from submitting an executive order under Article II, §24. Thus, I see no constitutional issue raised by this legislation with regard to the Governor's reorganization powers.

SB 2 / HB 162

This legislation does not expressly transform at-will employees who are in the management service or who hold special appointments into the tenured ranks of skilled or professional service employees. However, it might be found by a court to do so by implication.

The key distinction between a tenured and at-will employee is that the former could only be removed for cause, whereas the latter can be removed for any reason, not illegal or unconstitutional - - whether or not the employer's grounds are arbitrary or capricious. *Towson University v. Conte*, 384 Md. 68, 82 (2004).[5] The statutory requirement of "cause" before a public employee may be fired has been held to create a property right under the Due Process Clause of the 14th Amendment to the U.S. Constitution. *See Board of Regents of State College v. Roth*, 408 U.S. 564, 577-78 (1972). And such an employee cannot be deprived of his or her property right in continued employment without notice and an opportunity to be heard before the termination takes place. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). At-will employees have no such constitutional protection and, even with regard to an alleged illegal or unconstitutional firing, do not have pre-termination rights.

Senate Bill 2 / House Bill 162 appears to blur the distinction between these two classes of employees by requiring that notice be given of reasons for termination to management service and special appointment employees[6]; by requiring personnel

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[4] This reorganization by executive order is a power rarely used. Most Governors submit major reorganization changes by ordinary legislation.

[5] There is no constitutional protection for at-will employees from an arbitrary or capricious firing. *See Lauck v. McCollum*, 424 F. 3d 631 (7th Cir. 2005).

[6] A number of years ago a Department of Personnel regulation required that unclassified employees be given a notice of reasons "if any" for dismissal. COMAR

decisions regarding employees in these categories to be made without regard to "non-merit factor[s]"; and by authorizing employees in these categories to appeal an arbitrary or capricious firing.[7]

If the intent of these changes is to convert certain at-will employees into tenured employees, this is certainly constitutionally permissible. However, by still characterizing the employees as "at-will", but with tenured employee-type protections, the legislation is ambiguous. And if the intent is to confer such tenure rights, special appointment and management service employees may not be limited to an after-the-fact, post-termination appeal. Due process would require that they would have to be accorded pre-termination notice and an opportunity to be heard before any removal. *See Cleveland Board of Education v. Loudermill, supra.*

To avoid these problems, I recommend that SB 2 / HB 162 be clarified. Otherwise we find no constitutional problems with the proposed legislation.[8]

Sincerely,

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

RAZ:DGW:as

06.01.01.62B. This regulation was rescinded.

[7] The legislation also confers this right on employees in the executive service. We recommend amendment of the measure to delete such a right to avoid any claim that this would interfere with the Governor's constitutional authority over "purely executive officers." *See* p. 3, *supra.*

[8] David Gray Wright, a University of Maryland Law School intern in the Attorney General's Office, made a substantial contribution to this advice letter.

Separation of Powers – Legislative Veto

Bill/ Chapter:	Senate Bill 764/Chapter 354 of 2007
Title:	Higher Education – St. Mary's College of Maryland – Procurement Authority
Attorney General's Letter:	April 30, 2007
Issue:	Whether amending a statute to reflect changes made to another statute requiring approval by a legislative committee before an executive department may implement procurement procedures is an invalid legislative veto.
Synopsis:	Senate Bill 764/Chapter 354 of 2007 makes conforming changes to the Education Article to reflect statutory changes enacted under Chapter 255 of 2006, a comprehensive law concerning the governance of Morgan State University and St. Mary's College of Maryland. Among other provisions, the bill adds St. Mary's College to § 11-203(e)(1) of the State Finance and Procurement Article, thereby requiring St. Mary's College to develop procurement policies and procedures that are approved by the Board of Public Works and the Administrative, Executive, and Legislative Review Committee (AELR).
Discussion:	A "legislative veto" is a provision of 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. Senate Bill 764, to the extent it requires approval by the AELR Committee before implementation of new procurement policies and procedures, amounts to a legislative veto, which, arguably, violates the explicit separation of powers requirements of the Maryland Declaration of Rights. The Attorney General notes that similar conclusions of doubtful constitutionality were previously reached by the Attorney General in reviews of similar legislation, including Chapter 255 of 2006, House Bill 1501 and Senate Bill 444 of 2006, Senate Bill 430 of 2004, and Senate Bill 682 of 1999. Although the legislative approval provision found in Senate Bill 764 may be found invalid, the Attorney General advises that the provision is severable and the bill may be given effect.
Drafting Tips:	**When 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 alternate methods of legislative oversight, including, for example, review, investigation, budget control, and notification and reporting requirements.

