Bill Review Letters - 2014

An Analysis of Selected Bill Review Letters of the Attorney General of Maryland on Legislation Passed at the 2014 Session of the General Assembly

Department of Legislative Services 2014

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An Analysis of Selected Bill Review Letters
of the
Attorney General of Maryland
on
Legislation Passed at the 2014 Session of the General Assembly

Department of Legislative Services
Office of Policy Analysis
Annapolis, Maryland

October 2014

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Foreword

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

The purpose of this document, *Bill Review Letters – 2014*, 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. Finally, the analysis of each letter includes a segment on drafting tips that should be considered carefully by legislative drafters. For purposes of summarization, citations to the cases relied on by the Attorney General are generally omitted.

Bill Review Letters – 2014 contains selected bill review letters that cover a wide range of topics including due process, free speech, federal preemption, separation of powers, delegation of legislative authority, and a variety of miscellaneous legislative issues. Note that several of these topics and other important constitutional and legal considerations related to legislation and legislative drafting are discussed in more depth in the department's *Maryland Legislative Desk Reference*.

This document was prepared by the Department of Legislative Services, Office of Policy Analysis. The analyses included in this document were written by April M. Morton, Crystal Lemieux, George H. Butler Jr., and Patrick D. Carlson. Michelle J. Purcell and Karen M. Belton prepared the document for publication. John J. Joyce edited the analyses and supervised production of the document. The Office of Policy Analysis is grateful to Kelly Keyser of the Office of the Attorney General, Counsel to the General Assembly, for her assistance in providing the letters discussed in this document.

U.S. Constitutional Issues

FIRST AMENDMENT – FREE SPEECH – REVENGE PORN

Bill/Chapter: House Bill 43/Chapter 583 of 2014

Title: Criminal Law – Harassment – Revenge Porn

Attorney General's Letter: April 30, 2014

Issue: Whether a bill prohibiting a person from intentionally causing serious emotional distress to another by intentionally placing certain sexually explicit images on the Internet with knowledge that the other person did not consent to placement violates the First Amendment of the U.S. Constitution.

Synopsis: House Bill 43/Chapter 583 of 2014 prohibits a person from intentionally causing serious emotional distress to another by intentionally placing on the Internet an image of the other person with his or her intimate body parts exposed or while engaged in sexual contact. The bill only applies to an image that reveals the identity of the victim, which was taken under circumstances in which the victim had a reasonable expectation that the image would be kept private. The person posting the image must have knowledge that the victim did not consent to placement of the image on the Internet.

Discussion: The Attorney General began the analysis by acknowledging that House Bill 43/Chapter 583 presents novel constitutional issues. "Revenge porn" is a relatively recently coined phrase used to describe the (usually malicious) posting of sexually explicit images or media of another person (typically a former intimate partner) without the subject's consent. Several states besides Maryland have adopted laws criminalizing this behavior, but the Attorney General noted that courts have not yet had the opportunity to rule on the constitutionality of these laws, including whether such laws infringe on First Amendment protections of free speech. Federal courts have ruled on a similar federal statute, however, which prohibits interstate stalking and harassing conduct. The courts held this statute to be constitutional because it punishes the conduct involved in posting or sending information and not speech per se. Moreover, the federal stalking statute was found not to be impermissibly overbroad because it required malicious intent by the defendant and substantial harm to the victim. The Attorney General noted that a similar analysis could be used to defend the prohibition in House Bill 43/Chapter 583.

The Attorney General also discussed a forthcoming academic paper on the constitutionality of "revenge porn" legislation. Drawing on court decisions

addressing constitutional challenges to civil tort actions, the authors of the paper suggested that the First Amendment provides a lower level of constitutional protection to the disclosure of purely private matters than to the disclosure of matters of public concern. The authors concluded that "revenge porn" legislation is more likely to survive a constitutional challenge if it requires a clear showing that the person distributing the images had knowledge that the subject of those images did not consent to their distribution and that the subject of the images had a reasonable expectation that the images would be kept private. The Attorney General noted that House Bill 43/Chapter 583 meets these requirements. Because the bill is limited to non-consensual distributions of matters in which the victim had a reasonable expectation of privacy, it likely does not violate First Amendment free speech protections.

Drafting Tips: **Legislation that prohibits or restricts the content of communications between people must be narrowly tailored to avoid placing an undue burden on an individual's right to free speech. In criminal legislation, this may be accomplished by requiring the State to prove that the conduct was intended to cause harm to the victim, and that the victim was actually harmed by the conduct. The drafter should also keep in mind that legislation limiting the disclosure of purely private matters is more likely to withstand constitutional scrutiny than legislation limiting the disclosure of matters of public concern.**

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THE ATTORNEY GENERAL OF MARYLAND

OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 30, 2014

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

RE: House Bill 43, "Criminal Law – Harassment – Revenge Porn"

Dear Governor O'Malley:

We have reviewed House Bill 43, "Criminal Law – Harassment – Revenge Porn" for constitutionality and legal sufficiency. While this bill presents novel constitutional issues, it is our view that it can most likely be successfully defended against constitutional challenge, at least as applied to photographs, film, videotapes, recordings, and other forms of actual image reproduction. We are less confident that the law would be upheld as applied to other forms of virtual image reproduction such as drawings or animation, which are, in any event, unlikely to be the types of conduct that would be prosecuted under this statute.

House Bill 43 would prohibit a person from intentionally causing serious emotional distress to another by intentionally placing on the internet, an image of the other person that reveals the identity of the person with his or her intimate body parts exposed or while engaged in sexual contact, with knowledge that the other person did not consent to the placement of the image on the internet and under circumstances in which the other person had a reasonable expectation of privacy that the image would be kept private. The prohibition would not apply to lawful and common practices of law enforcement, the reporting of unlawful conduct, legal proceedings, or situations involving voluntary exposure in public or commercial settings. A violation would be a misdemeanor subject to imprisonment not exceeding two years or a fine not exceeding $5,000, or both.

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Legislative enactments against so-called "revenge porn" have been a fairly recent development in some states. Similar bills were enacted in New Jersey in 2004, and California in 2013. There is no federal law addressing revenge porn. Although there does not yet appear to be any published court opinions that address First Amendment challenges to these revenge porn statutes, federal courts that have examined an analogous statute (18 U.S.C. § 2261A, which prohibits interstate stalking and harassing conduct) have suggested that the statute does not punish speech, but rather the conduct involved in the act of posting or sending information. *See e.g. United States v. Petrovic*, 701 F.3d 849 (8th Cir. 2012) (violation of 18 U.S.C. § 2261A was not protected speech); *see also United States v. Sayer*, 2012 U.S. Dist. LEXIS 67684 (D. Me. 2012). Because the federal stalking statute, like House Bill 43, requires malicious intent by the defendant and substantial harm to the victim, the statute was held not to be impermissibly overbroad. *Petrovic*, 701 F.3d at 856. Similar analysis could be used to defend the prohibition in House Bill 43, that the intentional use of the materials in question for the purpose of causing serious emotional distress, is not protected speech.

In a forthcoming law review article, two law professors suggest that revenge porn legislation may be drafted in such a way that would be likely to survive First Amendment challenges. *See* Citron and Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. (forthcoming 2014).[1] For example, the authors suggest that legislation should make clear that the person distributing the images must be shown to have knowledge that "the subject of those images did not consent to the disclosure of the images and that the subject had a reasonable expectation that they would be kept confidential or private." *Id.* at *23. They also suggest that a statute require the state to prove that the victim suffered emotional harm, and that the images "do not concern matters of public importance."[2] *Id.* at *24. *See also United States v. Shrader*, 675 F.3d 300, 311-12 (4th Cir. 2012) (recognizing that an intent to cause serious emotional distress may mitigate vagueness and may provide adequate notice of proscribed action). The authors rely on court decisions addressing First Amendment challenges to civil tort actions that suggest that disclosure of matters of purely private matters are deserving of less First Amendment protection than matters of public concern, and that the images at issue constitute the former. *Id.* at *28 (citing *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (dicta explaining that protected disclosure of phone conversation between union officials that constituted a

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[1] Downloaded at http://papers.ssrn.com/sol3/ papers.cfm?abstract_id=2368946 (last visited April 23, 2014).

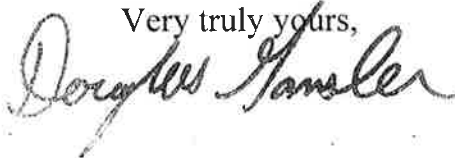
[2] An exception to the prohibited act for "images concerning matters of public importance" had been amended onto the bill, but ultimately was stricken before the bill's passage.

matter of public concern did not involve "domestic gossip or other information of purely private concern"); *Michael v. Internet Entertainment Group, Inc.* 5 F.Supp.2d 823 (C.D. Cal. 1998) (upholding privacy tort claim for publishing celebrity sex tape, explaining that public has no legitimate interest in graphic depictions of intimate aspects of celebrity couple's relationship)).

House Bill 43 contains many of the suggestions offered in the law review article. As the prohibited act in the bill is limited to non-consensual distributions of matters in which the victim had a reasonable expectation of privacy and that requires the State to prove that the actor intentionally cause serious emotional distress by placing the image on the internet, such limitations may help preserve its constitutionality.

While we believe that the prohibited act in House Bill 43 would likely survive a facial challenge to its constitutionality, there is a risk that as applied to virtual representations such as drawings or animation, a court could find the prohibition to be an impermissible restraint on speech. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (federal prohibitions against use of virtual images of child pornography found to be overbroad and unconstitutional); *but see United States v. Whorley*, 550 F.3d 326 (4th Cir. 2008) (federal statute prohibiting trafficking in obscene material upheld as applied to receipt of obscene anime images). Nevertheless, it is our view that House Bill 43 is legally sufficient and constitutional.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/JMM/kk

cc: The Honorable Luiz R.S. Simmons
The Honorable John P. McDonough
Jeanne D. Hitchcock
Karl Aro

First Amendment – Establishment Clause – Church Approval of Licenses

---

Bill/Chapter:	Senate Bill 846/Chapter 346 and House Bill 831/Chapter 347 of 2014
Title:	Baltimore City – Alcoholic Beverages Act of 2014
Attorney General's Letter:	April 28, 2014
Issue:	Whether a bill authorizing a waiver of restrictions on the transfer of an alcoholic beverages license if the waiver application is approved by a church located within a specified distance of the proposed location for the establishment for which the license is sought violates the Establishment Clause of the First Amendment of the U.S. Constitution.
Synopsis:	Senate Bill 846/Chapter 346 and House Bill 831/Chapter 347 of 2014 authorize the Board of Liquor License Commissioners for Baltimore City to waive, in a specified area, a restriction on the transfer of a license to sell alcoholic beverages in a building located within a certain distance of a church if the waiver application is approved by the pastor and church board of directors or the pastoral council for the church.
Discussion:	Relying on *Larkin v. Grendel's Den*, 459 U.S. 116 (1982), the Attorney General examined whether the bills violate the Establishment Clause. In *Grendel's Den*, the Supreme Court struck down a Massachusetts statute that required the denial of an alcoholic beverages license if the governing body of a church or school located within 500 feet of the premises filed an objection to the requested license. The Massachusetts statute impermissibly had a primary effect of advancing religion by giving the appearance of a "joint exercise of legislative authority by Church and State," providing a "significant symbolic benefit to religion in the minds of some by reason of the power conferred." The statute also led to an entanglement of the church and the processes of government by substituting the "unilateral and absolute power" of a church for the reasoned decision-making of a legislative body "acting on evidence and guided by standards." The Attorney General warned that the bills at issue gave even greater power to the churches than the statute in *Grendel's Den.* Under the invalidated Massachusetts statute, a license could be granted unless there was an objection. Under the bills at issue, however, no license may be granted unless the applicant is able to get the approval of any church within 300 feet. Based on this analysis, the Attorney General advised that the portion of the bills requiring approval by the pastor and church board of directors or the pastoral council of a church within the designated distance was invalid

under the Establishment Clause and should not be given effect. The remainder of the waiver provisions could and should be severed from the bills and given effect, according to the Attorney General.

Drafting Tips: **If asked to draft legislation that requires approval by a church for a license to be issued or transferred, or requires denial of a license if a church objects to the issuance of the license, the drafter should advise the sponsor that the bill may violate the Establishment Clause. This type of legislation has been held to have a primary effect of advancing religion by giving the appearance of a joint exercise of legislative authority by church and state and for entangling church and the processes of government. The drafter should discuss with the sponsor whether there are alternative ways to protect the interests of churches that may be affected by the issuance or transfer of the type of license at issue.**

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April 28, 2014

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

RE: House Bill 831 and Senate Bill 846, "Baltimore City – Alcoholic Beverages Act of 2014"

Dear Governor O'Malley:

We have reviewed House Bill 831 and Senate Bill 846, identical bills entitled "Baltimore City – Alcoholic Beverages Act of 2014," for constitutionality and legal sufficiency.[1] We have evaluated the constitutionality of the bills under the Establishment Clause of the First Amendment to the United States Constitution and under two provisions of the Maryland Constitution, the prohibition on "special laws" and the separation of powers and preservation of the Governor's removal powers. While we find a portion of the bills to be unconstitutional under the First Amendment and recommend that it not be given effect, it is our view that the unconstitutional provision is severable and that the bills may be signed. We conclude by pointing out several provisions that, in our view, ought to be fixed in future legislation and by making comment about the proper interpretation of some provisions.

Constitutional Analysis

Establishment Clause

The bills allow waiver of certain food service requirements in a six block area of East Baltimore for a restaurant owned and operated by a not-for-profit organization.

[1] While the provisions of the bills are identical, the pages and line numbers are not. For convenience, the page and line number cites in this letter refer to the Senate Bill only.

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Page 4, lines 9-15. To qualify for the waiver described in the last paragraph, the waiver must be "approved by . . . the pastor and church board of directors or pastoral council for each church within 300 feet of the proposed location for the establishment for which the license transfer is sought." Page 6, lines 4 and 8-11. It is our view that this requirement violates the Establishment Clause of the First Amendment of the United States Constitution.

In *Larkin v. Grendel's Den*, 459 U.S. 116 (1982), the Supreme Court considered the validity of a statute that required that an application for an alcoholic beverages license be denied if the governing body of a church or school within five hundred feet of the proposed legislation filed an objection to the issuance of a license. The Court found that the statute gave religious institutions a veto power over the issuance of a license, that the law provided no standards governing the exercise of that veto, thus allowing the power to be exercised for explicitly religious goals. The Supreme Court observed that "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Id.* at 125-126. As a result, the Court found that the statute had the primary effect of advancing religion. Moreover, because the statute "substitute[d] the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards," *id.* at 127, it led to entanglement of the church and the processes of government and thus violated the First Amendment.

Under the statute in question in the *Grendel's Den* case, the license could be granted unless there was an objection, while under House Bill 831 and Senate Bill 846, no license may be granted unless the applicant is able to get the approval of any church within the 300 feet. If anything, this gives greater power to the churches than was the case in the *Grendel's Den* case. For that reason, it is our view that the portion of the statute that requires the approval of the pastor and church board of directors or pastoral council of a church within 300 feet before a license can be granted is invalid and cannot be given effect.

Once we have determined that the provision is unconstitutional, the next question is whether the effect of that invalidity is to leave the waiver in place, but subject only to the requirement of approval of each community association representing the area and the execution of a memorandum of understanding with each community association, or whether the waiver provision as a whole could not be given effect. This answer to this question rests on the intent of the General Assembly – that is, on a determination of what the General Assembly would have wanted if it had known that the provision could not be given effect as a whole. *Davis v. State*, 294 Md. 370, 383 (1982). There is a presumption that the General Assembly intend that its enactments be severed if possible. *Id.*; Article 1,

§ 23, Annotated Code of Maryland. Thus, "if the dominant purpose of a statute may largely be carried out notwithstanding the invalid provision" it should be severed. *Id.* at 384. It is our view that the invalidity of the minister approval requirement does not prevent the achievement of the dominant purpose of the waiver provision in light of the requirement that neighborhood associations approve, and the ability of churches to work with the neighborhood groups. Therefore, it is our view that the remainder of the waiver provision may be given effect.

Special Laws

We have also investigated whether the waiver described above was intended for the benefit of a single, favored person or business and, as such, might implicate the prohibition on special laws found in Article III, § 33 of the Maryland Constitution. Testimony before the Education, Health and Environmental Affairs Committee indicated that the waiver is intended to apply to a specific restaurant run by a not-for-profit organization, but it is our judgment that the affected area is large enough so that it cannot be considered to create a closed class. *See, e.g. Reyes v. Prince George's County*, 281 Md. 279, 305-06 (1977). For that reason, it is our view that this provision does not violate the constitutional prohibition.

Governor's Removal Powers

Section 5 of the bill provides for the appointment of new license commissioners by May 30, 2014, thus cutting off the terms of the existing license commissioners. In *Schisler v. State*, 394 Md. 519 (2006), the Court of Appeals found that legislation terminating the terms of members of the Public Service Commission unconstitutionally interfered with the Governor's removal powers. *Id.* at 583, 596. It is our view, however, that unlike *Schisler*, these bills do not unconstitutionally interfere with the Governor's removal power because the mode of appointment is unchanged and nothing in the statute would prevent the Governor from reappointing one or more of the existing commissioners if he wished to do so, subject, of course, to the confirmation of the Senate.

Suggestions for Corrections in Future Legislation

The bills permit the Board to waive distance restrictions for churches and schools in two defined areas. The second area is described as being bounded by West Cross Street on the west, Clifford Street on the north, Scott Street on the east, and Carroll Street on the south. Page 5, lines 30-32. According to Mapquest, however, Clifford Street does not run all the way to West Cross Street but stops at South Amity Street leaving a gap in the

border of the area described. If our understanding is correct, it may be desirable to address this in future legislation.

The "resign to run" provision of the bills are defective and unlikely to achieve their purpose of preventing current employees *and* members of the Board from running for elected office. The bills provide, at Page 11, line 12:

> (i) On filing a certificate of candidacy for election to a public office or within 30 days before the filing deadline for the primary election for the public office sought, whichever occurs later, an individual who is a member of the Board or an employee of the Board shall certify to the City Board of Elections under oath that the individual is no longer a member of the Board.
>
> (ii) The certification shall be accompanied by a letter addressed to the Governor containing the resignation of the member of the Board

The effect is that an employee who decides to run for office must certify that he or she is no longer a member of the Board. While this would not be difficult, it would not seem to achieve the aim of the provision, which presumably is that a person not be employed by the Board while running for political office. We would recommend that this be addressed in a future legislative session.

Finally, the bills require that the City Solicitor review regulations proposed by the Board to ensure that the regulations comply with the authority granted to the Board by the State. Page 12, line 29. They further provide that the Board "shall . . . use as needed the advice of the Baltimore City Law Department." Page 13 line 33. This would appear to conflict with current law at State Government ("SG") Article § 6-107(a)(2), which provides that the "Attorney General is the legal adviser of and shall represent and otherwise perform all legal work for . . . the Board of Liquor Commissioners of Baltimore City." To the extent that they are inconsistent, the bills, as the more recent enactment, repeal the earlier enactment by implication. *Farmer & Merchants Bank of Hagerstown v. Schlossberg*, 306 Md. 48, 61 (1986). It is advisable to amend or repeal SG § 6-107(a)(2) to be consistent with these bills.

Additional Comments

We conclude with a few additional observations. The bills provide that the Governor shall appoint all of the members of the Board, and that the appointments shall be made:

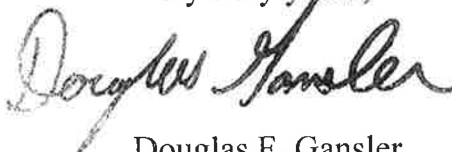
1. If the Senate is in session, with the advice and consent of the Senate; or

2. If the Senate is not in session, by the Governor alone.

Page 18, lines 3-7. This provision tracks the language of Article 2B, § 15-101(a)(1) in current law, which governs the appointment of Boards of License Commissioners in any county where no other provision has been made. Despite the reference to "the Governor alone," this provision has been interpreted to require the advice and consent of the Senate once they are back in session. 88 *Opinions of the Attorney General* 136 (2003).

Finally, Section 7 of the bills provides that Section 3 of the Act will take effect when House Bill 270 takes effect, or will become abrogated if House Bill 270 does not take effect. House Bill 270 has been signed into law as Chapter 94 and takes effect October 1, 2014. Therefore, if signed, these bills will take effect on that same date.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/KMR/eb

cc: The Honorable Verna Jones-Rodwell
The Honorable Talmadge Branch
The Honorable Curt Anderson
The Honorable John P. McDonough
Jeanne D. Hitchcock
Karl Aro

COMMERCE CLAUSE – DISCRIMINATION AGAINST INTERSTATE COMMERCE – FARMERS' MARKET WINE PERMIT

Bill/Chapter: House Bill 600/Chapter 414 of 2014

Title: Alcoholic Beverages – Farmers' Market Permit – Establishment

Attorney General's Letter: April 28, 2014

Issue: Whether a bill establishing a farmers' market permit that requires all wine offered for sale or sampling be wine manufactured and processed in the State violates the Commerce Clause of the U.S. Constitution.