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 30, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: Senate Bill 764

Dear Governor O'Malley:

We have reviewed for constitutionality and legal sufficiency Senate Bill 764, "Higher Education - St. Mary's College of Maryland - Procurement Authority." In amending the Education Article to reflect changes made to the State Finance and Procurement Article by Chapter 255 of 2006, the bill repeats and perpetuates a legislative veto provision that we have previously advised is of doubtful validity. As the provision is severable and does not make the law any more unconstitutional than it previously was, it is our view that it may be signed into law.

Chapter 255 of 2006 was a comprehensive act relating to the governance of Morgan State University and St. Mary's College of Maryland. Among its provisions were adding the St. Mary's College of Maryland to State Finance and Procurement Article § 11-203(e)(1), thus requiring that its procedures comply with policies and procedures developed by the College and approved by the Board of Public Works and the Administrative, Executive, and Legislative Review Committee ("AELR") as required by § 11-203(e). Chapter 255 did not, however make corresponding changes in Education Article § 4-405, which relates to procurement by the College. The purpose of Senate Bill 764 is to make these conforming changes. Thus, as reflected by the use of the term "clarifying" in the title, the bill does not change the law with respect to the review and approval of the required procedures.

It is our view that to the extent that the new provision and State Finance and Procurement Article § 11-203(e) makes the policies and procedures developed by the College contingent on approval by the AELR Committee, this would be a legislative veto and would be of doubtful validity. We reached the same conclusion when we reviewed Chapter 255,

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Bill Review letter on House Bill 1501 and Senate Bill 444 of 2006, and also on previous bills with similar requirements. Bill Review letter on Senate Bill 430 of 2004; Bill Review letter on Senate Bill 682 of 1999. In each case, we concluded that the legislative veto was severable. We reach the same conclusion here.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/KMR/kmr
SB764.wpd

cc: Joseph Bryce
Secretary of State
Karl Aro
The Honorable Roy P. Dyson

Local Law

Bill/Chapter: House Bill 1175/Chapter 267 of 2007

Title: Counties – Purchase of Development Rights

Attorney General's Letter: General approval letter dated April 18, 2007, citing Letter of Advice to Delegate Anne Healey dated March 26, 2007

Issue: Whether land use legislation can be made applicable to a single charter county, or one or more charter counties, without violating charter home rule.

Synopsis: House Bill 1175/Chapter 267 of 2007, as passed, authorizes Anne Arundel, Baltimore, Howard, and Prince George's counties to enter into an agreement to purchase development rights.

Discussion: House Bill 1175 was originally drafted as an amendment to the Express Powers Act (Article 25A, § 5 of the Code) and would have applied to *all* counties that adopted a charter form of government. Legislators sought advice from the Attorney General regarding how the legislation could be amended to limit its applicability without raising charter home rule issues.

The Attorney General suggested three alternatives for amending the legislation to apply to Prince George's County and also limit its applicability to other charter counties without violating charter home rule requirements. The first option is to amend the legislation so that it applies to Prince George's County and at least one other charter county, thereby making the bill a public general law. The General Assembly may enact public general laws affecting more than one charter county. A second option is to apply the provisions of the bill only to Prince George's County and then amend them onto another bill that applies to another charter county and also deals with the same subject, *i.e.* land purchases. A final option, which is available only because Prince George's County is under the jurisdiction of the Maryland-National Capital Park and Planning Commission, is to draft the provision as part of Article 28 of the Code. As a land use provision relating to the regional district in Article 28, it would be a public general law.

Drafting Tips: **In drafting legislation that affects a single jurisdiction with a charter form of government, or amending legislation to affect only a single jurisdiction, the drafter should be mindful of the limitations imposed on the General Assembly regarding enactment of legislation affecting**

a single charter county. The drafter should take steps to ensure that the legislation is drafted in a way that does not offend the authority granted to the charter county under its home rule powers.

Douglas F. Gansler
Attorney General

Katherine Winfree
Chief Deputy Attorney General

John B. Howard, Jr.
Deputy Attorney General

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

Sandra Benson Brantley
Bonnie A. Kirkland
Kathryn M. Rowe
Assistant Attorneys General

The Attorney General of Maryland

Office of Counsel to the General Assembly

April 18, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Dear Governor O'Malley:

We have reviewed the following bills and hereby approve them for constitutionality and legal sufficiency:

HOUSE		SENATE
61[A]	1321	130[B]
412	1323	582[C]
611[B]	1347	710
697[C]	1359[F]	920[F]
709	1424	973
773	1427	
784[D]	1433	
1175[E]		

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/RAZ/as

104 Legislative Services Building · 90 State Circle · Annapolis, Maryland 21401

Enclosures
cc: Joseph Bryce
Secretary of State
Karl Aro
2007br\fm12

Footnotes

A. HB 61 is identical to SB 440.

B. HB 611 is identical to SB 130.

C. HB 697 is identical to SB 582.

D. HB 784 is identical to SB 710. Enclosed is a March 16, 2007 advice letter on the legislation.

E. HB 1175, like SB 710 / HB 984 adds a new Title 20 to Article 24 of the Code. Enclosed is a March 26, 2007 advice letter on HB 1175.

F. HB 1359 is identical to SB 920.

DOUGLAS F. GANSLER
ATTORNEY GENERAL

CATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND

OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

March 26, 2007

The Honorable Anne Healey
350 House Office Building
Annapolis, Maryland 21401-1991

Dear Delegate Healey:

You have requested advice on the options available to the General Assembly to convert HB 1175 into legislation applicable to Prince George's County or one or more additional counties without raising charter home rule issues under Article XI-A, §4 of the Maryland Constitution.

House Bill 1175 would amend Article 25A, §5, of the Express Powers Act, to authorize a charter county to provide easements and restrictions designated under certain circumstances.[1]

1) If the legislation is amended to include another county, it would be a public

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[1] According to the Fiscal and Policy Note on HB 1175:

> This bill authorizes a charter county to purchase easements to restrict development. Within specified limitations, the county council of a charter county may determine by resolution the provisions, terms, conditions, and duration of the agreement to purchase the easement. However, a payment obligation in an agreement authorized by the bill is a general obligation of the county and may not be subject to annual appropriation. The agreement, however, is not subject to any limitations in the county's charter, public local law, or public general law. An agreement authorized by the bill, the transfer or assignment of the agreement, and any payment required are exempt from State and local taxes.

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general law. One option is to include the provisions in Article 24 of the Code (Political Subdivisions). That Article contains a number of provisions applicable to some but not all counties.[2]

2) If the bill applies only to Prince George's County, one possibility is to include it in Article 28 of the Code (Maryland - National Parks and Planning Commission). Because a land use provision for the Prince George's portion of the Regional District in Article 28 is a public general law, such a measure would not offend charter home rule. A less secure option would be to include the single county legislation in another Article, *e.g.*, Art. 24, and argue it is an implied amendment to Article 28.

3) Another option is to amend the Prince George's County legislation on to SB 682 / HB 657 (Cecil County - Purchase of Development Rights Program - General Obligation Installment Purchase Agreements). Although the Cecil County legislation is an uncodified bond bill with a cap, it also relates to the authority to purchase property interests to restrict development. Thus, there is no one subject problem. However, if such an amendment occurs, it would probably be better to codify the provision, perhaps in Article 24.

I hope this is responsive to your inquiry.

Sincerely,

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

RAZ:as

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[2] Article 25A contains provisions applicable to all charter counties.

Miscellaneous Legislative Issues

Constitutional Amendment – Statutory Provisions

Bill/Chapter:	Senate Bill 1/Chapter 513 of 2007
Title:	Elective Franchise – Early Voting and Polling Places
Attorney General's Letter:	General approval letter dated April 30, 2007, citing Letter of Advice to Senator Roy Dyson (discussed below) dated February 13, 2007
Issue:	Whether a bill that proposes a constitutional amendment may contain a statutory provision.
Synopsis:	Senate Bill 1/Chapter 513 of 2007 proposes a constitutional amendment authorizing the General Assembly to provide for early voting, provisional voting, and out-of-district voting. The bill also contains an uncodified section of law that specifically provides that existing statutory provisions on early voting will not continue in effect, thus making clear that it will be necessary to adopt new legislation to implement the constitutional amendment.
Discussion:	The Constitution of Maryland vests in the General Assembly the power to enact laws as well as the authority to propose amendments to the Constitution. There are procedural differences, however, between a bill that may become law and one that proposes a constitutional amendment. For example, although proposed amendments are in bill form, they require a three-fifths vote of both houses rather than a simple majority, are not subject to gubernatorial veto, and become part of the Constitution only if approved by voters at a general election. The Attorney General noted that these procedural differences raise practical complications when a proposed constitutional amendment is combined in a bill with statutory provisions. For example, different parts of the bill will be subject to different voting requirements; portions of the bill will be subject to veto while others will not; and parts of the bill will be subject to voter approval while other parts cannot be made subject to voter approval. The Attorney General emphasized, however, that while these complications may explain why statutory and constitutional provisions have rarely been combined in a single bill, there is no legal prohibition against such a combination. Despite the fact that Senate Bill 1 proposed a constitutional amendment that, standing alone, would not need gubernatorial approval, the Attorney General recommended that, since the bill also contained a statutory provision, it should be submitted to the Governor and the Governor should act on the bill.