Synopsis: House Bill 600/Chapter 414 of 2014 authorizes the Comptroller to issue a farmers' market permit to a holder of a license other than a Class 4 limited winery license under specified circumstances. All wine offered for sale or samplings by the permit holder is required to be the product of a Class 4 limited winery, thereby limiting the sales to Maryland wines.

Discussion: Article I, § 8 of the U.S. Constitution reserves for the U.S. Congress the power to regulate interstate commerce. Courts have held that a law that discriminates against interstate commerce is subject to strict scrutiny and may only be upheld by a showing that the state has no other means to advance a legitimate local purpose.

The Attorney General noted that the provision limiting sales or samples to products of a Class 4 limited winery effectively limits sales at farmers' markets by these retailers to selling only Maryland wines. Citing prior bill review letters advising that provisions limiting festivals to wine or beer that is manufactured and processed in Maryland violate the Commerce Clause, the Attorney General concluded that the legislation's restriction of sales and samples to Maryland wines was unconstitutional and should not be given effect. The Attorney General noted, however, that the purposes of the legislation – promotion of Maryland wine and beer and of tourism – can be accomplished even if other wines or beers are sold as well.

Drafting Tips: **If asked to draft legislation that authorizes the sale of a product restricted to one produced by an in-state entity, the drafter should advise the sponsor that the bill may violate the Commerce Clause by discriminating against interstate commerce. The drafter should discuss with the sponsor whether there are alternative ways to encourage the economic activity at issue in a manner that will achieve the desired legislative objective without discriminating against interstate commerce.**

Douglas F. Gansler
ATTORNEY GENERAL

Katherine Winfree
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ASSISTANT ATTORNEYS GENERAL

THE ATTORNEY GENERAL OF MARYLAND

OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 28, 2014

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 2 1401-1991

RE: House Bill 600, "Alcoholic Beverages – Farmers' Market Permit – Establishment"

Dear Governor O'Malley:

We have reviewed House Bill 600, "Alcoholic Beverages – Farmers' Market Permit – Establishment" for constitutionality and legal sufficiency. While we approve the bill, we write to point out an unconstitutional provision, which should not be enforced.

House Bill 600 reinstates a farmers' permit provision that was deleted from the law by Chapter 396 of 2013, which created the winery off-site permit and wine festival permit. The deleted provision, formerly codified as Article 2B, § 2-101(x) was apparently deleted because it was infrequently used. In the intervening year, however, it appears that at least one farmers' market that had wine sales under the previous provision has been unable to attract a winery to sell at their market under the new law. House Bill 600 reinstates the prior provisions, in their entirety, allowing the issuance of a farmers' market permit to a holder of any local license that allows the holder to sell alcoholic beverages to the public for consumption off the licensed premises.

The last two lines of the bill, which were also contained in the law prior to 2013, provide that all wine offered for sale or sampling under the farmers' market permit shall be the product of a Class 4 limited winery. This provision effectively limits sales at farmers' markets by these retailers to selling only Maryland wines.

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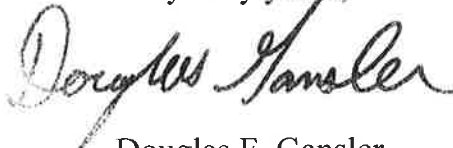
In past years, we have advised that provisions limiting festivals to wine or beer that is manufactured and processed in Maryland are unconstitutional as violative of the Commerce Clause of the United States Constitution. Opinion No. 93-012 (March 29, 1993); Bill Review Letter on House Bill 749 and Senate Bill 767 of 2013; Bill Review Letter on House Bill 198 of 1995; Bill Review Letter on House Bill 95 of 1993; Bill Review Letter on House Bill 276 of 1991; Bill Review Letter on House Bills 1146 and 1353 of 1990. No changes in the law since that time would alter this view.

In the past, we have concluded that Maryland wine only or Maryland beer only provisions in festival bills are severable from the remainder of the bill as the purposes of the bills – promotion of Maryland wine and beer and of tourism – can be accomplished even if other wines or beers may be sold as well. We think the same applies to farmers' markets. As a result, we do not recommend veto of the bills. The requirement that sales be limited to wines that are made by Class 4 limited wineries, however, cannot be given effect.[1]

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/KMR/eb

cc: The Honorable Eric Luedtke
The Honorable John P. McDonough
Jeanne D. Hitchcock
Karl Aro

[1] Of course, the fact that the State must allow such sales does not mean that farmers' markets must allow sales by persons who will not limit their sales consonant with the intention and atmosphere of the farmers' market.

COMMERCE CLAUSE – ALCOHOLIC BEVERAGES LICENSES – RESIDENCY REQUIREMENTS

Bill/Chapter: House Bill 1170/Chapter 644 of 2014

Title: Harford County – Alcoholic Beverages – Residency Requirements

Attorney General's Letter: April 28, 2014

Issue: Whether a bill that relaxes, but does not eliminate, residency requirements for certain alcoholic beverages license applicants in Harford County violates the Commerce Clause of the U.S. Constitution.

Synopsis: House Bill 1170/Chapter 644 of 2014 repeals the requirement that an individual applying on behalf of certain business entities for a Class B restaurant or a Class D tavern license in Harford County must be a resident of Harford County. Instead, the bill requires the individual to be a resident of the State and to reside within a 100-mile radius of the Town of Bel Air – an area which includes all of Harford County as well as portions of other counties.

Discussion: Article I, § 8 of the U.S. Constitution reserves for the U.S. Congress the power to regulate interstate commerce. A law violates the Commerce Clause if it purposely favors local businesses over out-of-state competitors. States may enact legislation that incidentally impacts interstate commerce, however, provided the legislation represents an evenhanded effort to effectuate a legitimate State interest.

In reviewing House Bill 1170/Chapter 644, the Attorney General cautioned that courts are increasingly rejecting residency requirements for alcoholic beverages and other business licenses on Commerce Clause grounds. The Attorney General noted, however, that House Bill 1170 actually relaxes existing residency requirements for alcoholic beverages licenses in Harford County, and thus does not increase any unconstitutionality of the current law. While the Attorney General did not recommend vetoing the legislation, the Attorney General did warn that residency requirements such as the ones found in the bill might be held unconstitutional in the future.

Drafting Tips: **If asked to draft legislation imposing residency requirements on applicants for alcoholic beverages or other business licenses, the drafter should work with the sponsor to ensure that the residency requirements serve legitimate governmental interests. Although legislation that relaxes existing residency requirements is less problematic than legislation strengthening or imposing new residency requirements, the**

drafter should advise the sponsor that such legislation may not be sufficient to resolve underlying constitutional issues in the law.

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OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 28, 2014

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

RE: House Bill 1170, "Harford County – Alcoholic Beverages – Residency Requirements"

Dear Governor O'Malley:

We have reviewed House Bill 1170, "Harford County - Alcoholic Beverages - Residency Requirements," for constitutionality and legal sufficiency. Because House Bill 1170 relaxes existing residency requirements, and thus does not increase any unconstitutionality of the current law, we do not recommend veto of the bill.

Under current law, an applicant for an alcoholic beverages license in Harford County must be a resident of the County for at least one year prior to the filing of the application and must remain a resident as long as the license is in effect. House Bill 1170 changes this requirement for an applicant who acts on behalf of a partnership, an association, a limited liability company, a sole proprietorship, or a club or corporation, whether incorporated or unincorporated, requiring an applicant for a Class B restaurant or Class D Tavern license to be a resident of the State for at least one year before the filing of the application and to remain a resident as long as the license is in effect, and further requiring that the applicant reside within a 100-mile radius of the Town of Bel Air. An applicant for a license other than a Class B restaurant or Class D tavern license must be a resident of Harford County for one year before the filing of the application and must remain a resident as long as the license is in effect, and also must reside within a 100-mile radius of the Town of Bel Air. These provisions expand the area in which an applicant for a Class B restaurant or Class D tavern license may reside, but has no affect on applicants for other licenses, as there is no part of Harford County that is not within 100 miles of Bel Air. House Bill 1170 also amends a provision that requires that one

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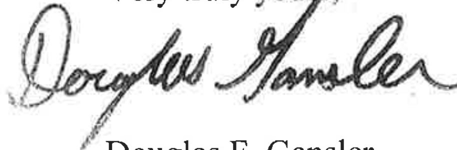
applicant on behalf of a corporation or limited liability company be a responsible operator of the licensed establishment who has been a resident of the County and remain a resident of the County as long as the license is in effect. The amendment requires that the person be and remain a resident of the State and reside within a 100-mile radius of the Town of Bel Air. This provision also expands the current permissible area of residency.

In recent years, this office has noted a trend in which courts have rejected residency requirements for alcoholic beverages and other licenses. Bill Review Letter on House Bill 482 and Senate Bill 656 of 2006; Letter to the Honorable Jamie Raskin dated March 24, 2014; Letter to the Honorable Brian E. Frosh dated August 26, 2009. While it continues to be our view that it is entirely possible that residency requirements such as the ones in this bill will be found to be unconstitutional in the future, we cannot yet say that they are clearly unconstitutional. Furthermore, because House Bill 1170 expands the area where an applicant may reside in some circumstances, it does not increase any unconstitutionality of current law, and, therefore, we would not recommend veto of this bill.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable John P. McDonough
Jeanne D. Hitchcock
Karl Aro

SUBSTANTIVE DUE PROCESS – INVOLUNTARY ADMINISTRATION OF MEDICATION

Bill/Chapter: Senate Bill 620/Chapter 314 of 2014 and House Bill 592/Chapter 315

Title: Mental Health – Approval by Clinical Review Panel of Administration of Medication – Standard

Attorney General's Letter: May 2, 2014

Issue: Whether a bill expanding the circumstances under which a hospital may involuntarily administer psychiatric medication to an individual with a mental disorder who is hospitalized involuntarily or committed by a court for treatment violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.

Synopsis: Senate Bill 620/Chapter 314 and House Bill 592/Chapter 315 of 2014 expand the circumstances under which a clinical review panel of a hospital may approve the involuntary administration of psychiatric medication to an individual with a mental disorder who has been hospitalized involuntarily or committed by a court to the hospital for treatment. The bills authorize the administration of medication over the objection of an individual if the individual is at substantial risk of continued hospitalization because of remaining seriously mentally ill with the symptoms that (1) cause the individual to be a danger to self or others while in the hospital, (2) resulted in the individual being committed to the hospital, or (3) would cause the individual to be a danger to self or others if released from the hospital.[1]

Discussion: The Attorney General reviewed a trio of cases in which the Supreme Court established that individuals have a liberty interest protected by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution in avoiding unwanted psychiatric medication. This liberty interest must be balanced, however, against the State's interest in medicating the individual to determine whether requirements of substantive due process are met. Administering medication without the consent of an individual does not violate the Constitution if there is a finding of overriding justification and a determination of medical appropriateness. In these cases, the Supreme Court generally established that medication may be administered involuntarily to an individual to provide medically appropriate treatment, to protect prison staff and other inmates, or to restore an individual's competency to stand trial if necessary to further important governmental trial-related interests.

[1] The legislation sought to remedy limitations in current law established by *Department of Health and Mental Hygiene v. Kelly*, 397 Md. 399, 416 (2007). In *Kelly*, the Court of Appeals held that under the statute that governs the administration of medication without consent, an individual may not be medicated involuntarily unless the individual is a danger to self or others while in the hospital.

The Attorney General acknowledged that these cases do not state or suggest that State interests other than those that were specifically examined by the Supreme Court might also justify involuntary medication. The Attorney General concluded, however, that the State's statutory obligation to treat patients in its hospitals and its obligation to provide care in the most integrated setting provide a similarly overriding justification for the involuntary administration of medication under the circumstances allowed under the legislation. The legislation furthers these interests by allowing the administration of medication to individuals who otherwise would be untreated and confined to the hospital for a lengthy period of time, if not indefinitely. According to the Attorney General, therefore, the bills are not clearly unconstitutional.

Drafting Tips: **If asked to draft legislation that allows the involuntary administration of medication to an individual, the drafter should advise the sponsor that an individual has a liberty interest protected by the Due Process Clause of the Fourteenth Amendment to avoid the unwanted administration of medication. To survive a substantive due process challenge, the involuntary administration of medication under the legislation must have an overriding justification and be medically appropriate for the individual.**

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Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND

OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 2, 2014

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

Re: House Bill 592 and Senate Bill 620, "Mental Health – Approval by Clinical Review Panel of Administration of Medication – Standard"

Dear Governor O'Malley:

House Bill 592 and Senate Bill 620 make identical changes to section 10-708 of the Health-General ("HG") Article to expand the circumstances under which a hospital may medicate a patient involuntarily admitted under title 10 of the Health-General Article or committed by a court under title 3 of the Criminal Procedure Article. We have determined that the bills are not clearly unconstitutional and, therefore, are appropriate for your approval. We write, however, because it is likely that there will be challenges to the constitutionality of new sections 10-708(g)(3)(i)(2) and (3), as well as (g)(3)(ii)(2) and (3).

Background

Currently, section 10-708 of the Health-General Article describes the circumstances under which a psychiatric patient may be medicated without the patient's consent and the process for determining whether medication without consent is appropriate. First, the patient must be an involuntary admission or committed by a court for treatment. For those patients who refuse to consent to take prescribed medication, a panel consisting of the facility's clinical director or designee, a psychiatrist, and a mental health professional other than a physician may approve the administration of medication without the patient's consent if it determines the following:

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> (1) The medication is prescribed by a psychiatrist for the purpose of treating the individual's mental disorder;
>
> (2) The administration of medication represents a reasonable exercise of professional judgment; and
>
> (3) Without the medication, the individual is at substantial risk of continued hospitalization because of:
>
> > (i) Remaining seriously mentally ill with no significant relief of the mental illness symptoms that cause the individual to be a danger to the individual or to others;
> >
> > (ii) Remaining seriously mentally ill for a significantly longer period of time with mental illness symptoms that cause the individual to be a danger to the individual or to others; or
> >
> > (iii) Relapsing into a condition in which the individual is in danger of serious physical harm resulting from the individual's inability to provide for the individual's essential human needs of health or safety.

Md. Code Ann., Health-Gen'l § 10-708(g) (Supp. 2013).

In *Department of Health and Mental Hygiene v. Kelly*, 397 Md. 399, 416 (2007), the Court of Appeals held that sections 10-708(g)(3)(i) and (ii) required a showing that the patient "is, because of his mental illness, dangerous to himself or others in the context of his confinement within the institution" before the patient may be medicated without the patient's consent.[1] Since the *Kelly* decision, State hospitals have not been able to medicate without consent patients who were admitted to the hospital involuntarily under title 10 of the Health-General Article or committed by a court under title 3 of the Criminal Procedure Article, but who do not exhibit in the hospital any dangerous

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[1] The *Kelly* case was decided exclusively on statutory grounds. Although Mr. Kelly raised constitutional issues in his appeal, the Court of Appeals expressly declined to address them "[b]ecause we decide this case on a non-constitutional ground." 397 Md. at 418 n.6.

behavior due to their mental disorder. Without treatment, it is unlikely that certain patients will be able to leave the hospital because they continue to exhibit the same symptoms of serious mental illness that caused them to be involuntarily admitted or committed.

To address this inability to treat certain patients, HB 592 and SB 620 amend section 10-708(g)(3)(i) and (ii) to allow a clinical review panel to authorize the involuntary administration of medication because the patient is at substantial risk of continued hospitalization because the patient remains seriously mentally ill and:

- The mental illness causes the patient to be a danger to self or others in the hospital;
- The patient still exhibits the symptoms of the mental illness that caused the patient to be involuntarily admitted or committed by a court; or
- The patient still exhibits symptoms of mental illness that would cause the patient to be a danger to self or others if released from the hospital.

HB 592 at 2-3; SB 620 at 2-3.

Constitutionality of HB 592/SB 620

In a trio of cases, the United States Supreme Court established that individuals have a liberty interest protected by the Fourteenth Amendment to the United States Constitution in avoiding unwanted psychiatric medication. That liberty interest must be balanced, however, against the State's interest in medicating the individual to determine whether the requirements of substantive due process are met. *See Sell v. United States*, 539 U.S. 166 (2003); *Riggins v. Nevada,* 504 U.S. 127 (1992); *Washington v. Harper,* 494 U.S. 210 (1990). If there is "a finding of overriding justification and a determination of medical appropriateness," medication without the consent of the individual does not violate the Constitution. *Riggins*, 504 U.S. at 135.

In *Harper,* state policy allowed medication of mentally ill inmates without their consent if the inmates presented a danger to themselves or others. The Court found "overriding justification" for that policy in the State's "obligation to provide inmates with medical treatment consistent with the inmates' medical needs" as well as the obligation to take reasonable measures to protect the prison staff and the inmates. 494 U.S. at 225. In *Riggins*, the Court suggested that Nevada "might have been able to justify medically appropriate, involuntary treatment . . . by establishing that it could not obtain an adjudication of Riggins' guilt or innocence by using less intrusive means." 504 U.S. at 135. Finally, in *Sell*, the Court held that, under certain circumstances, the Constitution permits the government to medicate a criminal defendant involuntarily to restore competency to stand trial if it "is necessary significantly to further important governmental trial-related interests." 539 U.S. at 179. Together, these cases stand for the proposition that a mentally ill inmate's right to refuse medication may constitutionally be overcome by certain overwhelming state interests.

None of these cases states or even suggests that State interests other than those before the Court might also justify involuntary medication. Nonetheless, it is our view that the State's statutory obligation to treat patients in its hospitals[2] and its obligation to provide care in the most integrated setting[3] provide a similarly "overriding justification" for the involuntary administration of medication under the limited circumstances allowed

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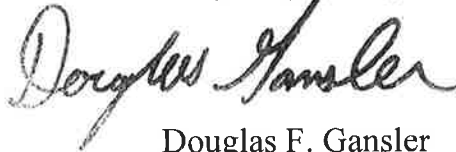
[2] The State has a statutory and constitutional obligation to treat patients in its facilities. *See Youngberg v. Romeo*, 457 U.S. 307, 319 (1982); Md. Code Ann., Crim. Proc. §§ 3-106, 3-112(a); Md. Code Ann., Health-Gen'l § 10-204(b). *See also Williams v. Wilzack*, 319 Md. 485, 494 (1990) ("Manifestly, the institution is charged with a statutory duty to treat Williams for his mental disorder to permit him to rejoin society."). The bill's amendments to section 10-708 further the State's interest and obligation to treat patients in its facilities by allowing, in limited circumstances, the involuntary medication of patients who otherwise would be untreated and confined to the hospital indefinitely.

[3] The State also has an established policy of providing care in the most integrated setting feasible and of limiting inpatient admissions to those most in need of inpatient care and treatment. *See* Md. Code Ann., Hum. Serv. § 7-132; 2012-2015 State Disabilities Plan (available at www.mdod.maryland.gov/uploadedFiles/Publications/2012-2015%20State%20Disabilities%20Plan%20for%20IADB%20Approved%20Final.pdf); FY 2014 Annual State Mental Health Plan (www.mdod.maryland.gov/uploadedFiles/Publications/2012-2015%20State%20Disabilities%20Plan%20for%20IADB%20Approved%20Final.pdf. The amendments to section 10-708 promote that policy by allowing involuntary medication if the lack of treatment would mean a lengthy hospitalization.

by HB 592 and SB 620. Therefore, it is our view that HB 592 and SB 620 are not clearly unconstitutional.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/DF/kk

cc: The Honorable Delores G. Kelley
The Honorable Dan K. Morhaim
The Honorable John P. McDonough
Jeanne D. Hitchcock
Karl Aro

Due Process – Applying New Statute of Limitations and Limitation of Remedies to Accrued Causes of Action

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Bill/Chapter:	House Bill 274/Chapter 592 and Senate Bill 708 of 2014
Title:	Residential Property – Statute of Limitations for Certain Specialties and Motion for Certain Deficiency Judgments
Attorney General's Letter:	April 28, 2014
Issue:	Whether bills that apply a new statute of limitations or limit certain remedies to civil causes of action that have already accrued violate due process or constitute a taking of property.

Synopsis:

House Bill 274/Chapter 592 and Senate Bill 708 of 2014 reduce the time period allowed for the filing of a civil action, from 12 years to 3 years, for an action to collect the unpaid balance due on a deed of trust, a mortgage, or a promissory note that has been signed under seal and secures or is secured by owner-occupied residential property. In addition, the bills authorize a secured party, or an appropriate party in interest, within 3 years after the final ratification of the auditor's report following a foreclosure sale, to file a motion for a deficiency judgment if the proceeds of the sale, after deducting all costs and expenses allowed by the court, are insufficient to satisfy the debt and accrued interest. The filing of a motion for deficiency judgment as specified in the bills constitutes the sole post-ratification remedy available to a secured party or party in interest for breach of a covenant contained in a deed of trust, mortgage, or promissory note that secures or is secured by owner-occupied residential property.