Drafting Tips: **Since there are significant procedural differences with respect to the passage by the General Assembly of bills that propose constitutional amendments and those that are merely statutory, the drafter should avoid combining the two in a single bill, if possible. Although there is no legal or constitutional barrier to the practice of combining constitutional and statutory provisions, it can create practical complications that might be litigated, such as the effect of a gubernatorial veto of a bill containing a proposed constitutional amendment, which, in the absence of statutory provisions, would not require the Governor's approval.**

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

ROBERT A. ZARNOCH
Assistant Attorney General
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 30, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: Senate Bill 1

Dear Governor O'Malley:

We have reviewed and approve for constitutionality and legal sufficiency SB 1, a proposed constitutional amendment authorizing the General Assembly to establish a process for early voting.

Although to be effective a proposed constitutional amendment need not be submitted to the Governor for signing, *Warfield v. Vandiver,* 101 Md. 78 (1905), we recommend that this legislation be acted on by the Governor because it contains statutory provisions in addition to the constitutional amendment. *See* SB 1 at Sections 2 and 3.[1]

We are also enclosing two advice letters on the bill.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/RAZ/as

[1] Although the practice has been restricted by recent amendments to the rules of both houses, it is constitutionally permissible to include ordinary legislation in a constittional amendment as long as all provisions relate to a single subject. *See* Letter of Advice to Hon. Roy Dyson, Feb. 13, 2007).

cc: Joseph Bryce
Secretary of State
Karl Aro

Douglas F. Gansler
Attorney General

Katherine Winfree
Chief Deputy Attorney General

John B. Howard, Jr.
Deputy Attorney General

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

Sandra Benson Brantley
Bonnie A. Kirkland
Kathryn M. Rowe
Assistant Attorneys General

The Attorney General of Maryland

Office of Counsel to the General Assembly

February 13, 2007

The Honorable Roy P. Dyson
102 James Senate Office Building
Annapolis, Maryland 21401-1991

Dear Senator Dyson:

You have asked for advice concerning a proposed amendment to Senate Bill 1, "Elective Franchise - Early Voting and Polling Places," that would add an uncodified section of law that would specifically provide that existing statutory provisions on early voting would not continue in effect, thus making clear that it would be necessary to adopt new legislation to implement the constitutional amendment. Specifically, you have asked whether a statutory provision may be added by amendment to a bill proposing a constitutional amendment. You have also asked that I look at the effect of the Senate and House rules on such an amendment. It is my view that there is no legal or constitutional barrier to the proposed amendment. In addition, I do not interpret the provisions of either the Senate or the House rules relating to amendments to impose any limitation on the proposed amendment. However, the two houses of the General Assembly are the final judges of the meaning of their own rules and my views are not binding on them.

The Constitution of Maryland gives the power to enact laws to the General Assembly. *Bradshaw v. Lankford*, 73 Md. 428 (1891). The General Assembly also has the authority to propose amendments to the Constitution. Maryland Constitution Article XIV, § 1.

Laws are enacted by the General Assembly pursuant to provisions of Article III that provide that a bill may not become law until it is read on three different days of the session in each house, and require that a bill may not be read for the third time until it is engrossed or printed for a third reading. Article III, § 27. The Constitution further provides that a majority of the members of the House are necessary to pass a bill into law, and requires that the yeas and nays be recorded on the final passage. Article III, § 28. A three-fifths vote in each house is required for a law to take effect as an emergency measure, Article XVI, § 2, or for a law to take effect over the veto of the Governor, Article II, § 17. Every bill proposing a law must be submitted to the Governor for his approval or veto, though it may be enacted over his veto with a three fifths vote of both houses. Article III, § 30, Article II, § 17. A bill with statewide effect may not be made contingent on a vote of the people. *Bradshaw v. Lankford*, 73 Md. 428 (1891).

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Amendments to the Constitution are proposed in bill form. Article XIV § 1. They require a three-fifths vote of both houses. *Id.* They are not subject to gubernatorial veto, *Warfield v. Vandiver*, 101 Md. 78 (1905), but become part of the Constitution only if approved by a vote of the people at a general election. Article XIV § 1.