The bills apply prospectively to any cause of action that arises on or after July 1, 2014. Under the bills, a cause of action to collect the unpaid balance due on a deed of trust, mortgage, or promissory note on owner-occupied residential property that accrues before July 1, 2014, and that is not otherwise barred, must be filed within 12 years after the date the action accrues or before July 1, 2017, whichever occurs first. A motion for deficiency judgment on owner-occupied residential property for which an auditor's report has final ratification before July 1, 2014, and that is not otherwise barred, must be filed within 3 years after the date of the final ratification or before July 1, 2017, whichever occurs first.

Discussion:

The Attorney General noted that the Court of Appeals has long held that the shortening of a statute of limitations may not be applied so as to preclude an opportunity to bring suit. The court has recognized that the General Assembly has the power to alter the length of the period of a statute of limitations so long as there is a reasonable period following the effective

date of the legislation within which to assert pre-existing claims. The Attorney General concluded that the application of the new limitations period to accrued cases, as prescribed in the bills, conforms to the manner in which the court would likely interpret and apply the bills had the legislation been silent on this issue. Consequently, the bills are not unconstitutional.

Turning to the bills' provisions that make a motion for a deficiency judgment in a foreclosure action the sole post-ratification action available for recovery of a deficiency, the Attorney General noted that the Court of Appeals has held that the General Assembly may retroactively abrogate a remedy for the enforcement of a property or contract right when an alternative remedy is open to the plaintiff. The Attorney General opined that the motion for a deficiency judgment is a sufficient alternate remedy and, therefore, the elimination of an action for breach of contract does not deprive any person of a vested right. Moreover, as the remedies are sufficiently similar, elimination of one remedy does not substantially impair and lessen the value of contracts and does not impair contracts in violation of the Contract Clause of the U.S. Constitution.

Drafting Tips: **A drafter must be aware that both the federal and State constitutions provide that a person's property or liberty rights may not be taken without due process. In the context of legislation that shortens a statute of limitations period, due process prohibits the shortening of the period so as to preclude any opportunity to bring suit and requires that a claimant be afforded a reasonable period following the effective date of the legislation within which to assert pre-existing claims. If working on legislation that limits the remedy for the enforcement of a property or contract right, the drafter should be aware that due process requires that an alternative remedy remain open to the plaintiff.**

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Dan Friedman
Counsel to the General Assembly

Sandra Benson Brantley
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Kathryn M. Rowe
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND

OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 28, 2014

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

RE: House Bill 274 and Senate Bill 708, "Residential Property – Statute of Limitations for Certain Specialties and Motion for Certain Deficiency Judgments"

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality House Bill 274 and Senate Bill 708, identical bills entitled "Residential Property – Statute of Limitations for Certain Specialties and Motion for Certain Deficiency Judgments." In approving the bills, we have considered whether the application of the new statute of limitations and the limitation of post-ratification remedies to causes of action that have already accrued would violate due process or constitute a taking of property and we have concluded that it would not.

House Bill 274 and Senate Bill 708 amend Courts and Judicial Proceedings Article, § 5-102, which sets a twelve year statute of limitations for specialties to exclude an action on a "deed of trust, mortgage, or promissory note that has been signed under seal and secures or is secured by owner-occupied residential property." The effect of this change is to make the default statute of limitations of three years applicable in these cases. The bills also specify that a motion for a deficiency judgment after a foreclosure on owner-occupied residential property must be filed within three years after the ratification of the auditor's report, as is now stated in Maryland Rule 14-216, and further provide that the filing of a motion for deficiency judgment "shall constitute the sole post-ratification remedy available to a secured party or party in interest for breach of a covenant contained in a deed of trust, mortgage, or promissory note that secures, or is secured by owner-occupied residential property."

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The bills contain four uncodified sections governing the application of the new limits to accrued, pending, and future cases. Section 3 provides that the change in the statute of limitations on certain types of specialties that secure or are secured by owner-occupied residential property from twelve years to three years applies prospectively to any cause of action that arises on or after the effective date of the bills, which is July 1, 2014. Section 4 provides that, with respect to a cause of action that arose before July 1, 2014 and is not already barred by that date, the twelve year statute of limitations will apply if the twelve years will expire before July 1, 2017, and if the twelve years would expire after July 1, 2017 the case must be filed by that date. Thus, cases that have already accrued must be filed within their original statute of limitations or three years from the effective date of the bill, whichever is shorter.

Section 5 of the bills provides that the establishment of a motion for deficiency judgment as the sole post-ratification remedy applies prospectively to any motion for that is filed on or after the effective date of the bills. Section 6 specifies that a motion for a deficiency on a deed of trust, mortgage, or promissory note that secures or is secured by residential property that was owner-occupied residential property at the time the order to docket or complaint to foreclose was filed and for which an auditor's report has final ratification before July 1, 2014, and that is not barred by the three year statute of limitations under Maryland Rule 14-216, must be filed within three years of final ratification or by July 1, 2017 whichever is earlier. Because the three year statute of limitation was retained for these actions, Section 6 has no effect at all.

The Court of Appeals has long held that the shortening of a statute of limitations may not be applied so as to preclude any opportunity to bring suit. *Allen v. Dovell*, 193 Md. 363, 364 (1949); *Kelch v. Keehn*, 183 Md. 140, 145 (1944); *Manning v. Carruthers*, 83 Md. 1, 8 (1896); *Garrison v. Hill*, 81 Md. 551, 557 (1895); *State v. Jones*, 21 Md. 432, 437 (1864). As a result, the Court has refused to construe alterations to the statute of limitations to have this effect. *Taggart v. Mills*, 180 Md. 302, 306 (1942); *Ireland v. Shipley*, 165 Md. 90, 99 (1933); *Frye v. Kirk*, 4 G&J 509, 521 (1832). Recognizing, however, that a statute of limitations that does not act to completely preclude the opportunity to file suit is procedural, *Allen v. Dovell*, 193 Md. at 363; *Kelch v. Keehn*, 183 Md. at 147; *Ireland v. Shipley*, 165 Md. at 99, the Court has recognized that the General Assembly has the power to alter the length of the period so long as there is a reasonable period following the effective date of the legislation within which to assert pre-existing claims, *Geisz v. Greater Baltimore Medical Center*, 313 Md. 301, 320 (1988); *Allen v. Dovell*, 193 Md. at 364; *Garrison v. Hill*, 81 Md. at 557; *State v. Jones*, 21 Md. at 437. Where the General Assembly has not made specific provision for the application of a

shortened statute of limitations to existing cases, the Court has interpreted statutes to require the new time period to run from the effective date of the law. *Allen v. Dovell*, 193 Md. 359; *Kelch v. Keehn*, 183 Md. at 145; *Ireland v. Shipley*, 165 Md. at 99; *Manning v. Carruthers*, 83 Md. at 8; *Garrison v. Hill*, 81 Md. at 557. These cases uniformly describe this interpretation as prospective. *Id.*

The application of the new limitations period in House Bill 274 and Senate Bill 708 does not eliminate any cause of action, but gives the claimant, in each case, either the full benefit of the previous twelve year period, or the full three years of the new three year limitations period running from the effective date of the bills, which is precisely how the Court would likely interpret and apply the bills if they were silent. For that reason, it is my view that the application of the new limitations period to accrued cases, as prescribed in the bills, is not unconstitutional.

House Bill 274 and Senate Bill 708 also make a motion for deficiency judgment in the foreclosure action the sole post-ratification action available for recovery of a deficiency, effectively eliminating the ability to bring a contract action for breach of the promise to repay in the promissory note after foreclosure after July 1, 2014. The two remedies are similar, however, in terms of what must be shown—that the person entered into a contract to pay the money and did not pay it—and in terms of what can be recovered—the amount owed, less any that was recovered as a result of the foreclosure.

The Court of Appeals has 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). As a result, "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). It is our view that a motion for a deficiency judgment is a sufficient alternate remedy and therefore, the elimination of the contract action does not deprive any person of a vested right. The fact that the remedies are sufficiently similar that elimination of one does not substantially impair and lessen the value of the contract also means that the change does not impair contracts in violation of the Contract Clause of the United States Constitution. *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

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

Neither *Muskin v. State Department of Assessments and Taxation*, 422 Md. 544 (2011) nor *Maryland v. Goldberg*, 437 Md. 191 (2014) is to the contrary. In *Muskin*, the Court of Appeals found that the portion of Chapter 290 of 2007 that provided for the extinguishment of a residential ground lease if it was not registered be September 30, 2010 as required by the bill, abrogated vested rights and thus was invalid under Article 24 of the Maryland Declaration of Rights and Article III, § 40 of the Maryland Constitution. Specifically, the Court found that while the three years for registration provided by the bill provided fair notice, the law impermissibly impacted the reasonable reliance and settled expectations of ground rent owners. The Court in *Muskin* expressly recognized that the Legislature has the power to alter the rules of evidence and remedies including the shortening of a statute of limitations or substitution of another remedy, but found that the statute in question neither established a remedy or a rule of evidence, but rather, "when applied to vested rights in existence at the time the statute was enacted, . . . eliminated all remedies." That is simply not the case with respect to House Bill 274 and Senate Bill 708, which leave a remedy in place that is equivalent to the one that is eliminated.

In *Goldberg*, the Court of Appeals held that Chapter 286 of 2007, which eliminated the remedy of re-entry through ejectment in residential ground rent cases and substituted lien and foreclosure as a means of reclaiming the property retrospectively abrogated vested rights and was invalid. Specifically, the Court, relying on *Muskin*, held that the right to re-enter and take possession of a property in the event of a default on the ground lease was a vested right that could not be taken away. The Court further found

that the foreclosure and lien remedy provided by Chapter 286 did not provide the same safeguards for leaseholders as the ejectment remedy did. The ejectment remedy returned the right of present possession to the ground leaseholder, terminating the ground lease so that the holder owned the property in fee simple, and also permitted the recovery of rents due prior to the termination of the lease. The foreclosure and lien remedy, on the other hand, did not provide any judicial remedy to terminate the lease and return the right of present possession to the ground leaseholder. Thus, it was not an effective replacement for ejectment. This conclusion, however, was based on the "unique nature of the right of re-entry." It did not alter the law with respect to the authority of the General Assembly to amend or substitute remedies. Moreover, nothing about the contract remedy for breach of promise to repay is comparable to the status of ejectment as a property right. In fact, the elements of a contract action and a motion for a deficiency judgment are very similar, as is the relief available. Thus, it is our view that the changes made by House Bill 274 and Senate Bill 708 do not abrogate vested rights.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable John P. McDonough
Jeanne D. Hitchcock
Karl Aro

DUE PROCESS CLAUSE – TAX LIENS COLLECTED THROUGH TAX SALE – RECORDATION OF LOAN GIVING RISE TO THE LIEN

Bill/Chapter: Senate Bill 186/Chapter 472 and House Bill 202/Chapter 473 of 2014

Title: Clean Energy Loan Programs – Private Lenders – Collection of Loan Payments

Attorney General's Letter: April 28, 2014

Issue: Whether a bill prioritizing a tax lien collected through a tax sale without providing for any recordation of the loan giving rise to the lien violates the due process requirements of the U.S. and Maryland Constitutions.

Synopsis: Senate Bill 186/Chapter 472 and House Bill 202/Chapter 473 of 2014 authorize a private lender to provide capital for a loan to a commercial property owner under a local clean energy loan program. Current law allows the loan payments to be collected as a surcharge on the property tax bill for the improved property. Senate Bill 186 and House Bill 202 provide that if the payments are not timely paid, the surcharge will be collectable as a tax lien through the tax sale process authorized under Title 14, Subtitle 8 of the Tax-Property Article, making the unpaid surcharge a first lien on the property.

Discussion: Under the due process mandates of the U.S. and Maryland Constitutions, noted the Attorney General, a person is entitled to reasonable notice and an opportunity to respond before being deprived of a property right by governmental action.

The Attorney General stated that a due process concern does not exist under the current statute for lien holders when a loan was issued under a clean energy loan program because the lien holders had to consent before the loan debt could jump ahead of the debt of those creditors on default of the loan. Thus, sufficient notice was given to the other lenders.

The Attorney General distinguished the tax collection process established by Senate Bill 186 and House Bill 202, however, because the tax collection process does not have a recordation requirement and, therefore, a subsequent lender would not be given notice that the loan security would not maintain its dominance under certain circumstances.

The Attorney General recommended that, to resolve any due process issues with Senate Bill 186 and House Bill 202, a local government that establishes a clean energy loan program through an ordinance or resolution should

include in its ordinance or resolution a recordation requirement that associates the loan with the property and includes notice of the special collection status of the loan.

Drafting Tips: **When drafting a bill that changes the priority of liens on property, due process concerns dictate that the drafter should include proper notice, such as a recordation requirement, to parties impacted by the change.**

Douglas F. Gansler
Attorney General

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Chief Deputy Attorney General

John B. Howard, Jr.
Deputy Attorney General

Dan Friedman
Counsel to the General Assembly

Sandra Benson Brantley
Jeremy M. McCoy
Kathryn M. Rowe
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND

OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 28, 2014

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

RE: House Bill 202 and Senate Bill 186, "Clean Energy Loan Programs – Private Lenders – Collection of Loan Payments"

Dear Governor O'Malley:

House Bill 202 and its crossfile, Senate Bill 186, are identical and could be signed in either order. The bills amend a pre-existing statutory loan program titled Clean Energy Loan Programs, which is codified in Local Government Article ("LG"), Title 1, Subtitle 11. That Subtitle authorizes local governments to enact an ordinance or resolution to establish such a program that is designed to finance energy efficiency and renewable energy projects. Current law allows the loan payments to be collected as a surcharge on the property tax bill for the improved property. LG § 1-1105. House Bill 202 and Senate Bill 186 go a step further and provide that if the payments are not timely paid, the surcharge will be collectable as a tax lien through the tax sale process authorized under Tax-Property Article, Title 14, Subtitle 8, despite that the lender may be a private party. As a result, the unpaid surcharge will become a first lien on the property that could become superior to other liens on the property. The bills require any existing lien holder on the property to consent to this collection process, but do not provide for any recordation of a loan under this program that indicates this first lien superiority. Thus, we have considered whether a constitutional due process issue is raised for subsequent lenders.

Under due process, a person is entitled to reasonable notice and opportunity to respond before being deprived of a property right by governmental action. *VNA Hospice v. Department of Health and Mental Hygiene*, 406 Md. 584, 603-04 (2008). No due process problem is presented for the lien holders existing when a loan is issued under the Clean Energy Loan Program because they must consent before the clean energy loan debt

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could jump ahead of the debt of those creditors upon default of the loan. Therefore, under the loan issuance process other lenders are given sufficient notice. The tax collection process created by these bills for that first lien, however, could put the security for a subsequent loan in serious jeopardy, denying that lender of its right of redemption in the property. Yet, because there is no recordation requirement, a subsequent lender is not given notice that its loan security will not maintain its primacy under certain circumstances. That lack of recordation could be construed as a constitutional violation.

To resolve any due process issue with House Bill 202 and Senate Bill 186, therefore, we make the following recommendation should these bills be signed. Under current law, if a local government establishes a Clean Loan Program, it is to do so in an ordinance or resolution that provides the terms and conditions for participating in the program. LG § 1-1104(a). To ensure that its program is implemented in compliance with the mandates of the federal and Maryland Constitutions, including all due process requirements, the local government should include in its ordinance or resolution a recordation requirement that associates the loan with the property and includes notice of the special collection status of this loan. In this way, the program can be established as the legislature designed and without depriving subsequent lenders of any due process rights.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/SBB/kk

cc: The Honorable Brian Feldman
The Honorable Charles E. Barkley
The Honorable John P. McDonough
Jeanne D. Hitchcock
Karl Aro

FEDERAL PREEMPTION – ASSERTION OF PATENT INFRINGEMENT MADE IN BAD FAITH

Bill/Chapter: Senate Bill 585/Chapter 307 and House Bill 430 of 2014

Title: Commercial Law – Patent Infringement – Assertions Made in Bad Faith

Attorney General's Letter: April 30, 2014

Issue: Whether bills prohibiting a person from making an assertion of patent infringement against another in bad faith are preempted by federal patent law.

Synopsis: Senate Bill 585/Chapter 307 and House Bill 430 of 2014 prohibit a person from making an assertion of patent infringement in bad faith, with specified exceptions, and specify factors for a court to consider as evidence of whether a person has made an assertion of patent infringement in bad faith or in good faith.

Discussion: The U.S. Congress has the authority to issue a patent under Article I, § 8, cl. 8 of the U.S. Constitution, which grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Citing "scant but persuasive" authorities, the Attorney General noted that, for purposes of federal preemption, courts and analysts have distinguished an action based on a general assertion of patent infringement from an action based on an assertion of patent infringement made in bad faith. Since an assertion of patent infringement made in bad faith goes to the behavior of the entity asserting the patent, in contrast to a general assertion of patent infringement that goes to the validity of the patent itself, these authorities have concluded that a state tort claim prohibiting the assertion of patent rights in bad faith would not be preempted by federal patent law.

Based on this reasoning, the Attorney General concluded that Senate Bill 585 and House Bill 430 were not preempted by federal patent law since they do not prevent or limit the assertion of federal patent rights, but only prohibit the assertion of claims in a deceptive or unfair manner.

Drafting Tips: **When drafting a bill that impacts on an area governed by federal law, like patent infringement, the drafter should be aware that the resulting legislation may be challenged as being preempted by the federal law. If the focus of the bill is not the manner in which the area is regulated, however, but instead seeks to prevent an underlying criminal conduct, it may survive judicial scrutiny.**

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THE ATTORNEY GENERAL OF MARYLAND

OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 30, 2014

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

RE: House Bill 430 and Senate Bill 585, "Commercial Law – Patent Infringement – Assertions Made in Bad Faith"

Dear Governor O'Malley:

We have reviewed and hereby approve House Bill 430 and Senate Bill 585, both entitled "Commercial Law – Patent Infringement – Assertions Made in Bad Faith," for constitutionality and legal sufficiency. In reviewing the bills we have considered whether the bills would be preempted by federal patent law and concluded that they could be successfully defended against a challenge on that ground. We also note that the bills are identical except that Senate Bill 585 has an effective date of June 1, 2014 while House Bill 430 has an effective date of October 1, 2014. If both bills are signed, the changes will take effect June 1, 2014 regardless of signing order.

House Bill 430 and Senate Bill 585 provide that a person "may not make an assertion of patent infringement against another in bad faith." The bills do not define the term "bad faith," but list factors that a court may consider in determining whether bad faith has been established, as well as factors that a court may consider as evidence that an assertion of patent infringement has been made in good faith. The prohibition may be enforced by the Attorney General and the Division of Consumer Protection or by a suit brought by the target of an assertion of patent infringement made in bad faith. These provisions are very similar to those found in the Vermont law on bad faith assertions of patent infringement, 9 V.S.A. §§ 4195, *et seq*. The Vermont law, enacted in 2013 was the first such law in the country, but several other states have followed suit.

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Article I, § 8, cl. 8, of the United States Constitution gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The Clause "reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the 'Progress of Science and useful Arts.'" *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 146 (1989). The Supreme Court has noted that the federal patent laws "have embodied a careful balance between the need to promote innovation and the recognition that imitation and refinement through imitation are both necessary to invention itself and the very lifeblood of a competitive economy." *Id.* Thus, state regulation of intellectual property must yield to the extent that it clashes with this balance. *Id.* at 152.

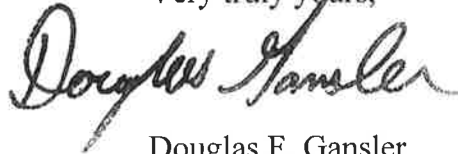
In *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 362 F.3d 1367 (Fed. Cir. 2004) it was held that "a patentee that has a good faith belief that its patents are being infringed violates no protected right when it so notifies infringers," and therefore must be allowed to make its rights known to a potential infringer, "so that the latter can determine whether to cease its allegedly infringing activities, negotiate a license if one is offered, or decide to run the risk of liability and/or the imposition of an injunction." *Id.* at 1374. Thus, the court concluded that a state tort claim based on an assertion of patent rights would be preempted unless they are based on a showing of bad faith. *Id.* at 1374-1375.

One commentator has suggested that the Vermont law has satisfied this test by targeting the conduct that surrounds patent infringement, allowing state courts to examine the behavior of the entity asserting the patent without requiring them to analyze the validity of the patent itself. T. Christian Landreth, *The Fight Against "Patent Trolls:" Will State Law Come to the Rescue?* 15 N.C. Journal of Law & Technology 100, 120 (2014). The article also concluded that the Vermont law comports with the "objectively baseless" standard set out in the *Globetrotter* case because it did not try to prevent the assertion of patent rights, but only to prevent the assertion of claims in a deceptive or unfair manner, and the factors set out in the law "could certainly lead to the conclusion that no reasonable litigant could realistically expect success on the merits." *Id.* at 124.

The conclusions of the Landreth article would appear to be supported by the recent ruling in *State of Vermont v. MPHJ*, 2014 U.S. Dist. LEXIS 52132 (D.Vt. April 15, 2014). The MPHJ case was filed by the State of Vermont before the enactment of the Vermont law, and asserts unfair and deceptive trade claims against MPHJ for sending hundreds of letters alleging infringement without appropriate research in ways that would

now support a claim of bad faith under the Vermont law. The case was removed to federal court by MPHJ and the federal court found that it lacked subject matter jurisdiction. The court concluded that the complaint was based solely on state law, not federal patent law, and did not concern the validity of the patents in question. It also found that the complaint did not "necessarily raise" federal issues because the claims did not depend on any determination of federal patent law but challenged MPHJ's bad faith acts, not its ability to protect its patent rights.[1] Given this scant but persuasive authority, it is our view that House Bill 430 and Senate Bill 585 could be successfully defended if challenged on federal preemption grounds.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable Thomas McLain Middleton
The Honorable Jon S. Cardin
The Honorable John P. McDonough
Jeanne D. Hitchcock
Karl Aro

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[1] While the Attorney General in Nebraska was less successful in *Activision TV, Inc. v. Pinnacle Bancorp, Inc.*, 2013 U.S. Dist. LEXIS 140805 (D. Neb. September 30, 2013), that case can be distinguished because the cease and desist order in question actually prevented the law firm from filing a patent enforcement action in federal court. It is also worth noting that the Eighth Circuit Court of Appeals held that Brunings appeal of the decision in that case was not frivolous. *See* http://legalnewsline.com/news/s-4461-state-ags/246306-eighth-circuit-says-neb-ags-patent-troll-appeal-not-frivolous (last visited April 30, 2014).

Maryland Constitutional Issues

SEPARATION OF POWERS – DUAL OFFICES – BALTIMORE METROPOLITAN COUNCIL

Bill/Chapter:	Senate Bill 547/Chapter 519 and House Bill 172/Chapter 520 of 2014
Title:	Economic Development – Baltimore Region – Baltimore Metropolitan Council and Advisory Board and Baltimore Region Transportation Board
Attorney General's Letter:	April 17, 2014
Issue:	Whether a bill that adds members of the General Assembly to a council that assists with regional planning and obtains transportation funding violates the separation of powers requirement of the Maryland Declaration of Rights or the dual office holding prohibition of the Maryland Declaration of Rights and Article III of the Maryland Constitution.
Synopsis:	Senate Bill 547/Chapter 519 and House Bill 172/Chapter 520 of 2014 increase the membership of the Baltimore Metropolitan Council by adding two legislative members, one from each House of the General Assembly, representing certain jurisdictions.

Discussion:

Article 8 of the Maryland Declaration of Rights provides that "the Legislative, Executive, and Judicial powers of Government ought to be forever separate and distinct from each other" and that "no person exercising the functions of one of the said Departments shall discharge the duties of any other." In addition, Article 35 of the Maryland Declaration of Rights prohibits a person from holding at the same time more than one "office of profit" created by the Constitution or Laws of the State.

Provisions of Article III of the Maryland Constitution also prohibit legislators from holding dual offices. Under Article III, § 11, "[n]o person holding any civil office of profit, or trust, under this State shall be eligible as Senator or Delegate." Article III, § 17 provides that "[n]o Senator or Delegate, after qualifying as such, notwithstanding he may thereafter resign, shall during the whole period of time, for which he was elected, be eligible to any office, which shall have been created . . . during such term."

The Attorney General noted first that Article 35 of the Maryland Declaration of Rights could not be violated by having legislators on the Council because the position is not compensated. As to whether the other provisions are violated by having legislators on the Council, the Attorney General determined that the answer depends on whether the Council is a governmental entity. If the Council is not a government entity, service on the Council does not amount to the assumption or discharge of duties in the executive branch or to the holding of an office of profit or trust.

The Attorney General reviewed and analyzed factors that courts have considered in determining whether an entity is a governmental entity. Some factors support a view that the Council is a governmental entity: it serves public purposes of assisting with regional planning and obtaining transportation funding, is created by State law (with the State having authority to modify or dissolve it), is not self-perpetuating (with members, instead, appointed entirely by governmental entities), and is required to report to the General Assembly.

Other factors, however, support the view that the Council is not a governmental entity within the meaning of the Maryland constitutional restrictions. The vast majority of the Council's funding comes from the federal government. As a result, its assets would not revert to the State on its dissolution, its excess funds are not returned to the State, and its budget is not subject to State approval. In addition, the Council does not have any special tax status beyond what is ordinarily available to nonprofit entities, the Attorney General is not designated as its counsel, and it is not subject to the control of any State or local department.

The Attorney General noted, moreover, that the bills expressly provide that the Council "is not a unit of State government" and that a comparable entity in the Washington metropolitan area is also considered an independent entity. The Attorney General concluded that these factors, taken together, support the conclusion that the Council is not a governmental entity and that service of legislators on the Council would not violate the State Constitution.

Drafting Tips:

When drafting legislation that includes members of the General Assembly on a council, board, commission, or task force, the drafter should consider whether the inclusion of legislators would violate provisions of the Maryland Constitution requiring the separation of powers or prohibiting legislators from holding dual offices. Service of legislators in this capacity would not violate these provisions unless the entity is a governmental entity. The drafter should, therefore, consider whether the entity is a governmental entity, mindful of the factors courts may consider in making the determination, and alert the sponsor of any potential separation of powers or dual office holding issues.

DOUGLAS F. GANSLER
ATTORNEY GENERAL

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OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 17, 2014

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

RE: House Bill 172 and Senate Bill 547

Dear Governor O'Malley:

We have reviewed House Bill 172 and Senate Bill 547, identical bills entitled "Economic Development - Baltimore Region - Baltimore Metropolitan Council and Advisory Board and Baltimore Regional Transportation Board." In approving the bill, we have concluded that the service of legislators on the Baltimore Metropolitan Council does not violate the separation of powers requirement of Article 8 of the Declaration of Rights Article 8, the prohibitions on dual office holding in Maryland Constitution in Article III, § 11 and Declaration of Rights Article 35, or the prohibition against a legislator serving in an office created during his or her term found in Article III, § 17.

Under current law, the Baltimore Metropolitan Council ("the Council") consists of one member appointed by the County Executive of Anne Arundel County, one member appointed by the Mayor of Baltimore City, one member appointed by the County Executive of Baltimore County, one member appointed by the County Commissioners of Carroll County, one member appointed by the County Executive of Harford County, one member appointed by the County Executive of Howard County, and "other members as the Council Charter provides." House Bill 172 and Senate Bill 547 delete the provision for the appointment of other members as provided by the Council Charter, and add two legislative members, one from each House who represents a district within Anne Arundel County, Baltimore City, Baltimore County, Carroll County, Harford County, or Howard County, appointed by the presiding officer of their respective houses, and "one representative of the private sector appointed by the Governor."[1]

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[1] The law provides that the members appointed by chief executives of the City and various counties serve at the pleasure of the appointing authority. No provision is made by the bills for a term or duration of service of the member appointed by the Governor. It may be advisable to add a similar provision for those appointments in future legislation.

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Article 8 of the Maryland Declaration of Rights provides that "the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other." Article 35 of the Maryland Declaration of Rights provides that "no person shall hold, at the same time, more than one office of profit, created by the Constitution or Laws of this State." This provision could not be violated by service on the Council because the position is not compensated. Article III, § 11 of the Maryland Constitution, however, provides that "[n]o person holding any civil office of profit, or trust, under this State shall be eligible as Senator or Delegate.," thus barring uncompensated office holding as well. Finally, Article III, § 17 of the Maryland Constitution provides that;"

> [n]o Senator or Delegate, after qualifying as such, notwithstanding he may thereafter resign, shall during the whole period of time, for which he was elected, be eligible to any office, which shall have been created, or the salary of profits of which shall have been increased, during such term.

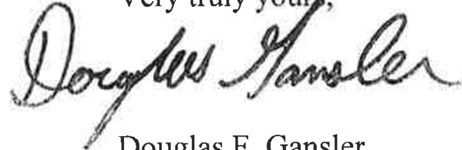
Whether the above provisions are violated depends on whether the Council is a governmental entity. If it is not, service on the Council does not amount to the assumption or discharge of duties in the executive branch or to the holding of an office of profit or trust. Among the factors ordinarily considered in determining whether an entity is a governmental entity are whether it serves a public purpose, *Napata v. University of Maryland Medical Corporation*, 417 Md. 724, 736-737 (2011), whether State or local government created the entity or has the power to modify or dissolve it, *id*, whether the entity's governing body is self-perpetuating, or appointed by State officials, *id*, whether, upon dissolution of the entity, its assets would revert to the State, *Baltimore Development Corporation v. Carmel Realty Associates*, 395 Md. 299, 335 (2006), whether the entity enjoys a special tax status, *A.S. Abell Publishing Company v. Mezzanote*, 297 Md. 26, 38 (1983); *Carmel*, 395 Md. at 335, whether the entity is required to report to the State, *Mezzanote, 297 Md.* at 38, whether it receives a substantial portion of its budget from the State, must return excess funds to the State, or must receive State approval of its budget, *Carmel*, 335 Md. at 335, whether the Attorney General was designated as legal advisor, *University of Maryland v. Murray*, 169 Md. 478, 481 (1936), and the extent to which the State controls the entity's operations, *Andy's Ice Cream v. Salisbury*, 125 Md. App. 125, 142 (1999), *Mezzanote*, 297 Md. at 38.

In the case of the Council, many of these factors would appear to support the conclusion that it is a governmental entity. It serves the public purposes of assisting with regional planning and obtaining transportation funding. It is created by State law, and the State has the authority to modify or dissolve it. With the amendments in effect, the Council will be in no part self-perpetuating, but instead appointed entirely by governmental entities, though the appointments are made by many separate governmental entities rather than one. The amendments in House Bill 172 and Senate Bill 547 also require the Council to report to the General Assembly. On the other hand, while the Council receives some money from the Maryland Department of Transportation and from local

governments, the vast majority of its funding comes from the federal government.[2] As a result, its assets would not revert to the State on its dissolution, its excess funds are not returned to the State, and its budget is not subject to State approval. Moreover, it does not appear to have any special tax status beyond that ordinarily available to non-profit entities, and the Attorney General is not designated as its counsel. Moreover, it is not subject to the control of any State or local department, though both State and local governments clearly have input through their positions on the Board. To these factors can be added the fact that Economic Development Article, § 13-301(b)(2) provides that the Council "is not a unit of State government" and the comparable entity for the Washington metropolitan area, the Washington Metropolitan Council of Governments, is clearly an independent entity.

Taken together, it is our view that these factors support the conclusion that the Council is not a governmental entity and that service of legislators on the Council would not violate the State Constitution.

Very truly yours,



Douglas F. Gansler
Attorney General

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[2] *See Baltimore Region FY 2014 Unified Planning Work Program for Transportation Planning* (April 23, 2013) at 151. http://www.baltometro.org/downloadables/UPWP/FY2014.pdf

SPECIAL LAWS – PENSION AND RETIREMENT BENEFITS – RETROACTIVE APPLICATION TO INDIVIDUAL

Bill/Chapter: Senate Bill 939/Chapter 362 of 2014

Title: State Retirement and Pension System – Service Credit for Leave of Absence – Extension of Purchase Period

Attorney General's Letter: General Approval Letter dated April 24, 2014, footnote 6.

Issue: Whether a bill concerning State retirement and pension benefits constitutes a special law in violation of Article III, § 33 of the Maryland Constitution if it applies retroactively to only one individual.

Synopsis: Senate Bill 939/Chapter 362 of 2014 authorizes the Executive Director of the State Retirement Agency (SRA) to extend the deadline for purchasing service credit in the State Retirement and Pension System following a leave of absence under specified circumstances. The bill applies retroactively to a member of the Correctional Officers' Retirement System who began a leave of absence on or after a certain date and who separated from employment with the State on or before a certain date. The SRA has advised that only one individual meets the bill's criteria for retroactive effect.

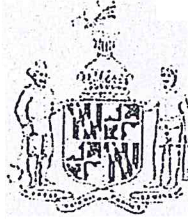
Discussion: Article III, § 33 of the Maryland Constitution provides that "the General Assembly shall pass no special law, for any case, for which provision has been made, by existing General Law." In the past, Maryland Courts have upheld laws granting retirement benefits to specific individuals on the basis that such laws may be necessary and just when there is no general law to cover the specific circumstances of those individuals. The Attorney General suggested that the retroactive application of Senate Bill 939 to a single individual could similarly be viewed as serving a particular need and promoting a public interest not protected by other laws. Therefore, applying a deferential standard of review, the Attorney General concluded that the bill did not clearly violate the constitutional prohibition on special laws.

Drafting Tips: **When drafting legislation that benefits a single person or a narrow class of people, the drafter should be mindful of the constitutional prohibition on special laws. Such legislation is more likely to be constitutional if it concerns the pension or retirement benefits of an individual public sector employee whose unique circumstances make the employee ineligible for benefits under existing laws.**

Douglas F. Gansler
Attorney General

Katherine Winfree
Chief Deputy Attorney General

John B. Howard, Jr.
Deputy Attorney General



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THE ATTORNEY GENERAL OF MARYLAND

OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 24, 2014

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

Dear Governor O'Malley:

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

HOUSE	**SENATE**
HB 205[1]	SB 378[1]
HB 250	SB 455[2]
HB 482[2]	SB 700[3]
HB 621[3]	SB 939[6]
HB 812	SB 966[7]
HB 1296[4]	
HB 1476[5]	

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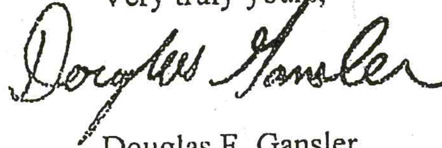
Very truly yours,



Douglas F. Gansler
Attorney General

DFG/DF/eb

cc: The Honorable John P. McDonough
Jeanne D. Hitchcock
Karl Aro

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[1] HB 205 is identical to SB 378.

[2] HB 482 is nearly identical to its cross-file bill SB 455. There is a small difference in the title between the two bills (the title in HB 482 on page 1, line 6 says "that certain youths qualify" whereas the title in SB 455 says that "certain youth qualify"), but there is no legal significance to either formulation. You may sign either or both in any order.

[3] HB 621 is identical to SB 700. These bills increase the annual registration fee for pesticides and the terminal registration fee for discontinued pesticides from $100 to $110. The bills also amend AG §5-105(f), page 2, lines 30-34, to indicate that the increased portion of the registration fees, which may only be expended for the collection, analysis, and reporting of data on pesticides, "is supplemental to and is not intended to take the place of funding that otherwise would be appropriated for such activities." We believe that subsection (f) is a nonbinding expression of intent only, not a constitutional funding mandate as it does not establish a specific level of required funding or create an objective formula by which such a number may be reached because the amount of revenue the annual fee will generate is uncertain and the "funding that otherwise would be appropriated" is not a sum certain.

[4] HB 1296 contains an erroneous cross-reference in Health – General Article, § 21-2A-07 to "§ 21-2A-06(c)(3)." We recommend a corrected cross-reference to "§ 21-2A-06(c)(2)" for inclusion in next year's corrective bill.

[5] To ensure that this bill will not violate the Establishment Clause of the First Amendment to the U.S Constitution, funds authorized under HB 1476 must be used only for work that has a secular purpose (such as, historic preservation), as opposed to renovations for the sectarian purposes of a church. Accordingly, we recommend that a grant agreement provide that no portion of the proceeds of a loan or any of the matching funds provided for a project funded under this bill may be used for the furtherance of sectarian religious instruction, or in connection

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with the design, acquisition, construction, or equipping of any building used or to be used as a place of sectarian religious worship or instruction, or in connection with any program or department of divinity for any religious denomination.

[6] SB 939 appears to provide a benefit to a single person, thus, we have analyzed the bill under Article III, § 33 of the Maryland Constitution, which prohibits special legislation. The Court of Appeals has recognized the propriety of individual grants of retirement benefits for employees who do not meet the requirements of the general law. *Police Pension Cases*, 131 Md. 315 (1917). Although that case involved statutes passed to provide certain retirement benefits to named individuals, the Court found there was no general law to cover the specific circumstances of the case and the statutes "would seem peculiarly meritorious and just," and, therefore, they did not violate Article III, Section 33. Based upon this case and because SB 939 is intended to serve a particular need and promote some public interest for which the general laws may have been inadequate, and because similar types of pension bills have been determined to be constitutional in the past, given our deferential standard of review, we do not believe a finding of unconstitutionality is required.

[7] SB 966 relates to deer hunting with a shotgun in Charles and St. Mary's County. It amends Natural Resources Article § 10-415(a) to allow hunting from January through March. It also amends § 10-415(d) for the issuance of a "deer management permit" by the Department of Natural Resources to allow deer hunting both in and out of season.

New subsection (d)(1) defines the term "deer management permit" as one that authorizes the holder to hunt deer outside of deer hunting season, § 10-415(d)(1). The actual authorizations in § 10-415(d)(2) and (3), however, do not mention hunting out of season. Instead, (d)(2) permits hunting in season, while (d)(3) is silent as to when the hunting may take place. The most logical reading is that the holder of a deer management permit may hunt in the locations set out in the permit during the season, and on agricultural crop land outside the season, but it may be desirable to clarify this in a future session.

Subsection (a), which currently sets out the three seasons to hunt deer (bow hunting, firearms, and muzzle loader), is amended to add a new paragraph (2), allows a person to hunt deer with a shotgun approved by the Department from January through March "[n]otwithstanding any other provision of law." The phrase "notwithstanding any other provision of law" is ambiguous in this context. Read broadly, it would permit hunting of deer during the times set without a license, as that is a requirement of another provision of law. It is our view that the provision should be read to be limited to the actual different change in the law – that is, the times when hunting is permitted under § 10-415(a)(1) and the regulations of the Department. It is also our view that it should not be read to override new § 10-415(d)(5), which expressly permits the Department to "terminate the deer hunting season established in subsection (a)(2)." It is well established that the provisions of a bill must be read in harmony with one another, *In re Adoption of Tracy* K., 434 Md. 198, 207 (2013), and that a more specific statute prevails over a more general one. *Farmers &Merchants Bank v* Schlossberg, 306 Md. 48, 63 (1986). Because Subsection (d)(5) expressly allows the Department to change the limits set in (a)(2), it is more specific than subsection (d), which refers generally to any other provision of law. Moreover, if (d)(5) is not read to allow the Department to alter the season set in (a)(2) it

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does nothing whatsoever – an interpretation that is to be avoided if possible. *Blue v. Prince George's County*, 434 Md. 681, 691 (2013). We also note that, because the provision applies to the hunting season set in subsection (a) and not to the times hunting is permitted under subsection (d), it probably should have been codified in subsection (a).

SINGLE-SUBJECT RULE AND DUE PROCESS CLAUSE – BUDGET RECONCILIATION AND FINANCING ACT

Bill/Chapter:	Senate Bill 172/Chapter 464 of 2014
Title:	Budget Reconciliation and Financing Act of 2014
Attorney General's Letter:	May 14, 2014
Issue:	I. Whether the single-subject rule of the Maryland Constitution bars the inclusion of provisions in the Budget Reconciliation and Financing Act (BRFA) not directly related to balancing the State budget or financing State government. II. Whether a provision of the BRFA terminating unclaimed tax credit certificates violates the Due Process Clause of the U.S. Constitution.
Synopsis:	The BRFA is an omnibus bill that executes a variety of actions related to the State budget and financing State and local government, primarily taking the form of transfers of special fund balances to the general fund, adjustments to mandated spending, and the use of other funds to cover general fund costs. Senate Bill 172/Chapter 464 of 2014 also contains a number of provisions beyond these traditional actions. These include provisions extending certain titling fee discounts, mandating funding for certain programs, authorizing a State agency to engage in certain negotiations with local governments, granting a certain tax authority to local governments, reallocating certain funds, establishing a certain advisory committee, and delaying the effective date of certain license fees. Another provision of the BRFA terminates stale Sustainable Communities Tax Credit Certificates, which were issued in fiscal years 2006 through 2010, but never claimed or extended.
Discussion:	**I. Single-Subject Rule** Article III, § 29 of the Maryland Constitution requires that "every Law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title." This requirement, known as the single-subject rule, is satisfied, according to authorities cited by the Attorney General, when all provisions of a bill are "germane" to one another. Generally, courts will regard two matters to be a single subject for purposes of § 29 if there is a direct connection between them or if they each have a direct connection to the broader common subject and purpose of the bill.

The Attorney General began the analysis of Senate Bill 172 by identifying the overarching purpose of the BRFA: to assist the Governor in times of fiscal difficulty with balancing the State operating budget and providing for the financing of State government. To accomplish this, the BRFA typically includes actions that enhance revenues or reduce current and future expenditures from the general fund. Funding mandates, actions that increase State expenditures, and actions that have no bearing on balancing the State budget, on the other hand, are not germane to the subject of the BRFA and are, therefore, of "doubtful constitutional validity," according to the Attorney General.