The procedural differences between a bill that will become law and one that proposes a constitutional amendment raise practical complications when they are combined in a single document. Different portions of the bill will be subject to different voting requirements, and parts of the bill will be subject to approval at an election, while other portions are subject to veto by the Governor and cannot be made subject to approval at an election. These technical complications most likely explain why constitutional and statutory provisions have not typically been included in the same legislation. However, they do not amount to a legal prohibition.

Nothing in the Constitution prohibits the combination of statutory and constitutional provisions in a single bill. *Cf.*, *Bourbon v. Governor*, 258 Md. 252, 255 (1970) (In the absence of a provision preventing repeal and reenactment of proposed constitutional amendment before it is submitted to the voters, repeal and reenactment is permissible).

In *Warfield v. Vandiver*, 101 Md. 78 (1905), the Court of Appeals addressed the issue of whether a bill proposing a constitutional amendment had to be submitted to the Governor for approval or veto. Noting the difference between material in a bill that will become law, and a proposed constitutional amendment, and in the procedures applicable to each, the Court held that a proposed constitutional amendment need not be submitted to the Governor "when no measures which are distinctively and essentially legislative in their nature are appended to it." *Id.* at 109, 114-115, dissent at 128. The Court proceeded to consider whether the provisions of the bills in question relating to the mode of presenting the proposed amendment to the voters were legislation requiring presentation to the Governor, and concluded that they were not. *Id.* at 121-122. While not directly addressing the issue of whether statutory changes and a proposed amendment to the constitution could be included in the same bill, this case does seem to reflect the view that such a combination is possible.

The only out-of-state case that I have found addressing this issue is *Wass v. Anderson*, 252 N.W.2d 131 (Minn. 1977). That case held that a proposal for amendment of the state constitution could be included in a bill relating to transportation, so long as the constitutional amendment and the provisions of the bill were in fact related to the same subject.

For the above reasons, it is my view that there is no legal or constitutional barrier to the amendment of statutory language onto a bill containing a proposed constitutional amendment.

Earlier this session, the Senate adopted an amendment to Senate Rule 46, which provides:

> (B)(1) Subject to Paragraph (2) of this subsection, a bill or resolution may not be amended on second reading in the Senate or, as to a House Bill or Resolution, on second or third reading in the Senate, or by a conference committee, to include a proposed constitutional amendment.
>
> (2) This subsection does not apply to an amendment adopted by a standing committee and included in the committee's favorable report of the bill that is the subject of the proposed amendment.

While this rule prevents the addition of a proposed constitutional amendment to a bill proposing statutory changes, it makes no mention of amendment of a proposed constitutional amendment to include statutory provisions. Thus, it is my view that this rule would not prevent the proposed amendment.

The House Rules provide, at Rule 46(b), that:

> No bill or resolution may be amended in its passage through the House to include a proposed constitutional amendment.

Like the Senate Rule, this rule does not address the issue of amendments that add statutory language to constitutional amendments. In addition, the rule speaks only to amendments in the House. Thus, it is my view that the Rule would not affect bills that are introduced with both statutory and constitutional provisions, or that are amended in the Senate to contain both.

Sincerely,

Kathryn M. Rowe
Assistant Attorney General

KMR/knr
dyson12.wpd

Legislative Process – Bill Enactment Rules

Bill/ Chapter:	Senate Bill 361 of 2007 (Unsigned by Governor)
Title:	Cigarette Fire Safety Performance Standard and Firefighter Protection Act
Attorney General's Letter:	Letter of Advice to Senator Mike Lenett dated April 25, 2007
Issue:	Whether a Senate bill that was passed by the House of Delegates with a nonsubstantive, technical amendment that did not appear in the bill when originally considered by the Senate can be considered "passed" despite the fact that, in the closing minutes of the session, there was no time for the Senate to officially concur in the House amendment.
Synopsis:	Senate Bill 361 and House Bill 785 of 2007 were cross-filed bills that, among other provisions, established a performance standard for cigarettes and prohibited the manufacture, sale, or offer for sale of cigarettes in the State unless the cigarettes have been tested in a specified manner and meet the performance standard. According to the floor reports presented by the respective committee chairs, the bills were intended to be passed in identical form by both houses. By a typographical error, however, a "(1)" was omitted in the Senate version. To correct this minor discrepancy between the two otherwise identical bills, on *Sine Die*, the House adopted an amendment to Senate Bill 361 to fix the typo. Unfortunately, however, the amendment was adopted by the House too late for the bill to be returned to the Senate for concurrence in the House amendment.
Discussion:	Citing legislative authorities, the Attorney General advises that if a bill passes both houses with only insubstantial or immaterial differences, it has validly passed. Since there was no *substantial* difference between Senate Bill 361 as passed by the Senate and House, notwithstanding the technical amendment, the Attorney General was of the opinion that Senate Bill 361 had validly passed both houses. Understanding that this conclusion did not necessarily settle the issue, however, the opinion was forwarded by the Attorney General to the Clerk of the House and the Secretary of the Senate "for whatever action they may decide to take pursuant to the rules and customs of each body." The Attorney General pointed out that Senate Rule 66 requires that the Senate concur in an amendment added to a bill by the opposite house before the bill can be considered finally passed by the Senate. In this case, the technical amendment to Senate Bill 361 was not considered by the Senate and, ultimately, in accordance with Senate rules, only the House crossfile was forwarded to the Governor and signed into law (Chapter 497 of 2007).

Drafting Tips: **Drafters of purely technical and nonsubstantive amendments, particularly in the waning hours of *Sine Die*, may want to counsel the requester of the amendment to forgo making the correction, if the amendment and concurrence process may lead to the bill not being considered as passed under the enactment rules of the respective houses.**

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

Assistant Attorney General
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 25, 2007

The Honorable Mike Lenett
202 James Senate Office Building
Annapolis, Maryland 21401-1991

Dear Senator Lenett:

You have requested advice on whether SB 361 (Cigarette Fire Safety Performance Standard and Firefighter Protection Act) passed both houses of the General Assembly.

For reasons set forth below, it is my view that the versions of SB 361 that passed each house did not differ "substantially". There is legal support for the proposition that such a bill would be deemed to have validly passed both houses.

You have provided me with the following background:

> SB 361 (introduced Feb. 1) and HB 785 (introduced Feb. 9) were cross-filed bills. The language for the bills was provided by the Maryland State Fire Marshal and was intended to be identical in both houses. By a typographical error, the "(1)" had inadvertently been omitted from the Senate bill. [SB 361, p. 5, line 8.]
>
> The amendments made in the Senate and in the House were identical to keep the bills identical. The typo regarding the "(1)" was not caught.
>
> On April 3, Senate Proceedings #59, the Senate and House bills were brought up together in the same Committee Report, and both passed. Senate Finance Chairman Mac Middleton, in delivering the Floor Report on SB 361, explained that the House and Senate worked very hard and collaboratively to pass the "agreed-upon amendments" that were being made to both bills. This can be heard in the Senate proceedings for that day online at the General Assembly website (time marker 1:10:00). A few minutes later, when HB 785 was brought up, the Committee Chairman stated that "House Bill 785 is identical

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> to Senate Bill 361, which was just considered by the Senate." (Time marker 1:18:35). Based on that representation and with that understanding, the bill passed, notwithstanding that no one was aware of the "(1)" typo.
>
> On April 10, House Proceedings #69, House Economic Matters Chairman Dereck Davis, in delivering the Floor Report on SB 361, explained that the bill was identical to the House bill "that passed both chambers". This can be heard in the House proceedings for that day online at the General Assembly website (time marker 1:17:48). In the last few minutes before sine die, the bill was moved up by special ordering another bill in front of it so that the bill would pass in time.

The amendment offered to SB 361 in the House was obviously a technical one.[1] It was adopted by the House, but did not appear in the legislation when the Senate originally considered the bill. It was too late to return the bill to the Senate for concurrence. Nor does the printed legislative history of the bill indicate that it was returned to the Senate "passed."

Analysis

According to Sutherland, *Statutory Construction* at §15:16, "[w]hen the respective houses of the legislature pass what purports to be the same bill but the contents differ substantially, the enrollment of the bill as finally passed is not conclusive, and the bill is not law." This also appears to be the rule when a passed bill differs from that presented to the Governor. *See Legg v. Annapolis*, 42 Md. 203, 221 (1875)(Legislation is a nullity if the Act in question "never in fact passed both houses of the Legislature, substantially, as it was approved by the Governor..."); and *Bull v. King*, 286 N.W. 311, 313-14 (Minn. 1939)(The bill presented to the governor for approval must be the same in substance and legal effect as the bill passed by the legislature but "immaterial" errors will be disregarded.) The import of these authorities is that if a bill passes both houses with only insubstantial or immaterial differences, it has validly passed. [2]

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[1] The amendment read: "On page 5, in line 8, strike '(E)' and substitute '(E)(1)' ".

[2] *Mason's Legislative Manual* at §737(4) states that:

> The fact that there is agreement between the houses as to the contents of a bill should appear with certainty, but it is

It is beyond doubt that there was no substantial difference between SB 361 as it passed the House and the Senate. The amendment added by the House to the Senate bill was a technical, nonsubstantive one that did not detract from the body's approval of the substance of the legislation both in SB 361 and its companion legislation. Under the rule articulated in *Sutherland,* SB 361 has validly passed both houses.