Applying this analysis to Senate Bill 172, the Attorney General rejected provisions extending discounted vehicle certificate of title fees for rental vehicles, requiring a certain percentage of State Park Service revenues to be dedicated to Park Service operations in future fiscal years, and requiring certain speed camera revenues to be allocated to the State Police force in future fiscal years. The Attorney General noted that these measures result in no immediate savings to the State and concluded that they were not appropriate subjects for the BRFA. A provision authorizing the Secretary of the Environment to negotiate with county governments on the establishment of alternative sources of funding for local watershed protection and restoration funds and a provision authorizing charter counties to impose a hotel rental tax were likewise dismissed as being insufficiently related to the purpose of the BRFA. The Attorney General also questioned the validity of a conference committee amendment reallocating a portion of certain video lottery terminal revenue, a provision establishing a Maryland Amusement Game and Advisory Committee, and a provision delaying the effective date of the imposition of certain amusement license fees. In each instance, the Attorney General reiterated that funding mandates and other actions unrelated to the BRFA should be accomplished in separate legislation, as they have no relationship to balancing the budget or helping to finance State government.

II. Due Process Clause

In a separate analysis, the Attorney General considered the constitutionality of a provision terminating stale Sustainable Communities Tax Credit certificates that had never been claimed or extended by their holders. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution prohibits the government from depriving a person of certain protected liberty or property interests without due process of law. To undertake this analysis, the Attorney General first tried to determine if the holders' interest in their state tax credit certificates constituted a property right and, if so, whether there was sufficient notice and opportunity for them to be heard regarding the termination.

Citing federal case law, the Attorney General noted that a property interest in a government benefit attaches when an individual has a "legitimate claim of entitlement" to the benefit rather than just a "unilateral expectation" of receiving the benefit. In the case of the tax credit certificates, the Attorney General acknowledged that the holders' interest rose to the level of a "legitimate claim of entitlement" because the law effectively mandated the award of the certificates to the holders.

Having determined that a property interest existed, the Attorney General considered whether the holders had been provided with the "minimum measure of procedural protection warranted under the circumstances." The Attorney General cited case law upholding the ability of a legislative body to make substantive changes to a law concerning entitlement to public benefits. In such instances, the legislative process itself provides benefit holders with notice of the proposed changes and an opportunity to be heard. The Attorney General concluded that, between Senate Bill 172 and its cross-file in the House, the holders of the stale tax credit certificates had sufficient notice of the legislature's intent to terminate the certificates. This action was, therefore, facially valid under the Due Process Clause.

Drafting Tips: **The Budget Reconciliation and Financing Act (BRFA), like all laws enacted by the General Assembly, must embrace only one subject. To satisfy the single subject rule, a drafter should remember that all provisions of a bill must be germane to the bill's primary purpose, which, in the case of the BRFA, is balancing the State operating budget and providing for the financing of State and local government. A BRFA provision is unlikely to survive constitutional analysis if it increases State expenditures, decreases State revenues, or impacts only local government finances. If requested to include such a provision in the BRFA, advise the sponsor that the provision may be declared invalid and severed from the bill. If possible, encourage the sponsor to introduce the provision as separate legislation. Provisions modifying tax credits or other public entitlements, however, generally may be included in the BRFA.**

The drafter should also be aware that, although a bill that reduces or eliminates a public benefit potentially raises the issue of due process, the notice of the change and the opportunity to be heard that is provided to the public by the legislative process itself will generally serve to satisfy this concern.

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Sandra Benson Brantley
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Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND

OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 14, 2014

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

Re: Senate Bill 172, "Budget Reconciliation and Financing Act of 2014"

Dear Governor O'Malley:

We have reviewed Senate Bill 172, the Budget Reconciliation and Financing Act of 2014 ("BRFA"), and, with certain exceptions identified below, hereby approve it for constitutionality and legal sufficiency. The BRFA is an omnibus bill that executes a variety of actions generally related to the State budget and financing State and local government. These actions primarily take the form of transfers of special fund balances to the general fund, adjustments to mandated spending, and use of other funds to cover general fund costs. It is our view that this year's BRFA is constitutional and legally sufficient and that you may sign it. There are, however, a number of severable provisions of the BRFA that are very likely to be found unconstitutional because they violate the single-subject rule in Article III, Section 29 of the Maryland Constitution.[1] We will identify those provisions and, where possible, suggest appropriate remedial measures.[2] Finally, we identify and discuss a few additional issues in the BRFA, unrelated to the single-subject rule, and conclude that the affected provisions are constitutional.

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[1] We apply a "not clearly unconstitutional" standard of review for the bill review process. 71 *Opinions of the Attorney General* 266, 272 n.11 (Aug. 14, 1986). We have determined that the provisions discussed below do not satisfy even this most deferential test.

[2] While this Office has previously identified BRFA provisions that may be "difficult to defend" or may not be "consistent with the purposes of the BRFA," we have not heretofore provided remedial suggestions in our bill review letters for previous BRFAs. We do so here because of the number and significance of constitutionally defective provisions as well as the need for guidance with respect to some of them. We elaborate below.

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I. Provisions Implicating the One-Subject Rule

A. The One-Subject Rule

Article III, § 29 of the Maryland Constitution provides, in relevant part, that "every Law enacted by the General Assembly shall embrace but one subject." It has traditionally been given a "liberal" reading so as not to interfere with or impede legislative action. *MCEA v. State*, 346 Md. 1, 13 (1997). This deferential approach has been taken in recognition of the nature of the legislative process, the compromises necessary in this process, and the complexity of the issues which necessitates multifaceted legislation. *Delmarva Power v. PSC*, 371 Md. 356, 368-69 (2002); *MCEA*, 346 Md. at 14.

The test as to whether a law violates the one-subject rule requires a reviewing court to determine whether the provisions of the bill are all "germane" to one another. *Migdal v. State*, 358 Md. 308, 317 (2000). The provisions of the bill must be "in close relationship, appropriate, relative, pertinent." *Porten Sullivan Corp. v. State*, 318 Md. 387, 402 (1990). Connection and interdependence between the provisions of a bill can be on either a horizontal or vertical plane. *MCEA*, 346 Md. at 15-16. Two matters can be regarded as a single subject, for purposes of § 29, either because of a direct connection between them, or because they each have a direct connection to a broader common subject to which the Act relates.

The Court of Appeals has explained that there are two purposes animating the one-subject rule:

> 1. To avoid the necessity for a legislator to acquiesce in a bill he or she opposes in order to secure useful and necessary legislation; to prevent the engrafting of foreign matter on a bill, which foreign matter might not be supported if offered independently....
>
> 2. To protect, on similar ground, a governor's veto power.

Porten Sullivan, 318 Md. at 408.

The BRFA is legislation introduced during times of fiscal difficulty to assist the Governor's efforts to balance the State operating budget and provide for the financing of

State and local government.[3] The BRFA implements actions to enhance revenues and reduce current and future year general fund expenditures. These actions often take the form of transfers of special funds to the general fund, the elimination, reduction, or suspension of mandated spending, and the enactment or increase of taxes, fees, or other revenue. By contrast, provisions that create funding mandates, increase State expenditures, or are otherwise inconsistent with the single subject of the BRFA, are not appropriate for inclusion in the bill and are of doubtful constitutional validity.

During the legislative session, this Office provided advice with respect to many of the provisions we address below. *See* Letter from Assistant Attorney General Bruce P. Martin, Principal Counsel to the Department of Budget and Management, to T. Eloise Foster, Secretary of the Department of Budget and Management (March 13, 2014); Letter from Assistant Attorney General Dan Friedman to the Honorable Maggie McIntosh and the Honorable Paul G. Pinsky (April 2, 2014). Those letters (copies of which are attached) reach the same conclusions about the application of the single-subject rule that we reach here.

B. The BRFA Provisions at Issue

The vast majority of the provisions within the BRFA fall well within the constitutional limits of what can be included within a single piece of legislation. Several, however, do not appear to do so. We explain why below, taking the provisions in turn. In questioning the constitutionality of these provisions, we do not mean to suggest that they do not represent wise legislative policy or that there would be any constitutional obstacle to the Legislature pursuing these same legislative goals through stand-alone legislation.

Extension of Discounted Vehicle Certificate Fee for Rental Vehicles

Under § 13-802(a) of the Transportation Article the certificate of title fee for vehicles is generally set at $100. For fiscal years 2012 through 2014, however, § 13-802(b) establishes only a $50 fee for rental vehicles. The BRFA amends § 13-802(b) to extend the lower fee for rental vehicles through fiscal year 2016. The annual cost of this amendment to the Transportation Trust Fund is approximately $4.2 million a year.

[3] It is our view that the BRFA can include local government financing measures only to the extent that they are elements of a legislative design with an intended effect on *State* government financing. Provisions exclusively concerning local government financing but that have no relationship to balancing the State budget are not germane to the subject of the BRFA.

Because the amendment would reduce rather than enhance State revenues for fiscal years 2015 and 2016, it cannot be "germane" to a bill that has as its purpose balancing the State budget and the financing of State government. Thus, it is our view that this provision very likely violates the one-subject rule. We recommend that the Motor Vehicle Administration be directed to collect the full $100 title fee from owners of rental cars beginning on July 1, 2014. Of course, if the General Assembly continues to see a public policy benefit, it may readopt the reduced fee through stand-alone legislation next session and further, if it wishes, it can rebate the extra $50 for each rental car titled in the interim.

Park Service Funding Mandate

An amendment to § 5-212(g) of the Natural Resources Article requires that 60% of State Park Service revenues be dedicated to Park Service operations in fiscal year 2016, 80% in fiscal year 2017, and 100% in fiscal year 2018 and beyond. Assuming that future Park revenues remain essentially the same as current revenues, the effect of the amendment would be to create a funding mandate of $8.1 million beginning in fiscal year 2016, $10.7 million in fiscal year 2017, and $13.4 million in fiscal year 2018. Because the fiscal year 2015 appropriation for Park Service operations is $5.8 million, the phased in funding mandate would result in a net increase in spending for Park Service operations of approximately $2.3 million in fiscal year 2016, $4.9 million in fiscal year 2017, and $7.6 million in fiscal year 2018. Because of this shift of Park Service revenue, it will take significant additional general fund expenditures to maintain other Department of Natural Resources operations at their current levels.

As this Office has previously advised, because the purpose of a BRFA is to help bring the State's budget into balance during a time of fiscal crisis, funding mandates are inappropriate in a BRFA. While some mandated funding provisions might be justified if included as "legislative reactions to budget action taken by the Executive," a specific, unrelated funding mandate, such as § 5-212(g), is "the hardest to defend." *See* Letter to the Honorable Robert L. Ehrlich, Jr. from Attorney General J. Joseph Curran, Jr. on House Bill 147 (May 19, 2005); Letter to the Honorable Norman H. Conway from Assistant Attorney General Bonnie A. Kirkland (Mar. 26, 2013). Accordingly, it is our view that this provision likely violates the one-subject rule. In other circumstances, when the legislature has attempted to create a funding mandate but failed either because of the timing (funding mandates may not apply to the budget bill under consideration in the same legislative session) or lack of specificity (funding mandates must be set forth in a dollar amount or by use of an objectively verifiable formula), this Office has treated the language as an expression of intent only, but not binding upon the Governor. *See, e.g.*, Bill Review Letter on Senate Bill 141 of 2010 (May 18, 2010) (citing Md. Const., Art.

III, § 52 (11), (12); 65 *Opinions of the Attorney General* 108, 110 (1980)). We recommend a similar treatment here.

Mandate that Speed Camera Revenue be Spent on Vehicle Purchases

An amendment to § 12-118(e) of the Transportation Article requires that, in fiscal years 2016 through 2018, at least $7 million of speed camera revenue be allocated annually to the State Police for the purchase of vehicles and related motor vehicle equipment. The amendment is unrelated to balancing the fiscal year 2015 budget, diverts the use of the money from other purposes, and creates no immediate savings. While the purchase of new vehicles may reduce maintenance costs in the long run, spending $21 million over three fiscal years will not result in a net savings during those years. Rather, the amendment seems to us to be an attempt to create a funding mandate for fiscal years 2016 through 2018.[4] As discussed above, funding mandates unrelated to other items in the BRFA should be accomplished in separate legislation as they have no relationship to balancing the budget or helping to finance State government. For these reasons it is our view that this provision likely violates the one-subject rule.[5] As with the previous provision, we recommend that you treat this as an ineffective funding mandate and, thus, as a non-binding expression of the intent of the General Assembly.[6]

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[4] We note the fiscal year 2015 budget bill was amended to restrict $7 million of the special fund appropriation such that it may only be used to purchase vehicles and vehicle equipment. The Governor is free to use the funds for that designated purpose or to simply allow the funds to revert to the special fund. We also note that the amendment requires that the special funds "be distributed" to the State Police, but does not by its terms appear to actually mandate an appropriation to expend those funds. For purposes of this letter, however, we interpret the provision as an attempt to mandate an appropriation.

[5] It was brought to our attention that the existing language in § 12-118(e)(1)(ii) of the Transportation Article, which requires that $3 million be distributed to the State Police for vehicle and vehicle equipment purchase in fiscal years 2013 through 2015, was added by amendment to the 2011 BRFA and that our Office did not object. That provision, however, was enacted in conjunction with a fiscal year 2011 deficiency appropriation that provided for over $7 million in general fund relief. Because the mandated expenditure was designed to offset a related Executive budget action, we concluded that it was constitutionally acceptable. The same circumstances are not present here.

[6] In fiscal years 2016 through 2018 the Governor may either appropriate the $7 million for vehicle and vehicle equipment purchase, allow the money to remain in the special fund created under § 12-118(c)(2) of the Transportation Article, or appropriate the funds to the State Police to fund roadside enforcement activities. § 12-118(e)(2).

Stormwater Remediation Fees

Effective July 1, 2013, nine counties and Baltimore City were required to assess stormwater remediation fees and implement local watershed protection and restoration programs supported by the new fee revenues. 2012 Md. Laws, ch. 151. A number of bills to repeal or establish exemptions or modifications to the fees were introduced during the 2014 legislative session. While none of these bills passed, the BRFA was amended in conference committee to address some of the issues raised in the unsuccessful legislation. Section 18, an uncodified provision, would permit the Maryland Department of the Environment, before December 1, 2014, to enter into a memorandum of understanding with Carroll County or Frederick County to permit them to establish an alternative source of funding to be deposited into a local watershed protection and restoration fund.

In our April 2, 2014 letter to Delegate McIntosh and Senator Pinsky, this Office advised that a proposed amendment to the BRFA that would modify the method by which counties may satisfy their obligations to assess stormwater remediation fees was not germane to the subject of the BRFA and thus violated the one-subject rule. While the proposed amendment addressed in the April 2 letter was broader and applied to any county, and not just Carroll and Frederick counties, narrowing the scope of the provision does not change the fundamental constitutional infirmity. It remains our view that this provision very likely violates the one-subject rule. As a result, it is our advice that this provision is not effective in authorizing the Secretary of the Environment to enter into the memoranda of understanding contemplated by this provision.

Hotel Rental Tax

The bill amends § 20-402 of the Local Government Article to authorize charter counties to impose a hotel rental tax. It is our understanding that this provision resolves a long-standing political debate regarding hotel taxes in just one jurisdiction, Harford County. Although the authorization of a hotel tax is relevant to the financing of local government, it is unrelated to any other provision in the BRFA as introduced or amended, or to the primary purpose of the BRFA, which is to balance the State budget in times of fiscal distress. *See supra*, note 3. In our view, it is only appropriate to include local government financing in a BRFA to the extent that the local government financing is incidental to the financing of State government. Therefore, it is our view that the hotel rental tax authorization is not an appropriate subject for the BRFA. We do not, however, recommend any measures to remedy the constitutional flaws in this provision because it leaves to the *county* the decision whether to impose the tax. Harford County, then, will

have to decide for itself whether to attempt to impose a hotel tax based on this provision or to seek a more constitutionally defensible method when next the Legislature convenes.

Other Provisions

There are a number of other provisions of the BRFA that are of doubtful constitutionality under the one-subject rule:

- A conference committee amendment to § 9-1A-31(a) of the State Government Article would redirect a portion of certain video lottery terminal revenue that is currently slated to go to Baltimore City. In fiscal years 2015 through 2019, $500,000 of the impact aid that would otherwise go to the Pimlico area will instead go to communities near Laurel Race Course.[7] While this reallocation of funds does not result in an increase in total State expenditures, it is unrelated to any other provision in the BRFA, or to the primary purpose of the BRFA, which is balancing the State budget in times of fiscal distress. Because of this, it is our view that this provision is not an appropriate subject for the BRFA. Moreover, because the General Assembly may not directly appropriate money through a statute that is not a supplementary appropriations bill, Md. Const., Art. III, §§ 32 and 52; 75 *Opinions of the Attorney General* 124 (1990), the Governor must provide for an appropriation for the funds to be distributed to the grantees. In our view, the Governor is not required to provide an appropriation in fiscal year 2015, however, because the amendment to § 9-1A-31 does not constitute a valid funding mandate. Pursuant to Article III, § 52(11) and (12) of the Maryland Constitution, the General Assembly may not

[7] This Amendment also contains a minor drafting error. The amendment states that "$500,000 shall be provided annually for local impact aid to be distributed as provided under § 11-404(d) of the Business Regulation Article to help pay for facilities and services in communities within 3 miles of the Laurel Race Course." Section 11-404 (d) of the Business Regulation Article provides formulae for calculating local impact grants for the Laurel impact area, which if applied, would result in aid of approximately $50,850. Maryland Operating Budget Volume 2, p. II-458. We think it is clear, however, that the Legislature intended $500,000 to go to Laurel area impact grants and the reference to § 11-404(d) is only intended to mean that the money goes to the Laurel area (as opposed to another impact area), not to invoke the formulae.

mandate an appropriation for the fiscal year that is the subject of the budget then under consideration.[8]

- The bill amends Criminal Law Article, § 12-301.1, to establish a Maryland Amusement Game and Advisory Committee. The advisory committee would advise the State Lottery and Gaming Control Commission "on the conduct and technical aspects of the amusement game industry, including … the legality of skills-based amusement games." The establishment of the advisory committee appears unrelated to the funding of State government or balancing the budget and is thus an inappropriate subject for the BRFA.

- We also reviewed a related provision of the BRFA that delays the effective date of the imposition of certain amusement license fees until July 1, 2016. On its face, a delay in imposition of licensing fees would appear to reduce general funds during that delay and, thus, would seem to run counter to the purposes of the BRFA. However, the Legislature had information before it that the State, as a practical matter, could not have collected the licensing fee before 2016 anyway. Thus, we can only say that the provision is not related to the proper purpose of the BRFA not that it is directly counter to it.

This list is not exhaustive. We have highlighted these three provisions as examples of provisions of the BRFA that are of doubtful constitutionality under the one-subject rule.

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[8] As with the State Police funding provisions discussed in footnote 6 above, a question was raised about whether our advice on this provision is consistent with our advice on similar provisions in the 2011 BRFA. In 2011, the General Assembly amended the BRFA to make grants to State and non-State entities of $500,000 from the admissions and amusement tax revenue. Unlike the amendment to this year's BRFA, however, the 2011 BRFA amendment was part of a larger package of measures that redirected $3.7 million of admissions and amusement tax revenue to the general fund to help balance the budget and, thus, in total, was consistent with the purposes of a BRFA. Moreover, our bill review letter noted that the 2011 provision, like this one, did not constitute a constitutional funding mandate. *See* Bill Review Letter to Governor Martin O'Malley, May 17, 2011, n.2.

II. Other Constitutional Issues Not Involving the One-Subject Rule

A. Comptroller v. Wynne

Section 16 of the BRFA provides that

> notwithstanding any other provision of law, the Comptroller shall set the annual interest rate for an income tax refund that is a result of the final decision under Maryland State *Comptroller of the Treasury v. Brian Wynne, et ux.*[,] 431 Md. 147 (2013) at a percentage, rounded to the nearest whole number, that is the percent that equals the average prime rate of interest quoted by commercial banks to large businesses during fiscal year 2015, based on a determination by the Board of Governors of the Federal Reserve Bank.

The *Wynne* case involved only two taxpayers—a married couple filing jointly—who appealed an assessment issued by the Comptroller after the agency determined that there was a deficiency in a single tax year. The Court of Appeals found that the limitation of a tax credit violated the Commerce Clause. The State of Maryland has petitioned for certiorari to the United States Supreme Court and that decision is currently pending. If the decision of the Court of Appeals is affirmed, however, the Wynnes will be entitled to a refund, as may other taxpayers who are in a similar position as the Wynnes. Many of those other taxpayers have already applied for refunds on the strength of the Court of Appeals decision and, if that decision is upheld, many more will likely follow. This BRFA provision sets the interest rate for those other taxpayers if they are successful on their claims.

We believe that the provision is constitutional and legally sufficient. The Court of Appeals has stated on numerous occasions, dating back for decades, that "[e]ntitlement to interest on a tax refund is a matter of grace which can only be authorized by legislative enactment." *Comptroller v. Fairchild Industries, Inc.*, 303 Md. 280, 284 (1985) (citations omitted); *see also Comptroller v. Science Applications Int'l Corp.*, 405 Md. 185, 198 (2008) ("[t]ax refunds in Maryland are 'a matter of grace' with the legislature"); *Comptroller v. Campanella*, 265 Md. 478, 487 (1972). Thus, determining the interest rate is a perfectly acceptable exercise of legislative power.

We have also determined that the provision is appropriate BFRA material because it will result in savings in the State budget. It is possible that the State could be faced with

paying these refunds this summer shortly after the fiscal year begins. If that occurs, the refunds will be paid from the general fund with the payments being offset in the March 2015 reconciling local income tax distribution. Thus, the general fund will be fronting the money on behalf of local governments, which will have a direct fiscal effect on the State. Moreover, if refunds are substantial (and we are told that the Comptroller's Office estimates that if the decision is affirmed the cost could be $190 million without interest), the State may need to transfer funds from other interest-bearing accounts to pay the claims. Lessening the interest payments on those claims—especially on the largest claims, which we expect to happen quickly—reduces the State's need to sacrifice its own investments to manage cash mid-year. Thus, it is our view that this provision is appropriate for inclusion in the BRFA.

B. Sustainable Communities Tax Credits

Section 11 permits the transfer of $19 million to the general fund and for that reason it is certainly consistent with the purposes of the BRFA. The $19 million reflects the amount of Sustainable Communities Tax Credit certificates that were issued in fiscal years 2006 through 2010 but have never been claimed or extended. We address the question of whether the termination of these stale tax credit certificates violates the constitutional rights of the certificate holders.

Section 11 provides that

> notwithstanding any other provision of law, on or before June 30, 2014, the Governor may transfer $18,971,632 from the Sustainable Communities Tax Credit Reserve Fund established under § 5A-303(d) of the State Finance and Procurement Article to the General Fund, which is the amount of commercial tax credit certificates that were issued in fiscal years 2006 through 2010 and that have not been claimed under § 5A-303(f)(4) of the State Finance and Procurement Article or extended under § 5A-303(c)(3)(ii) of the State Finance and Procurement Article.

By this provision, the BRFA terminates some 35 Sustainable Communities Tax Credit certificates for which the State had reserved nearly $19 million.[9] The question that

[9] You should also be aware that HB 510 of this session made wholesale revisions to the Sustainable Communities Tax Credit, including adding, for the first time, provision for the termination of unused credits. *See* House Bill 510 of 2014, § 3. Of course, if SB 172 is signed, its provisions will "trump" the termination provisions of House Bill 510, § 3.

we have investigated is whether this termination violates the constitutional rights of the holders of these stale tax credit certificates (the "holders"). We have determined that it does not. The Due Process Clause of the 14th Amendment to the United States Constitution requires governments to afford due process before they may deprive persons of life, liberty, or property. Here, this analysis requires us to determine first if the holders' interest in their stale tax credit certificates constitutes a property right and, if so, whether there was sufficient notice and opportunity for them to be heard.

A property interest in a government benefit attaches when an individual has "more than a unilateral expectation" of receiving the benefit; the individual must have "a legitimate claim of entitlement to it." *Mallette v. Arlington County*, 91 F.3d 630, 634 (4th Cir. 1996) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). "Entitlement" to a benefit, as opposed to mere "expectation," depends upon the degree to which the government's decision-maker has discretion to award or not award the benefit. *Id.* If the law mandates, or effectively mandates, award of a benefit in a given situation, then the individual possesses a property interest. *Id.* At the stage in the process applicable to these holders, known as a Part 3 review, the Maryland Historical Trust has little discretion and simply (1) reviews reported expenditures for consistency with the project approval and then (2) issues a tax credit certificate up to the amount of the initial certificate. Given this, we believe that a reviewing court is likely to find that at least for these holders, their receipt of the tax credit is more of an "entitlement" than an "expectation," and thus likely a constitutionally-protected property interest.

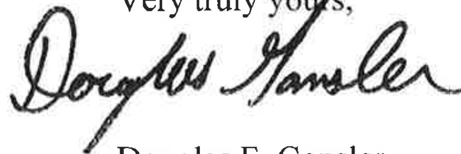
Once a property interest is established, the second step of the due process analysis is to determine whether the individual deprived of the interest was provided the "minimum measure of procedural protection warranted under the circumstances." *Mallette*, 91 F.3d at 634. In cases where legislatures altered or removed individualized government benefits, the courts have held that "the procedural component of the Due Process Clause does not impose a constitutional limitation on the power of [the legislature] to make substantive changes in the law of entitlement to public benefits." *Pashby v. Delia*, 709 F.3d 307, 328 (4th Cir. 2013) (citing *Atkins v. Parker*, 472 U.S. 115, 129 (1985)). In such instances, "the legislative determination process provides all the process that is due." We think that, between HB 510 and SB 172, the holders had sufficient notice that the Legislature was concerned with the problem of stale tax credit certificates and intended to terminate them, although the celerity of that termination was not yet clear. We think that is more than sufficient to comport with due process as

described in the *Pashby* line of cases. Thus, we find the termination of the stale tax credits to be facially constitutional.[10]

Conclusion

We find that although Senate Bill 172 contains numerous provisions detailed above that are very likely to be found to be in violation of the one-subject requirement of Article III, § 29 of the Maryland Constitution, the bill as a whole is constitutional and legally sufficient because the offensive provisions are severable. Md. Code Ann., Art. 1, § 23; Senate Bill 172, § 19. *See also* General Provisions Article, § 1-210 (effective October 1, 2014).

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/DF/kk

cc: The Honorable John P. McDonough
Jeanne D. Hitchcock
Karl Aro

[10] We also understand that the Maryland Historical Trust has contacted the holders of these stale tax credit certificates to warn them of the impending deadline and to encourage them to seek payment before the bill's effective date. We believe that this minimizes the risks of an "as applied" challenge as well.

DOUGLAS F. GANSLER
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**STATE OF MARYLAND
DEPARTMENT OF BUDGET AND MANAGEMENT**

March 13, 2014

T. Eloise Foster
Secretary
Department of Budget and Management
45 Calvert Street
Annapolis, Maryland 21401

Dear Secretary Foster:

You have requested advice concerning Senate Bill 172, the Budget Reconciliation and Financing Act of 2014 (BRFA). Specifically, you have asked whether certain amendments to the bill approved yesterday by the Senate violate the single subject rule under Article Ill, §29 of the Maryland Constitution or are otherwise improper. It is my view that because several of the amendments create funding mandates, increase State expenditures, or are otherwise inconsistent with the single subject of the BRFA, they are not appropriate for inclusion in the bill.

Article III, §29 of the Maryland Constitution provides, in relevant part, that "every Law enacted by the General Assembly shall embrace but one subject." The purposes of this provision are to prevent logrolling, and to protect the veto power of the Governor. *Porten Sullivan Corp. v. State*, 318 Md. 387, 402 (1990). It has traditionally been given a liberal reading so as not to interfere with or impede legislative action. *MCEA v. State*, 346 Md. 1, 13 (1997). This deferential approach has been taken in recognition of the nature of the legislative process, the compromises necessary in this process, and the complexity of the issues which necessitates multifaceted legislation. *Delmarva Power v. PSC*, 371 Md. 356, 368-69 (2002); *MCEA* v. *State*, 346 Md. 1, 14 (1997).

The test as to whether a law violates the one subject requirement requires a reviewing court to determine whether the provisions of the bill are all "germane" to one another. *Migdal v. State*, 358 Md. 308, 317 (2000). That is, whether the provisions are "in close relationship, appropriate, relative, pertinent." *Porten Sullivan*, 318 Md. at 402.

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Connection and interdependence between the provisions of a bill can be on either a horizontal or vertical plane. *MCEA*, 346 Md. at 15-16. Two matters can be regarded as a single subject, for purposes of § 29, either because of a direct connection between them, or because they each have a direct connection to a broader common subject to which the Act relates.

The Budget Reconciliation and Financing Act is legislation introduced during times of fiscal difficulty to assist the Governor's efforts to balance the State operating budget and provide for the financing of State and local government. The BRFA executes actions to enhance revenues and reduce current and future year general fund expenditures. These actions often take the form of transfers of special funds to the general fund, the elimination, reduction or suspension of mandated spending, and the enactment or increase of taxes, fees or other revenue.

Amendment No. 3, seeks to establish a Maryland Amusement Game and Advisory Committee. The advisory committee would advise the State Lottery and Gaming Control Commission "on the conduct and technical aspects of the amusement game industry, including . . . the legality of skills-based amusement games." The establishment of the advisory committee appears unrelated to the funding of State government or balancing the budget and is thus an inappropriate subject for the BRFA. The same amendment would also delay the effective date of the imposition of certain amusement license fees until July 1, 2016. The delay in implementation of the license fee until fiscal year 2017 would have a negative impact on State revenues for fiscal years 2015 and 2016 and, for that reason, is not appropriate for inclusion in the BRFA.

Amendment No. 7 would authorize charter counties to impose a hotel rental tax. While authorization of a hotel tax is relevant to the financing of local government it is unrelated to any other provision in the BRFA as introduced or amended, or to the primary purpose of the BRFA, which is balancing the State budget in times of fiscal distress. Therefore, it is my view that the hotel rental tax authorization is not an appropriate subject for the BRFA.

Amendment No. 8 seeks to require that a specified portion of State Park Service revenues be dedicated to Park Service operations. Assuming future park revenues remain essentially the same as current revenues, the effect of the amendment would be to create a funding mandate of $8.1 million beginning in fiscal year 2016, $10.7 million in fiscal year 2017, and $13.4 million in fiscal year 2018. As this Office has previously advised, because the purpose of a BRFA is to help bring the State's budget into balance during a time of fiscal crisis, funding mandates have no place in a BRFA. While some mandated funding provisions might be justified if included as "legislative reactions to

budget action taken by the Executive," a specific, unrelated funding mandate such as Amendment No. 8 is "the hardest to defend." *See* Letter to the Honorable Robert L. Ehrlich, Jr. from Attorney General J. Joseph Curran, Jr. on House Bill 147 (May 19, 2005); Letter to the Honorable Norman H. Conway from Assistant Attorney General Bonnie A. Kirkland (Mar. 26, 2013).

Amendment No. 11 alters the method of determining local education aid maintenance of effort (MOE) requirements by providing that wealth per pupil should be calculated using September 1 net taxable income for fiscal years 2015 through 2017, and November 1 beginning in fiscal year 2018. The provision would have no impact on the amount of State education aid to local jurisdictions but instead is designed to clarify how the counties calculate their MOE requirements. The amendment is unrelated to any other provision in the BRFA, or to the primary purpose of the BRFA, which is balancing the State budget in times of fiscal distress. Because the clarification of the county MOE requirements is not part of a larger plan regarding education aid, it is my view that this provision is not an appropriate subject for the BRFA.

Amendment No. 12 would permit the Secretary of Information Technology to require that the Health Benefit Exchange information technology projects be subject to oversight by the Department of Information Technology. A justification for this amendment is that it is designed to reduce State expenditures by putting the Health Benefit Exchange under tighter procurement and budget control. However, the fiscal savings are speculative and the Department of Legislative Services (DLS) has determined that the fiscal impact is "indeterminate." Nevertheless, because the purpose of the amendment seems related to fiscal oversight and control designed to reduce expenditures it is, at least, defensible for inclusion in the BRFA.

Amendment No. 13 redirects a portion of the Racetrack Facility Renewal Account to local racetrack impact aid to prevent a reduction in the funding given as grants to local jurisdictions. This provision would reduce the State grants allocated to racetracks for capital construction and improvements in order to ensure that adequate funds are available to fully fund horse racing impact aid to Baltimore City, the City of Laurel, and Anne Arundel and Howard counties under Business Regulation Article, § 11-404. While this reallocation of funds does not result in an increase in total State expenditures, it is unrelated to any other provision in the BRFA, or to the primary purpose of the BRFA, which is balancing the State budget in times of fiscal distress. Because of this, it is my view that the redirection of racetrack facility renewal funds to local racetrack impact aid is not an appropriate subject for the BRFA.

Amendment No. 15 would amend the Transportation Article to require that $7 million of speed camera revenue be allocated annually to the State Police for the purchase vehicles. The amendment creates no immediate savings and is unrelated to balancing the fiscal year 2015 budget. The amendment simply creates a funding mandate. As discussed above, funding mandates unrelated to other items in the BRFA should accomplished in separate legislation as they have nothing to do with balancing the budget or helping to finance State government.

Amendment No. 16, which would repeal a sunset and permanently set the certificate of title fee for rental vehicles at $50 would cost the Transportation Trust Fund $4.2 million a year. Because the amendment would reduce rather than enhance State revenues I can discern no justification that would support the inclusion of this provision in the BRFA.

Amendment No. 23 would permit the Governor to transfer $10.8 million from the Baltimore City Community College fund balance to DoIT's Major Information Technology Development Fund "to ensure the implementation of Enterprise Resource Planning." The BRFA is typically used to transfer money from special funds to balance the budget, not to transfer to special funds to meet other policy objectives. While the General Assembly may authorize, but not require, the Governor to transfer funds, this proposal is inappropriate for the BRFA because it does not help to balance the budget or to finance State government.

Sincerely,

Bruce P. Martin
Assistant Attorney General

cc: Dan Friedman, Counsel to the General Assembly
David C. Romans, Deputy Secretary
Marc L. Nicole, Executive Director

Douglas F. Gansler
Attorney General

Katherine Winfree
Chief Deputy Attorney General

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Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND

OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 2, 2014

The Honorable Maggie McIntosh, Chair
House Environmental Matters Committee
House Office Building, Room 251
Annapolis, Maryland 21401

The Honorable Paul G. Pinsky
Senate of Maryland
James Senate Office Building, Room 220
Annapolis, Maryland 21401

Re: Proposed Amendment to Senate Bill 172, the Budget Reconciliation and Financing Act of 2014

Dear Chairwoman McIntosh and Senator Pinsky:

You have each separately inquired about the constitutionality of a proposed amendment to Senate Bill 172, the Budget Reconciliation and Financing Act of 2014 ("BRFA"). The proposed amendment, currently "on hold" in conference committee on the Budget, would modify the method by which counties could satisfy their obligation to collect stormwater remediation fees pursuant to Section 4-202.1 of the Environment Article ("EN") of the Maryland Code. It is my view that the proposed amendment violates the one subject rule of Article III, § 29 of the Maryland Constitution.

Article III, § 29 of the Maryland Constitution provides in relevant part that "every Law enacted by the General Assembly shall embrace but one subject." 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). This provision has traditionally been given a liberal reading so as not to impede legislative action. *MCEA v. State*, 346 Md. 1, 13 (1997). The courts' deferential approach recognizes the nature of the legislative process, the compromises necessary in this process, and the complexity of the issues which necessitates multifaceted legislation. *Delmarva Power v. PSC*, 371 Md. 356, 368-369 (2002); *MCEA* v. *State*, 346 Md. 1, 14 (1997).

The test as to whether a law violates the one subject requirement requires a reviewing court to determine whether the provisions of the bill are all "germane" to one another. *Migdal v. State*, 358 Md. 308, 317 (2000). That is, whether the provisions are "in close relationship, appropriate, relative, pertinent." *Porten Sullivan*, 318 Md. at 402.

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Connection and interdependence between the provisions of a bill can be on either a horizontal or vertical plane. *MCEA*, 346 Md. at 15-16. Two matters can be regarded as a single subject, for purposes of § 29, either because of a direct connection between them, or because they each have a direct connection to a broader common subject to which the Act relates.

The single subject of the BRFA is the financing of State government. More specifically, BRFAs over the last 20 years have been used to balance budgets, raise revenue, make or authorize fund transfers, redistribute funds, and cut mandated appropriations. While the individual provisions in the BRFA address numerous areas of State government, "the genesis of budget reconciliation acts was to help bring the State's budget into balance during a time of fiscal crisis." *Bill Review Letter on House Bill 147 of 2005* (May 19, 2005). The proposed amendment concerns only the methods by which local government may collect monies for stormwater remediation programs. Although this local funding supplements State funding for compliance with its federally-mandated Watershed Improvement Plan ("WIP"), the amendment neither changes the amount nor makes more secure the local funding component. Thus, it is unrelated to the funding of State government or balancing the State's budget and thus its inclusion in the BRFA violates the one subject rule of Article III, § 29.

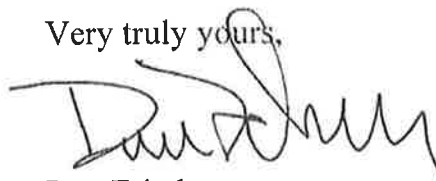
Another concern is that this proposed amendment has many of the hallmarks that have doomed bills under the one subject rule in the past. For example, the Court of Appeals has looked skeptically on amendments that are adopted in such a way as to avoid the legislative committee of jurisdiction. *See, e.g., Migdal*, 358 Md. at 322. Here, the stormwater remediation fees were originally imposed by legislation considered by the House Environmental Matters ("ENV") Committee and Senate Education, Health & Environmental Affairs ("EHEA") Committee. This amendment, if allowed, avoids those committees and would instead be recommended to the House and Senate by the budget committees, the Senate Budget & Taxation ("B&T") Committee and the House Appropriations ("APP") Committee. Similarly, the Court of Appeals has looked skeptically on amendments that were previously rejected as stand-alone legislation. *Migdal*, 358 Md. at 322. Here, modifications to the stormwater remediation fees were a popular topic for the introduction of legislation this session, but those that have been acted upon have been uniformly rejected by the committees of jurisdiction, including:

Bill	**Short Title**	**Status**
House Bill 50	Stormwater Management - Watershed Protection and Restoration Program - Repeal	Unfavorable (ENV)
House Bill 55	Anne Arundel County - Watershed Protection and Restoration Program - Exemption (Anne Arundel County Rain Tax Exemption Act of 2014)	Unfavorable (ENV)
House Bill 97	Stormwater Management - Watershed Protection and Restoration Program - Repeal	Unfavorable (ENV)
House Bill 155	Environment - Stormwater Management - Exemption From Watershed Protection and Restoration Program	Unfavorable (ENV); Withdrawn
House Bill 324	Frederick County - Stormwater Management - Watershed Protection and Restoration Program - Exemption	Unfavorable (ENV); Withdrawn
House Bill 895	Stormwater Management - Watershed Protection and Restoration Program - Repeal	Unfavorable (ENV)
House Bill 952	Baltimore County - Watershed Protection and Restoration Program - Exemption	Unfavorable (ENV); Withdrawn
House Bill 1139	Environment - Stormwater Remediation Fees - Reduction of Fees	Awaiting action in ENV
Senate Bill 5	Stormwater Management - Watershed Protection and Restoration Program - Repeal	Unfavorable (EHE)
Senate Bill 135	Watershed Protection and Restoration Program - Enforcement by Department of the Environment - Moratorium	Unfavorable (EHE)
Senate Bill 277	Frederick County - Stormwater Management - Watershed Protection and Restoration Program - Exemption	Unfavorable (EHE)
Senate Bill 315	Environment - Stormwater Remediation Fee - County Tax Limitations	Unfavorable (EHE)
Senate Bill 316	Anne Arundel County - Watershed Protection and Restoration Program - Exemption (Anne Arundel County Rain Tax Exemption Act of 2014)	Unfavorable (EHE)
Senate Bill 359	Watershed Protection and Restoration Programs - Impervious Surface - Definition	Unfavorable (EHE)
Senate Bill 464	Stormwater Management - Watershed Protection and Restoration Program - Repeal	Unfavorable (EHE)
Senate Bill 1084	Baltimore County - Stormwater Remediation Fee - Application and Limitation	Awaiting action in EHE

Thus, it is my view that a reviewing court will consider this factor against the amendment as well. Finally, some have suggested that the stated purpose of the BRFA is too narrow and if we just consider its purpose more broadly, we can construct an umbrella large enough to shelter even this amendment from the application of the one subject rule. The Court of Appeals, however, has rejected such exercises, instructing that a too broad topic, like "corporations" cannot protect non-germane provisions. *Migdal*, 358 Md. at 318-19. Frankly, the whole raison d'être for this amendment to have emerged at this time and in this manner was to force members to vote for an unpalatable provision to save the other, meritorious provisions of the BRFA. This is precisely what the constitutional provision was intended to avoid. *See Porten Sullivan*, 318 Md. at 408 (describing the bill considered there as a "textbook example of legislation designed to frustrate [the] purposes [of the one subject rule]").

In the end, it is plain to me that this proposed amendment is very likely to be found to be unconstitutional.[1]

Very truly yours,



Dan Friedman
Counsel to the General Assembly

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[1] Despite this, it is my view that this provision is severable from the other provisions of the BRFA. *See, e.g., Porten Sullivan*, 318 Md. at 410 (reciting "strong presumption" in favor of severability); Md. Ann. Code, Art. 1, §23 (presumption of severability).

SINGLE-SUBJECT RULE – LEGISLATIVE HISTORY – MINIMUM WAGE

Bill/Chapter:	House Bill 295/Chapter 262 of 2014
Title:	Maryland Minimum Wage Act of 2014
Attorney General's Letter:	April 28, 2014
Issue:	Whether an amendment regarding increased rates of reimbursement for a specific class of employees added to a bill establishing a State-wide minimum wage violates the single-subject requirement for legislation in the Maryland Constitution.
Synopsis:	House Bill 295/Chapter 262 of 2014 requires employers in the State, as of January 1, 2015, to pay the greater of the federal minimum wage or a State minimum wage of $8.00 per hour to employees subject to federal or State minimum wage requirements. House Bill 295 was also amended to authorize increased rates of reimbursement paid by the State to caregivers of individuals with developmental disabilities.