I am forwarding this advice to the Clerk of the House and the Secretary of the Senate, for whatever action they may decide to take pursuant to the rules and customs of each body.[3]

> sufficient if it be clear from the record as a whole that the bill, as finally passed by both houses, was *identical.* (emphasis added).

Mason's and *Sutherland* (and the cited cases) are not necessarily in conflict. *Mason's* could be read as articulating an evidentiary rule or presumption rather than a constitutional standard as to whether a bill has passed both houses.

[3] I should call to your attention Senate Rule 66, which provides that:

> (a) When a Senate bill or joint resolution has been amended by the House and returned to the Senate, having been read the third time and passed by the House by yeas and nays, the President shall call each amendment to the attention of the Senate and cause it to be read. In the absence of a motion from the floor as to any amendment, the President shall put the question: "Will the Senate concur in the House amendment?"
>
> (b) If the Senate concurs in each House amendment, the bill or joint resolution in its amended form immediately shall be considered again by the Senate on third reading for final passage by yeas and nays. If the Senate refuses to concur in any House amendment, the bill or joint resolution fails unless the Senate, by message accompanied by the bill or joint resolution, requests the House to recede from its amendment.

Sincerely,

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

RAZ:as

Statutory Construction – Validity of Bill in View of Inconsistent Current Law

Bill/Chapter: House Bill 910/Chapter 439 of 2007

Title: Public Safety – Correctional Officers – Minimum Age

Attorney General's Letter: General letter of approval dated April 26, 2007, citing Memorandum (discussed below) by Assistant Attorney General, Department of Public Safety and Correctional Services, dated April 26, 2007

Issue: Whether a bill that requires the adoption of regulations establishing a minimum age for correctional officers can be given effect notwithstanding that a current statute (Art. 49B, § 16), which is not addressed in the bill, prohibits age discrimination in employment.

Synopsis: House Bill 910/Chapter 439 of 2007 requires the Secretary of Public Safety and Correctional Services to adopt regulations establishing a minimum age of 21 years for a correctional officer hired for employment in any unit within the Division of Correction. The bill also requires that the regulations exempt any honorably discharged veteran or reserve member of the United States armed forces from the minimum age requirement.

Discussion: In a 2002 opinion addressing whether the Division of Correction could legally adopt a policy establishing a minimum age for correctional officers, the Attorney General concluded that, in the absence of a showing that the age requirement was a *bona fide* occupational qualification, such a policy would violate Article 49B, § 16 of the Code, which prohibits age discrimination in employment. However, in reviewing House Bill 910, the Attorney General was not considering the validity of an administratively-initiated policy, but rather an enactment of the General Assembly specifically directing adoption of a minimum age requirement. While the Attorney General questioned the validity of House Bill 910 in light of the existing statutory prohibition against age discrimination in employment, support for the bill's validity was found in the opinion of the Court of Appeals in *Mayor and City Council of Baltimore v. State*, 281 Md. 217, 228-30 (1977). In that case, the court held that a specific authorization approved by the General Assembly can, in effect, except the actions of government officials from compliance with a previously enacted statutory requirement. The Attorney General found that House Bill 910 presented such a specific authorization. The Attorney General, in approving the legislation, concluded that the General Assembly was aware

of Article 49B, § 16 and the 2002 opinion of the Attorney General concerning age discrimination in employment at the time it passed House Bill 910. In view of the General Assembly's presumed knowledge of current law, the Attorney General concluded that the General Assembly must have intended that the subsequently-enacted and more specific legislation, House Bill 910, prevail over the proscriptions of Article 49B and govern the age requirement for correctional officers.

Drafting Tips: **Effective legislative drafting requires that the drafter have a full understanding of all relevant statutory provisions that may affect, or be affected by, draft legislation. Rather than relying on a court in the future to derive the legislative intent regarding an enactment that appears to conflict with a previously enacted statute, the drafter should seek to clarify the legislative intent by explicitly addressing any conflicts with current law.**

With respect to employment discrimination, in particular, when requested to draft a bill that would establish age requirements for public employment, a drafter should be mindful of the provisions of Article 49B, § 16 of the Code and analogous federal laws concerning discrimination in employment. Unless age can be shown to be a *bona fide* occupational qualification, legislation that establishes an age requirement for employment may be susceptible to challenge under statutes that prohibit employment discrimination based on age.