Discussion:

Under Article III, § 29 of the Maryland Constitution, a bill may embrace only "one subject." An act meets the single-subject requirement of § 29 if the act's several sections refer to and are germane (*i.e.*, connected, related, pertinent) to the same subject-matter. The Maryland Court of Appeals, noted the Attorney General, has reasoned that two matters can be regarded as a single subject either because of a direct connection between them, horizontally, or because they each have a direct vertical connection to a broader common subject to which the bill relates. The court has also traditionally given the single-subject requirement a liberal construction so as not to interfere with or impede legislative action.

Factors that contribute to a lack of "connection and interdependence" between issues and thus raise single-subject concerns, according to the precedents cited by the Attorney General, include whether the issue was the subject of earlier, rejected legislation that was resurrected by amendment onto another bill and whether the bill was added by a policy committee that is unfamiliar with the subject area.

Reviewing the legislative history of House Bill 295, the Attorney General noted that, having been passed by the House, the Senate Finance Committee added additional wage protections for a specific class of employees, similar to other amendments to the bill pertaining to training wages for younger employees. The Attorney General pointed out that the Senate Finance Committee is a policy committee with partial jurisdiction over both wage

issues and health care policy relating to individuals with developmental disabilities. The Attorney General approved the bill after concluding that, in light of the policy committee that added the amendment and to the extent the provisions of the bill horizontally relate to the payment of wages for various employees in the State, those provisions were germane and embraced only one subject.

Drafting Tips: **When drafting an amendment to a bill, it is essential that the drafter consider whether the added language is sufficiently connected to the single subject of the bill. As part of this analysis, the drafter should consider those factors that a reviewing court would look to in evaluating whether there is sufficient "connection and interdependence" between the amendment and the provisions of the bill. Such factors could include whether the subject of the amendment was previously considered and rejected, and whether the amendment will be considered by a policy committee with appropriate subject matter jurisdiction.**

If the drafter concludes that the proposed amendment likely violates the single-subject requirement of the Maryland Constitution, the drafter should advise the amendment's sponsor of that fact and discuss with the sponsor alternatives for achieving the sponsor's goals, including amending a more appropriate "vehicle" or introducing a separate, stand-alone bill.

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
CHIEF DEPUTY ATTORNEY GENERAL

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THE ATTORNEY GENERAL OF MARYLAND

OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 28, 2014

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

RE: House Bill 295, "Maryland Minimum Wage Act of 2014"

Dear Governor O'Malley:

We have reviewed House Bill 295, entitled "Maryland Minimum Wage Act of 2014." In approving the bill, we have concluded that provisions of the bill increasing the State minimum wage as well as increasing the rate of reimbursement for community services providers, do not violate the single subject requirement of the Maryland Constitution.

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." To comply with this requirement "the several sections must refer to and be germane to the same subject matter, and that subject matter must be described in its title." *Delmarva Power and Light v. Public Service Commission*, 371 Md. 356, 370 (2002). The test of whether legislation violates the single subject requirement examines whether the provisions of the bill are all "germane" to each other. *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). Two matters can be regarded as a single subject "either because of a direct connection between them, horizontally, or because they each have a direct [vertical] connection to a broader common subject to which the Act relates." *MCEA v. State*, 346 Md. 1, 15 (1997).

This rule has traditionally been "given ... a liberal construction so as not to interfere with or impede legislative action." *Id.* at 13. "That liberal approach is intended to accommodate a significant range and degree of political compromise that necessarily attends the legislative process in a healthy, robust democracy." *Id.* at 14.

House Bill 295 relates to the determination of the State minimum wage rates under a variety of circumstances and across a range of employment settings, including private

caregivers to individuals with developmental disabilities. The bill also addresses increased rates of reimbursement paid by the State to caregivers of individuals with developmental disabilities, and specifically provides that a portion of the increased reimbursement rate "may be allocated to address the impact of an increase in the State minimum wage on wages and benefits of direct support workers employed by community providers licensed by the Developmental Disabilities Administration ["DDA"]." *See* proposed Health-General Article, § 7-307(f).

Both sets of provisions reasonably relate to the payment of wages for employment services. The bill does not appear to be the product of legislative action that is indicative of a single subject violation. For example, the provisions addressing increased reimbursement rates for DDA providers did not appear to be the subject of earlier, rejected legislation that was resurrected by amendment onto another bill, or was added by a policy committee that is unfamiliar with the subject area, which are factors that contribute to a lack of "connection and interdependence" between issues that present single subject concerns. *See MCEA*, 346 Md. at 20, 22. In this instance, in the process of amending the bill passed by the House of Delegates, the Senate Finance Committee, a policy committee with partial jurisdiction over both wage issues and health care policy relating to individuals with developmental disabilities, added additional wage protections for a specific class of employees, similar to other amendments in the bill pertaining to training wages for younger employees. To the extent the provisions of the bill horizontally relate to the payment of wages for various employees in the State, those provisions appear to be germane and embrace, for constitutional purposes, one subject.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/JMM/eb

cc: The Honorable Thomas McLain Middleton
The Honorable John P. McDonough
Jeanne D. Hitchcock
Karl Aro

UNIFORMITY IN TAXATION – PROPERTY TAX CREDIT FOR REHABILITATION OF EXISTING COMMERCIAL STRUCTURES

Bill/Chapter: Senate Bill 605/Chapter 538 of 2014

Title: Property Tax Credit – Commercial Structures – Rehabilitation

Attorney General's Letter: General Approval Letter dated April 15, 2014, footnote 6.[1]

Issue: Whether a bill authorizing county and municipal governments to grant a property tax credit against the county or municipal property tax for certain commercial structures violates the uniform taxing requirements of Article 15 of the Maryland Declaration of Rights.

Synopsis: Senate Bill 605/Chapter 538 of 2014 authorizes county and municipal governments to grant, by law, a property tax credit against the county or municipal property tax imposed on an existing commercial structure in which a qualifying investment is made for the purpose of allowing for adaptive reuse of the structure. The property tax credit authorized by the bill may not exceed 50% of the amount of qualifying investment in a structure and may be granted for up to a 10-year period in an equal amount each year.

Discussion: The Attorney General noted that Article 15 of the Maryland Declaration of Rights requires property taxes to be assessed uniformly. Nevertheless, according to the Attorney General, the courts have tolerated a 5-year assessment cycle during which the taxable assessment gradually becomes divorced from the fair market value of the property. Furthermore, the Attorney General has previously opined that, at least for the short-term, a lack of uniformity resulting from specific property tax credits does not violate the constitution.

Senate Bill 605 authorizes a partial credit for up to 10 years. The bill does not, however, mandate that period and grants local governments the discretion to determine the duration of the credit. The Attorney General assumes that, when a local government establishes the rules for administering the credit, "it will strive" to follow the uniformity requirement of Article 15 and, when necessary, not allow nonuniformity to

[1] The following Bill Review Letters provide similar analyses on this issue: Senate Bill 600/Chapter 530 and House Bill 742/Chapter 531 of 2014 (Regional Institution Strategic Enterprise Zone Program), dated April 29, 2014; Senate Bill 572/Chapter 526 and House Bill 227/Chapter 527 of 2014 (Homestead Tax Credit – Eligibility – Definition of Legal Interest), dated April 9, 2014; House Bill 932/Chapter 431 of 2014 (Charles County – Property Tax Credit – Senior Citizens Receiving Social Security Benefits), dated April 11, 2014; and Senate Bill 736/Chapter 193 and House Bill 876/Chapter 194 of 2014 (Baltimore City – Property Tax Credit for Historic or Heritage Properties – Calculation), dated April 10, 2014.

extend beyond the safe harbor time periods discussed in the precedents and previous advice from the Attorney General. Consequently, the Attorney General recommended Senate Bill 605 for signature.

Drafting Tips: **When drafting a bill establishing or authorizing a partial property tax exemption, the drafter should be aware that the tax scheme may be challenged for creating an unconstitutional lack of uniformity. At the very least, a partial tax exemption should be drafted as a temporary adjustment, effective for the shortest period acceptable to the sponsor, and probably no longer than five years.**

Douglas F. Gansler
Attorney General

Katherine Winfree
Chief Deputy Attorney General

John B. Howard, Jr.
Deputy Attorney General

Dan Friedman
Counsel to the General Assembly

Sandra Benson Brantley
Jeremy M. McCoy
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Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND

OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 15, 2014

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

Dear Governor O'Malley:

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

HOUSE	**SENATE**
HB 356[1]	SB 354[5]
HB 591[2]	SB 420[1]
HB 786	SB 458[3]
HB 833	SB 605[6]
HB 953[3]	SB 1015[2]
HB 1001	SB 1091
HB 1033	
HB 1097	
HB 1415[4]	

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Very truly yours,

Douglas F. Gansler
Attorney General

DFG/DF/eb

Attachment

cc: The Honorable John P. McDonough
Jeanne D. Hitchcock
Karl Aro

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[1] House Bill 356 and Senate Bill 420 make some of the same changes to Article 2B, § 8-807, but Senate Bill 420 makes an additional change to that section, and House Bill 356 makes changes to other provisions in the Code. Both bills add a "Class 8 Farm Brewery License" to the list of entities that may be issued a festival license, to the list of entities that may invoice beer to the holder of a beer festival license, and also to the list of entities that may enter into an agreement with a beer festival license to deliver beer 2 days before the effective date of the beer license and to accept returns not later than 2 days after the expiration of the beer festival license. Senate Bill 420 also amends § 8-807 to provide that a holder of a beer festival license may sell only beer that is manufactured and processed in any State, while current law requires that the beer be manufactured and processed in this State. That change avoids Commerce Clause problems with the section. House Bill 356 adds a "Class 8 Farm Brewery License" to a number of other festival provisions and permits farm brewery licensees to enter into temporary delivery agreements with the holder of a beer or beer and wine festival permit. If both bills are signed, all of the provisions will become part of the law, regardless of signing order.

In addition, the referendum provisions in House Bill 356 are most likely ineffective. House Bill 356 also amends current law to reflect that a farm brewery licensee may open on Sundays "only in an election district <u>OR A PRECINCT IN AN ELECTION DISTRICT</u> where the voters, in a referendum authorized by law, have approved Sunday sales at a farm." The change accurately reflects the current law on alcoholic beverages referenda in Garrett County. The laws providing for such referenda, however, do not mention Class 8 Farm Brewery licenses or relate to Sunday sales at a farm. Section 11-512 currently allows on premises sales on Sundays in

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election districts 11 and 15 and any other election district or precinct in which voters approve Sunday sales by Class B, Class C, and Class D licensees. Referenda to be held in the coming election would apply to off premises sales by Class A, Class B, certain Class C, and Class D licensees, (House Bill 690), and on premises sales as currently allowed, in any additional districts or precincts where it is approved (House Bill 1097). Neither of these, nor any previous referendum has referenced Class 8 licensees or addressed Sunday sales on a farm. Thus, for this provision to be effective, § 11-512 should be amended to include Class 8 licensees.

[2] House Bill 591 and Senate Bill 1015 are very nearly identical except that the title of House Bill 591 indicates that it is "creating in Anne Arundel County a BWLT beer, wine, and liquor tasting (on premises) license," while the title of Senate Bill 1015 indicates that it is "creating in Anne Arundel County a BWLT beer, wine, and liquor (on-premises) tasting license." Both forms appear in various provisions of current law governing tasting licenses. Thus, either version of the title is legally sufficient and either or both bills may be signed.

[3] House Bill 953 and Senate Bill 458 are identical bills relating to microbrewery licenses in the 40th Alcoholic Beverages District of Baltimore. The bills allow a microbrewery in the 40th District to brew in two locations under the same license if it requests and obtains permission from the Comptroller to do so. This permission is obtained by submitting a written application to the Comptroller. The titles to the bills, however, state simply that the bills "[require] a holder of a Class 7 license to submit a certain application to the State Comptroller." While a Class 7 license holder may submit this application if it desires to brew in more than one location, however, it is not required to do so otherwise. This provision, however, is adequately covered by the portion of the title that states that the bills authorize "the holder of a Class 7 micro-brewery license in Baltimore City to brew at certain locations using the same license . . . under certain circumstances." Thus, the portion of the titles that indicates that a Class 7 license holder is required to submit an application to the Comptroller can be disregarded as surplusage.

[4] Section 1 of House Bill 1415 proposes an amendment to the Maryland Constitution. Section 2 of the bill would make changes in the Election Law Article of the Maryland Annotated Code. This Office has previously opined that a bill may combine portions that are constitutional amendments and ordinary legislation but that each portion must satisfy its own requirements to be adopted. *Letter of Advice to the Hon. Robert J. Garagiola* (Jan. 17, 2011) (***attached***). Section 1 of the bill, as a constitutional amendment, had to be and was approved by three-fifths of the members in each House of the General Assembly. It does not require your signature and you may not veto that portion of the bill. *Warfield* v. *Vandiver,* 101 Md. 78 (1905), If you choose to sign HB 1415, your signature will be surplusage as to Section 1. If you choose to veto HB 1415, your veto will be ineffective as to Section 1. Thus, irrespective of your actions to the bill as a whole, Section 1 will be placed before the voters at the November 2014 general election. By contrast, Section 2 of the bill is ordinary legislation that was approved by a constitutional majority in each house and needs your acquiescence to become law.

[5] Section 2 of SB 354 states "[t]hat it is the intent of the General Assembly that Prince George's County establish a local program to provide additional rent relief for low–income residents in the county. Prince George's County may use $894,850 to provide the additional relief." This is not nor could it be a mandatory requirement that Prince George's County spend

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this amount (or any other amount) on this (or any other program). Rather, Section 2 of the bill expresses the General Assembly's desire that a proposed renter assistance program that was described to it be implemented. *See* Fiscal & Policy Note on Senate Bill 354 (Revised). Moreover, although the title of the bill describes Section 2 of the bill awkwardly, we do not think it is affirmatively misleading.

[6] Senate Bill 605 authorizes the governing body of a county (including Baltimore City) or municipal corporation to grant a property tax credit for the rehabilitation of existing commercial structures. Article 15 of the Maryland Constitution requires property tax to be assessed uniformly, but the courts have also recognized that the property tax system cannot be administered in perfect uniformity. Thus, the court has tolerated a 5-year assessment cycle during which the taxable assessment gradually becomes divorced from the fair market value of the property. *Rogan v. County Commissioners of Calvert County*, 194 Md. 299, 309 (1949) (5-year reassessment cycle does not violate uniformity clause). Similarly, while specific property tax credits might appear to introduce a lack of uniformity into the system because different properties are taxed differently depending on the property, the Office of the Attorney General has opined that, at least for the short-term, this lack of uniformity does not violate the state constitution. 72 Op. Att'y Gen. 350 (1987) (homestead tax credit not in clear violation of the uniformity clause until it reaches its tenth year). Senate Bill 605 authorizes a partial credit based on the full market value of the property and the amount of the qualifying investment. While the bill authorizes the credit for up to ten years, it does not mandate that period and leaves the duration of the credit in the discretion of the local government. Therefore, it must be assumed that when a local government establishes the rules for administering this tax credit, it will strive to follow the uniformity requirement of Article 15 and, when necessary, will not allow non-uniformity to extend beyond the safe harbor time periods described in *Rogan* and 72 Op. Att'y Gen. 350. Accordingly, Senate Bill 605 is recommended for signature.

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

January 17, 2011

The Honorable Robert J. Garagiola
104 James Senate Office Building
Annapolis, Maryland 21401-1991

Dear Senator Garagiola:

You have asked for advice concerning whether a constitutional amendment and statutory changes may be included in the same bill. Although the matter is not free from doubt, it is my view that the combination of the two is permissible. Of course, all other constitutional requirements, including the one subject requirement, must be complied with.

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. Except as provided in Article XIX (for bills concerning the expansion of commercial gaming), a bill with statewide effect may not be made contingent on a vote of the people. *Bradshaw v. Lankford*, 73 Md. 428 (1891). In addition, each bill must relate to a single subject, which is reflected in its title. Article III, § 29.

Amendments to the Constitution are proposed in bill form. Article XIV § 1. This section specifically requires that "each amendment be embraced in a separate bill, embodying the Article or Section, as the same will stand when amended." *Id.* This requirement does not:

> prevent the General Assembly from (1) proposing in one bill a series of amendments to the Constitution of Maryland for the general purpose of removing or correcting

> correcting constitutional provisions which are obsolete, inaccurate, invalid, unconstitutional, or duplicative; or (2) embodying in a single Constitutional amendment one or more Articles of the Constitution so long as that Constitutional amendment embraces only a single subject.

A three-fifths vote of both houses is required. *Id.* Constitutional amendments 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. Finally, "when two or more amendments shall be submitted to the voters of this State at the same election, they shall be so submitted as that each amendment shall be voted on separately."

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.

The separate vote provision has appeared in the Constitution since 1864. The separate bill requirement was added in 1867. Nothing in the history of the provision reflects whether this requirement was simply added to strengthen the separate vote requirement, or whether it had some independent meaning. The Court of Appeals, however, has held that the single subject and separate vote provisions "must be construed together as serving the same objectives and directed at the same evils," and that they are "intended to require a single amendment to deal with a single subject which may be ratified or rejected by a single vote." *Andrews v. Governor*, 294 Md. 285, 296-297 (1982). As a result, neither this provision nor any other in the Constitution prohibits the combination of statutory 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).

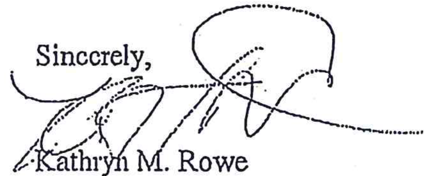
In *Warfield v. Vandiver*, 101 Md. 78 (1905), the Court of Appeals addressed the issue of whether a bill proposing a constitutional amendment had to be submitted to the Governor for approval or veto. Noting the difference between material in a bill that will become law, and a proposed constitutional 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 a proposed constitutional amendment and statutory changes may be included in a single bill.[1]

Sincerely,



Kathryn M. Rowe
Assistant Attorney General

KMR/kmr
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[1] The rules of both houses bar the amendment of a bill to include a proposed constitutional amendment in most circumstances. Senate Rule 46(b); House Rule 46(b).

CONSTITUTIONAL FUNDING MANDATES – SPECIAL FUNDS – NON-BINDING LANGUAGE

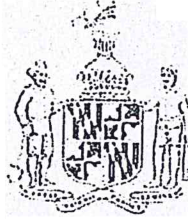
Bill/Chapter:	Senate Bill 700/Chapter 546 and House Bill 621/Chapter 547 of 2014
Title:	Registration of Pesticides – Fee Increase – Disposition of Fees
Attorney General's Letter:	General Approval Letter dated April 24, 2014, footnote 3.
Issue:	Whether a bill creates a funding mandate under the Maryland Constitution by stating that money expended from a special fund for certain purposes "is supplemental to and not intended to take the place of funding that otherwise would be appropriated" for those purposes.
Synopsis:	Senate Bill 700/Chapter 546 and House Bill 621/Chapter 547 of 2014 increase the annual registration fee for pesticides and the terminal registration fee for discontinued pesticides from $100 to $110. The increased portion of the fees is deposited into the State Chemist Fund and may only be expended for the collection, analysis, and reporting of data on pesticides. The bills further provide that any expenditure from the fund for these purposes "is supplemental to and is not intended to take the place of funding that otherwise would be appropriated for such activities."
Discussion:	Under Article III, § 52 of the Maryland Constitution, the General Assembly may, by legislation, require the Governor to include funding for a particular program in future budgets. In order to constitute a valid funding mandate, however, the statute must clearly prescribe a dollar amount for future appropriations or must provide an objective basis or formula for calculating such appropriations. The Attorney General determined that the provisions of Senate Bill 700 and House Bill 621 concerning future appropriations for activities of the State Chemist did not meet this requirement because the amount of new revenue generated by the fee increase is uncertain and the "funding that otherwise would be appropriated" also is not a sum certain. The Attorney General concluded that the provisions should be interpreted as a nonbinding expression of intent only and not as a constitutional funding mandate.
Drafting Tips:	**When drafting legislation that provides a new, but not exclusive source of funding for a particular program, be wary of using language stating that expenditures from the new funding source "are supplemental to" and are not intended to replace funds that "otherwise would be appropriated." Make sure the sponsor understands that this type of**

language does not mandate that other revenue be appropriated for the purpose. More likely, it will be interpreted as a nonbinding expression of intent only. If the sponsor would like to ensure that the Governor includes in the budget a certain level of funding for the program, advise the sponsor that the legislation must include a specific dollar amount or a clear formula for calculating the amount of future appropriations.

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
CHIEF DEPUTY ATTORNEY GENERAL

JOHN B. HOWARD, JR.
DEPUTY ATTORNEY GENERAL



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OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 24, 2014

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

Dear Governor O'Malley:

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

HOUSE	**SENATE**
HB 205[1]	SB 378[1]
HB 250	SB 455[2]
HB 482[2]	SB 700[3]
HB 621[3]	SB 939[6]
HB 812	SB 966[7]
HB 1296[4]	
HB 1476[5]	

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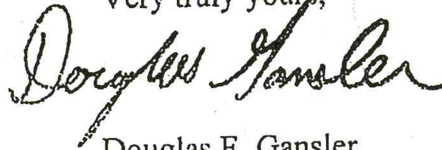

Douglas F. Gansler
Attorney General

DFG/DF/eb

cc: The Honorable John P. McDonough
Jeanne D. Hitchcock
Karl Aro

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[1] HB 205 is identical to SB 378.

[2] HB 482 is nearly identical to its cross-file bill SB 455. There is a small difference in the title between the two bills (the title in HB 482 on page 1, line 6 says "that certain youths qualify" whereas the title in SB 455 says that "certain youth qualify"), but there is no legal significance to either formulation. You may sign either or both in any order.

[3] HB 621 is identical to SB 700. These bills increase the annual registration fee for pesticides and the terminal registration fee for discontinued pesticides from $100 to $110. The bills also amend AG §5-105(f), page 2, lines 30-34, to indicate that the increased portion of the registration fees, which may only be expended for the collection, analysis, and reporting of data on pesticides, "is supplemental to and is not intended to take the place of funding that otherwise would be appropriated for such activities." We believe that subsection (f) is a nonbinding expression of intent only, not a constitutional funding mandate as it does not establish a specific level of required funding or create an objective formula by which such a number may be reached because the amount of revenue the annual fee will generate is uncertain and the "funding that otherwise would be appropriated" is not a sum certain.

[4] HB 1296 contains an erroneous cross-reference in Health – General Article, § 21-2A-07 to "§ 21-2A-06(c)(3)." We recommend a corrected cross-reference to "§ 21-2A-06(c)(2)" for inclusion in next year's corrective bill.

[5] To ensure that this bill will not violate the Establishment Clause of the First Amendment to the U.S Constitution, funds authorized under HB 1476 must be used only for work that has a secular purpose (such as, historic preservation), as opposed to renovations for the sectarian purposes of a church. Accordingly, we recommend that a grant agreement provide that no portion of the proceeds of a loan or any of the matching funds provided for a project funded under this bill may be used for the furtherance of sectarian religious instruction, or in connection

with the design, acquisition, construction, or equipping of any building used or to be used as a place of sectarian religious worship or instruction, or in connection with any program or department of divinity for any religious denomination.

[6] SB 939 appears to provide a benefit to a single person, thus, we have analyzed the bill under Article III, § 33 of the Maryland Constitution, which prohibits special legislation. The Court of Appeals has recognized the propriety of individual grants of retirement benefits for employees who do not meet the requirements of the general law. *Police Pension Cases*, 131 Md. 315 (1917). Although that case involved statutes passed to provide certain retirement benefits to named individuals, the Court found there was no general law to cover the specific circumstances of the case and the statutes "would seem peculiarly meritorious and just," and, therefore, they did not violate Article III, Section 33. Based upon this case and because SB 939 is intended to serve a particular need and promote some public interest for which the general laws may have been inadequate, and because similar types of pension bills have been determined to be constitutional in the past, given our deferential standard of review, we do not believe a finding of unconstitutionality is required.

[7] SB 966 relates to deer hunting with a shotgun in Charles and St. Mary's County. It amends Natural Resources Article § 10-415(a) to allow hunting from January through March. It also amends § 10-415(d) for the issuance of a "deer management permit" by the Department of Natural Resources to allow deer hunting both in and out of season.

New subsection (d)(1) defines the term "deer management permit" as one that authorizes the holder to hunt deer outside of deer hunting season, § 10-415(d)(1). The actual authorizations in § 10-415(d)(2) and (3), however, do not mention hunting out of season. Instead, (d)(2) permits hunting in season, while (d)(3) is silent as to when the hunting may take place. The most logical reading is that the holder of a deer management permit may hunt in the locations set out in the permit during the season, and on agricultural crop land outside the season, but it may be desirable to clarify this in a future session.

Subsection (a), which currently sets out the three seasons to hunt deer (bow hunting, firearms, and muzzle loader), is amended to add a new paragraph (2), allows a person to hunt deer with a shotgun approved by the Department from January through March "[n]otwithstanding any other provision of law." The phrase "notwithstanding any other provision of law" is ambiguous in this context. Read broadly, it would permit hunting of deer during the times set without a license, as that is a requirement of another provision of law. It is our view that the provision should be read to be limited to the actual different change in the law – that is, the times when hunting is permitted under § 10-415(a)(1) and the regulations of the Department. It is also our view that it should not be read to override new § 10-415(d)(5), which expressly permits the Department to "terminate the deer hunting season established in subsection (a)(2)." It is well established that the provisions of a bill must be read in harmony with one another, *In re Adoption of Tracy* K., 434 Md. 198, 207 (2013), and that a more specific statute prevails over a more general one. *Farmers &Merchants Bank v* Schlossberg, 306 Md. 48, 63 (1986). Because Subsection (d)(5) expressly allows the Department to change the limits set in (a)(2), it is more specific than subsection (d), which refers generally to any other provision of law. Moreover, if (d)(5) is not read to allow the Department to alter the season set in (a)(2) it

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does nothing whatsoever – an interpretation that is to be avoided if possible. *Blue v. Prince George's County*, 434 Md. 681, 691 (2013). We also note that, because the provision applies to the hunting season set in subsection (a) and not to the times hunting is permitted under subsection (d), it probably should have been codified in subsection (a).

APPROPRIATIONS – TRANSFER OF FUNDS FROM SPECIAL FUND

Bill/Chapter: Senate Bill 785/Chapter 339 and House Bill 1215/Chapter 340 of 2014

Title: Higher Education – 2+2 Transfer Scholarship

Attorney General's Letter: General Approval Letter dated May 1, 2014, footnote 2.[1]

Issue: Whether bills transferring funds by ordinary legislation from one special fund to another may be given effect.

Synopsis: Senate Bill 785/Chapter 339 and House Bill 1215/Chapter 340 of 2014 alter the defunct Community College Transfer Scholarship Program to be the 2+2 Transfer Scholarship Program for students who earn an associate's degree at a Maryland community college and transfer to a public senior or private nonprofit higher education institution in the State. If the State budget does not include at least $2 million for the scholarship in any fiscal year, the bills require funds to be transferred from the Need-Based Student Financial Assistance Fund in an amount that provides a total of at least $2 million to make awards under the 2+2 Transfer Scholarship Program each year.

Discussion: The Attorney General noted that it has consistently advised that the General Assembly may not transfer funds by ordinary legislation from one special fund to another because to do so would evade the requirements of Article III, § 52(8) of the Maryland Constitution. Article III, § 52(8) provides that the General Assembly may only increase or decrease an appropriation through a Supplementary Appropriation bill. Consequently, the Attorney General advised that the bills' provisions concerning the transfer of funds must be construed as merely an authorization for the Governor to transfer funds through a budget amendment.

Drafting Tips: **A drafter should be aware that the Maryland Constitution provides specific requirements for how the General Assembly may appropriate money that do not allow the General Assembly to transfer funds by ordinary legislation from one special fund to another. A purported transfer that violates this constitutional restraint will be considered as only an authorization for the Governor to transfer funds through a budget amendment. The drafter should discuss this issue with the sponsor if proposed legislation seeks to appropriate money in an impermissible manner.**

[1] See also the Bill Review Letter for Senate Bill 908/Chapter 359 and House Bill 1345/Chapter 360 of 2014 (Electric Vehicles and Recharging Equipment – Rebates and Tax Credits), dated May 1, 2014, which provides a similar analysis.

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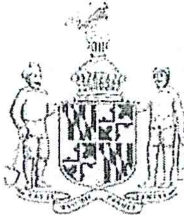

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THE ATTORNEY GENERAL OF MARYLAND

OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 1, 2014

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

Dear Governor O'Malley:

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

HOUSE	**SENATE**
HB 553	SB 350[1]
HB 929[1]	SB 785[2]
HB 1215[2]	

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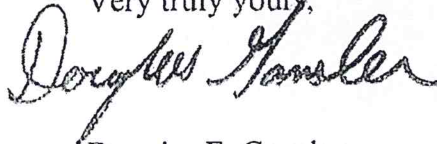

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cc: The Honorable John P. McDonough
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[1] HB 929 is identical to SB 350.

[2] HB 1215 and its crossfile, SB 785, are identical and could be signed in either order. Newly created § 18-2507(b) states that "[i]f the State budget does not include at least $2,000,000 for the 2+2 Transfer Scholarship Program in any fiscal year, funds shall be transferred from the Need–based Student Financial Assistance Fund … in an amount that provides a total of at least $2,000,000 to make awards under the 2+2 Transfer Scholarship Program each year." Relying on a longstanding Court of Appeals decision, this Office has consistently advised that the General Assembly may not transfer funds by ordinary legislation from one special fund to another because to do so would evade the requirements of Article III, § 52(8) of the Maryland Constitution. *See, e.g.*, Bill Review Letter for Senate Bill 868 to the Honorable Parris N. Glendening from Attorney General J. Joseph Curran, Jr., dated May 5, 1995 (citing *McKeldin v. Steedman*, 203 Md. 89, 100-101 (1953)). Under Article III, § 52(8), the legislature may only increase or initiate an appropriation through a Supplementary Appropriation bill. Accordingly, it is our view that § 18-2507(b) of these bills must be construed as an authorization to the Governor to transfer the funds through a budget amendment.

Miscellaneous Legislative Issues

COMMISSION, COUNCIL, OR TASK FORCE DESIGNATION – EX OFFICIO MEMBER

Bill/Chapter:	House Bill 461/Chapter 232 of 2014
Title:	State Early Childhood Advisory Council
Attorney General's Letter:	General Approval Letter dated April 11, 2014, footnote 2.
Issue:	Whether a bill that requires the appointment of an "ex-officio member" for a council membership position is sufficiently clear to guide the appointment of an individual when the specific office of the ex-officio member is not specified.
Synopsis:	House Bill 461/Chapter 232 of 2014 creates the State Early Childhood Advisory Council and, among other things, establishes the 32-member makeup of the council, including "one ex officio member appointed by the Council."
Discussion:	The Attorney General noted that, according to Black's Law Dictionary, an "ex officio" member is one who "serves (on a board or commission) by virtue of holding an office, and whose membership will therefore pass with the office to his or her successor." The State Superintendent of Schools is an example of a designated ex officio member of the Council; one whose membership would pass to a successor holding the same office. The Attorney General concluded that, without designating an office, the description "ex officio member" is not sufficiently clear to guide an appointment for that council position.
Drafting Tips:	**When drafting a bill establishing a commission, council, or task force, the drafter should state the specific office of any member who is to serve on an ex-officio basis.**

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April 11, 2014

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

Dear Governor O'Malley:

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

HOUSE	SENATE
HB 79	SB 11
HB 397	SB 86
HB 402[1]	SB 107[6]
HB 461[2]	SB 314[4]
HB 705[3]	SB 364
HB 714	SB 512
HB 1127[5]	SB 592
	SB 685
	SB 884[5]
	SB 940[3]

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[1] HB 402 is not entirely identical to its crossfile SB 314. HB 402, at page 19, line 12, states "overread," while SB 314, page 19, line 7, states "over read." In addition, HB 402, page 28, line 17, states "hold a hearing," while SB 314 at page 28, line 13, states "hold the hearing." The House version of each difference is preferable so we recommend that if you sign both bills, you sign HB 402 last. In addition, HB 402 has a title problem. The title at page 4 at lines 4-5 should state "Naturopathic Medicine Advisory Committee" to be consistent with page 35, line 17. This should be corrected in next year's curative bill. In addition, the following changes should be made in next year's corrective bill: on page 28 at lines 1, 6, 22 (second instance), 24, 26 (both times), 31, and on page 29 at lines 4-5, in all places where "Board" is listed, the phrase "or a disciplinary panel" should be inserted after "Board" to be consistent with § 14-5F-18(a) at page 23, lines 18-19.

[2] House Bill 461 creates the State Early Childhood Advisory Council and specifies the members of that council. Of the 32 members, one is described as "one ex officio member, appointed by the Council." An ex officio member is one who "serves (on a board or commission) by virtue of holding an office, and whose membership will therefore pass with the office to his or her successor." *Black's Law Dictionary* at 1073 (9th ed. 2009). Thus, the State Superintendent of Schools, the Secretary of Health and Mental Hygiene, and other officer who are made members of the Council are ex officio members. Without a designation of an office, however, the description "ex officio member" is not sufficiently clear to guide an appointment.

[3] HB 705 is identical to SB 940.

[4] SB 314 is not entirely identical to its crossfile HB 402. HB 402, at page 19, line 12, states "overread," while SB 314, page 19, line 7, states "over read." In addition, HB 402, page 28, line 17, states "hold a hearing," while SB 314 at page 28, line 13, states "hold the hearing." The House version of each difference is preferable so we recommend that should you sign both bills, that you sign SB 314 last.

[5] HB 1127 is identical to SB 884.

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[6] Senate Bill 107 provides that the Agency *shall* apply to thc Central Repository for a State and national criminal history records check for each new applicant for a license. It also provides that that the Director of the State Lottery and Gaming Control Agency *may* require any applicant seeking a change of ownership or renewal of a license to submit fingerprints to the Central Registry for a State and national criminal history records check. The FBI ordinarily requires, for a national criminal history records check, that the check be required by law. While the applications for new licenses clearly meet this test, the applications for change of ownership or renewal may not. As a result, this bill may not be able to be fully implemented as now written.

INTERPRETIVE ISSUES – "NOTWITHSTANDING" CLAUSES

Bill/Chapter: Senate Bill 966/Chapter 574 of 2014

Title: Charles County and St. Mary's County – Deer Hunting

Attorney General's Letter: General Approval Letter dated April 24, 2014, footnote 7.

Issue: Whether a provision in a bill that applies "notwithstanding any other provision of law" should be interpreted to prevail over other, more specific, provisions of law on the same subject.

Synopsis: Senate Bill 966/Chapter 574 of 2014 authorizes deer hunting with a shotgun in Charles and St. Mary's Counties from January through March, "notwithstanding any other provision of law." The bill also authorizes the Department of Natural Resources (DNR) to terminate the shotgun hunting season and to restrict the lands on which an individual may hunt in order to protect public safety and welfare.

Discussion: The Attorney General expressed concern that the section of Senate Bill 966 authorizing a person to hunt deer with a shotgun "notwithstanding any other provision of law" was ambiguous. Read broadly, the section could be interpreted to supersede all other hunting laws, including other provisions of the same bill. The Attorney General rejected this broad interpretation, however, citing the principle that provisions of a bill must be read in harmony with one another and that a more specific statute prevails over a more general one.

Considering the "notwithstanding" clause in its context, the Attorney General concluded that it should not be read to prevail over all other hunting laws, but only over other provisions directly related to deer hunting seasons. Moreover, the "notwithstanding" clause should not be interpreted to override provisions of the bill specifically authorizing DNR to terminate or otherwise restrict the deer shotgun hunting season. To allow otherwise, the Attorney General pointed out, would lead to the absurd result of DNR being unable to exercise the authority expressly granted by the bill to close the shotgun hunting season because people could continue using shotguns to hunt deer "notwithstanding" the attempted closure under another provision of law.

Drafting Tips: **When drafting legislation that creates an exception to a general rule, a drafter should strive to use clear, unambiguous language. In general, the phrase "notwithstanding any other law" should be avoided because it may create confusion about the scope of the exception. The drafter should instead try to identify each provision of law that the exception is intended to override.**

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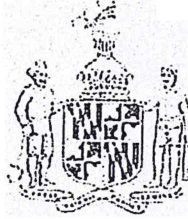

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April 24, 2014

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

Dear Governor O'Malley:

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

HOUSE	**SENATE**
HB 205[1]	SB 378[1]
HB 250	SB 455[2]
HB 482[2]	SB 700[3]
HB 621[3]	SB 939[6]
HB 812	SB 966[7]
HB 1296[4]	
HB 1476[5]	

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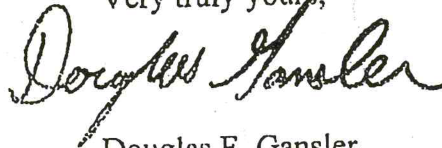

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[1] HB 205 is identical to SB 378.

[2] HB 482 is nearly identical to its cross-file bill SB 455. There is a small difference in the title between the two bills (the title in HB 482 on page 1, line 6 says "that certain youths qualify" whereas the title in SB 455 says that "certain youth qualify"), but there is no legal significance to either formulation. You may sign either or both in any order.

[3] HB 621 is identical to SB 700. These bills increase the annual registration fee for pesticides and the terminal registration fee for discontinued pesticides from $100 to $110. The bills also amend AG §5-105(f), page 2, lines 30-34, to indicate that the increased portion of the registration fees, which may only be expended for the collection, analysis, and reporting of data on pesticides, "is supplemental to and is not intended to take the place of funding that otherwise would be appropriated for such activities." We believe that subsection (f) is a nonbinding expression of intent only, not a constitutional funding mandate as it does not establish a specific level of required funding or create an objective formula by which such a number may be reached because the amount of revenue the annual fee will generate is uncertain and the "funding that otherwise would be appropriated" is not a sum certain.

[4] HB 1296 contains an erroneous cross-reference in Health – General Article, § 21-2A-07 to "§ 21-2A-06(c)(3)." We recommend a corrected cross-reference to "§ 21-2A-06(c)(2)" for inclusion in next year's corrective bill.

[5] To ensure that this bill will not violate the Establishment Clause of the First Amendment to the U.S Constitution, funds authorized under HB 1476 must be used only for work that has a secular purpose (such as, historic preservation), as opposed to renovations for the sectarian purposes of a church. Accordingly, we recommend that a grant agreement provide that no portion of the proceeds of a loan or any of the matching funds provided for a project funded under this bill may be used for the furtherance of sectarian religious instruction, or in connection

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with the design, acquisition, construction, or equipping of any building used or to be used as a place of sectarian religious worship or instruction, or in connection with any program or department of divinity for any religious denomination.

[6] SB 939 appears to provide a benefit to a single person, thus, we have analyzed the bill under Article III, § 33 of the Maryland Constitution, which prohibits special legislation. The Court of Appeals has recognized the propriety of individual grants of retirement benefits for employees who do not meet the requirements of the general law. *Police Pension Cases*, 131 Md. 315 (1917). Although that case involved statutes passed to provide certain retirement benefits to named individuals, the Court found there was no general law to cover the specific circumstances of the case and the statutes "would seem peculiarly meritorious and just," and, therefore, they did not violate Article III, Section 33. Based upon this case and because SB 939 is intended to serve a particular need and promote some public interest for which the general laws may have been inadequate, and because similar types of pension bills have been determined to be constitutional in the past, given our deferential standard of review, we do not believe a finding of unconstitutionality is required.

[7] SB 966 relates to deer hunting with a shotgun in Charles and St. Mary's County. It amends Natural Resources Article § 10-415(a) to allow hunting from January through March. It also amends § 10-415(d) for the issuance of a "deer management permit" by the Department of Natural Resources to allow deer hunting both in and out of season.

New subsection (d)(1) defines the term "deer management permit" as one that authorizes the holder to hunt deer outside of deer hunting season, § 10-415(d)(1). The actual authorizations in § 10-415(d)(2) and (3), however, do not mention hunting out of season. Instead, (d)(2) permits hunting in season, while (d)(3) is silent as to when the hunting may take place. The most logical reading is that the holder of a deer management permit may hunt in the locations set out in the permit during the season, and on agricultural crop land outside the season, but it may be desirable to clarify this in a future session.

Subsection (a), which currently sets out the three seasons to hunt deer (bow hunting, firearms, and muzzle loader), is amended to add a new paragraph (2), allows a person to hunt deer with a shotgun approved by the Department from January through March "[n]otwithstanding any other provision of law." The phrase "notwithstanding any other provision of law" is ambiguous in this context. Read broadly, it would permit hunting of deer during the times set without a license, as that is a requirement of another provision of law. It is our view that the provision should be read to be limited to the actual different change in the law – that is, the times when hunting is permitted under § 10-415(a)(1) and the regulations of the Department. It is also our view that it should not be read to override new § 10-415(d)(5), which expressly permits the Department to "terminate the deer hunting season established in subsection (a)(2)." It is well established that the provisions of a bill must be read in harmony with one another, *In re Adoption of Tracy* K., 434 Md. 198, 207 (2013), and that a more specific statute prevails over a more general one. *Farmers &Merchants Bank v* Schlossberg, 306 Md. 48, 63 (1986). Because Subsection (d)(5) expressly allows the Department to change the limits set in (a)(2), it is more specific than subsection (d), which refers generally to any other provision of law. Moreover, if (d)(5) is not read to allow the Department to alter the season set in (a)(2) it

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does nothing whatsoever – an interpretation that is to be avoided if possible. *Blue v. Prince George's County*, 434 Md. 681, 691 (2013). We also note that, because the provision applies to the hunting season set in subsection (a) and not to the times hunting is permitted under subsection (d), it probably should have been codified in subsection (a).