Douglas F. Gansler
Attorney General

Katherine Winfree
Chief Deputy Attorney General

John B. Howard, Jr.
Deputy Attorney General

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

Sandra Benson Brantley
Bonnie A. Kirkland
Kathryn M. Rowe
Assistant Attorneys General

The Attorney General of Maryland

Office of Counsel to the General Assembly

April 26, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Dear Governor O'Malley:

We have reviewed the following bills and hereby approve them for constitutionality and legal sufficiency:

HOUSE		SENATE	
327[A]	910[D]	412	717[H]
447	930[E]	413[E]	817[I]
473	949	525[C]	851
515[B]	971[F]	557[B]	
538[C]	1006[G]	572[F]	
745		705[A]	

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/RAZ/as
Enclosures
cc: Joseph Bryce
Secretary of State
Karl Aro
2007bri\fm21

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

Footnotes

A. HB 327 is identical to SB 705.

B. HB 515 is identical to SB 557.

C. HB 538 is identical to SB 525.

D. Enclosed is an April 26, 2007 memorandum on HB 910.

E. HB 930 is identical to SB 413.

F. HB 971 is identical to SB 572.

G. Enclosed is a March 8, 2007 letter of advice on HB 1006.

H. HB 601, approved by form letter on April 16, 2007, like SB 717 amends Natural Resources Article §10-410(a). The bills are not inconsistent and both can be given effect regardless of the order of signing.

I. Enclosed is a February 28, 2007 letter of advice on SB 817.

DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

STUART M. NATHAN
Assistant Attorney General
Principal Counsel

ALAN D. EASON
Assistant Attorney General
Deputy Counsel

SUSAN HOWE BARON
JUDITH A. BARR
DIANE C. BUSTOS
MICHAEL O. DOYLE
STEVEN G. HILDENBRAND
BEVERLY F. HUGHES
HOLLY L. KNEPPER
MICHELE J. MCDONALD
LAURA MULLALLY
KARL A. POTHIER

Assistant Attorneys General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL
Department of Public Safety &
Correctional Services
6776 Reisterstown Road, Suite 313
Baltimore, Maryland 21215

TELECOPIER NO
410-764-5366

WRITER'S DIRECT DIAL NO
410-585-3070

April 26, 2007

TO: Robert A. Zarnoch, Counsel to Maryland General Assembly

FROM: Stuart M. Nathan, Assistant Attorney General

SUBJECT: House Bill 910

House Bill 910, sponsored by approximately thirty delegates, requires the Secretary of the Department of Public Safety and Correctional Services to adopt regulations that require that correctional officers hired by the Division of Correction ("DOC"),[1] on or after October 1, 2007, shall be at least 21 years old.

Previously, the DOC considered adopting a policy which would have established the same age requirement as this bill. Apparently, this policy was considered in light of a Maryland Correctional Training Commission, the agency which sets selection standards for correctional officers, regulation which lowered the minimum age for entry-level positions from 21 to 18. In 87 Op. Att'y. Gen. 177 (2002), the Attorney General concluded that such a DOC policy would violate the Maryland statute (Act. 49B, Section 16) that prohibits age discrimination in employment unless the DOC could establish that such an age criterion is a bonafide occupational qualification for a correctional officer. The opinion went on to cast doubt on whether the Division could meet that burden.

[1] This bill does not apply to any other state-employed correctional officers, such as those at Patuxent Institution or the Division of Pretrial Detention and Services

Presumably the General Assembly was aware of both the provisions of Article 49B, concerning the authority of the Commission on Human Relations, as well as the 2002 opinion of the Attorney General when it enacted House Bill 910. However, this bill does, in my mind, raise the issue of its validity in view of the state law prohibiting employment discrimination based on age.[2]

A case which may be instructive in this matter is *Mayor and City Council of Baltimore v. State*, 281 Md. 217, 378 A.2d 1326 (1977) which involved the proposed construction of a state correctional facility on the site of the old Continental Can property in East Baltimore. Opponents of the construction company argued, *inter alia*, that the state legislation appropriating funds for the acquisition of the property violated previously-enacted statutory provisions governing purchase of property and environmental requirements. The Court of Appeals ruled that the specific authorization approved by the General Assembly concerning this property excepted the actions of government officials from compliance with the previous statutory requirements. 281 Md. At 228-30.

Thus, it can be concluded that the General Assembly, when passing House Bill 910, was mindful of previous legislation concerning age discrimination in employment and intended that this subsequent and more specific legislation governing the age requirement for DOC correctional officers should prevail over the proscriptions of Article 49B.

[2] The analogous federal statute, the Age Discrimination in Employment Act of 1967, Public Law 90-202, protects individuals who are 40 years of age or older from employment discrimination based on age.