Bill Review Letters - 2015

An Analysis of Selected Bill Review Letters of the Attorney General of Maryland on Legislation Passed at the 2015 Session of the General Assembly



DEPARTMENT OF LEGISLATIVE SERVICES 2015

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of the
Attorney General of Maryland
on
Legislation Passed at the 2015 Session of the General Assembly

Department of Legislative Services
Office of Policy Analysis
Annapolis, Maryland

October 2015

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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 – 2015*, 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 – 2015 contains selected bill review letters that cover a wide range of topics including freedom of speech, equal protection, privacy, separation of powers, executive privilege, 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, Charity L. Scott, Jennifer L. Young, and Patrick D. Carlson. Karen Belton, Nichol A. Conley, and Michelle J. Purcell 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 and Federal Legislative Issues

FIRST AMENDMENT AND COMMERCE CLAUSE – "MUG SHOT" WEBSITES – REQUIRED REMOVAL OF CONTENT

Bill/Chapter: House Bill 744/Chapter 453 of 2015

Title: Commercial Law – Consumer Protection – "Mug Shot" Web Sites

Attorney General's Letter: May 7, 2015

Issue: Whether a bill that requires an operator of a "mug shot" website to remove a mug shot from the site under specified circumstances violates the First Amendment or the Commerce Clause of the U.S. Constitution.

Synopsis: House Bill 744/Chapter 453 of 2015 applies to operators of websites that charge a fee for the removal of an arrest or detention photograph or digital image. The bill authorizes an individual to request an operator of a website to remove the individual's photograph or digital image from the operator's website if (1) the image was taken during the arrest or detention of the individual for a criminal or traffic charge or for a suspected violation of a criminal or traffic law and (2) the court or police record that contained the image was expunged, shielded or otherwise removed from public inspection, or the resulting judgment was vacated. The operator must remove the image free of charge within 30 days after receiving a request. A violation is an unfair or deceptive trade practice and subject to penalty provisions under the Maryland Consumer Protection Act.

Discussion: The Attorney General observed, first, that the bill raises a concern under the Free Speech Clause of the First Amendment because it punishes the continuing publication of information originally available to the public. Mug shots are public records under Maryland law. The level of scrutiny a court will apply when analyzing the constitutionality of a law banning speech depends on whether or not the speech in question is commercial speech. The Attorney General analyzed the legislation under both standards, noting that the principal purpose of the website operators targeted by the bill is to make money from posting mug shots, while acknowledging that the fact that a fee may be charged in connection with speech does not necessarily render the speech commercial.

If the subject of the bill is noncommercial speech, the legislation must be shown to be narrowly tailored to promote a compelling government interest. The Attorney General viewed the State's interest in requiring the removal of mug shots as arguably compelling because removal protects the privacy of individuals damaged by the availability of mug shots online, especially when the underlying records have been expunged, removed, or shielded by a court. Removal also supports State policies that give individuals an opportunity to clear their criminal records. The Attorney General then stated that the bill is arguably narrowly tailored because, among other

reasons, it targets only those websites that post mug shots for the purpose of inducing the subjects of the mug shots to pay for removal.

The Attorney General also analyzed the bill under the Supreme Court's four-part test for commercial speech that examines (1) if the speech concerns a lawful activity and is not misleading; (2) whether the government's interest is substantial; (3) if the restriction directly advances the governmental interest asserted; and (4) whether the restriction is not more extensive than is necessary to service that interest. Under this test, the Attorney General stated that a court would likely find the bill to be constitutional on its face because, among other reasons, it only targets certain websites and limits the right of removal to individuals whose criminal records have been expunged, removed, or shielded or where no criminal conviction resulted from the arrest. The Attorney General also noted that the bill's limitations on the right of removal advance the State's interest in protecting the privacy of individuals and removing job barriers to individuals with criminal records.

The Attorney General then considered whether the bill violates the Commerce Clause by applying to any website, including those situated outside of Maryland. Article I, § 8 of the U.S. Constitution reserves for the U.S. Congress the power to regulate interstate commerce, and this clause has been interpreted as barring states from regulating interstate commerce. The Attorney General concluded that the bill does not clearly violate the Commerce Clause after analyzing whether the bill impermissibly discriminates against interstate commerce or has the practical effect of regulating extraterritorially. Although the bill does not, on its face, discriminate between in-state and out-of-state website operators, it may reach an operator whose only contact with the State is its publication of a mug shot associated with the commission of a crime in Maryland. The Attorney General noted, however, that Maryland's anti-spam act was found to not regulate extraterritorially. In that case the court upheld the law because it focused on the conduct of spammers in targeting Maryland consumers. Accordingly, a court may find that by pulling mug shots from Maryland-based agencies, the website operator has sufficient contacts with Maryland. The constitutionality of the bill will likely be determined on a case-by-case basis and depend on the conduct of the website operator sued. Therefore, the Attorney General concluded, the bill does not clearly violate the Commerce Clause.

Drafting Tips: **If asked to draft legislation that restricts the display of public information on the Internet, a drafter should advise the sponsor that the bill may be challenged for violating free speech protections of the First Amendment and for having an impermissible practical effect of regulating extraterritorially under the Commerce Clause. The drafter should work with the sponsor to draft the bill's restrictions narrowly and in a manner that addresses conduct with a connection to Maryland.**

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May 7, 2015

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: House Bill 744, "Commercial Law – Consumer Protection – "Mug Shot" Web Sites"

Dear Governor Hogan:

We have reviewed House Bill 744 for legal sufficiency and constitutionality. The bill raises issues regarding whether it would survive a challenge to its constitutionality under the First Amendment and the Commerce Clause. Nevertheless, because there is no binding precedent directly on point, we cannot say that the bill is clearly unconstitutional on its face.

House Bill 744 allows individuals to request that "an operator of a web site remove the individual's photograph or digital image from the operator's web site" under certain circumstances. The individual may request removal if the image is a mug shot, i.e., "taken during arrest or detention of the individual for a criminal or traffic charge or suspected violation of a criminal or traffic law," and the court or police record has been expunged under Maryland law, the public record containing the image has been shielded or removed by court order, or a court has vacated "the judgment that resulted from the arrest or detention." The web site operator must remove the image within 30 days after receiving a request for removal. The web site operator is prohibited from charging a fee for doing so. A violation of the provisions of House Bill 744 constitutes an unfair or deceptive trade practice under Title 13 of the Commercial Law Article and is subject to all enforcement and penalty provisions therein.

The legislative history shows that the intent of the bill is to reach web sites that use automated methods to download or "screen scape" hundreds of mug shots from detention

centers and other facilities, and publish them online. After posting the mug shots online, these companies then typically charge a high fee—around $400—to remove a mug shot. The sponsor and other proponents of the bill testified that the continuing presence and easy availability of these mug shots online, including for arrests that occurred years ago and resulted in no convictions, creates a stigma for those individuals and imposes a job barrier. The legislative history also shows that to address the concerns of media organizations the bill was amended to limit the scope to an "operator of a web site that charges a fee to remove an arrest or detention photograph or digital image."

The First Amendment prohibits the government from enacting laws "abridging the freedom of speech." U.S. Const. amend. I. The First Amendment of the United States Constitution applies to the state through the Fourteenth Amendment. *Central Hudson Gas v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980). In addition, the Maryland Court of Appeals has instructed that Article 40 of the Maryland Declaration of Rights is "substantially similar" to the First Amendment and has been treated "as in *pari materia* with the First Amendment." *Freedman v. State*, 233 Md. 498, 501 (1965). Accordingly, the Supreme Court's interpretation of the First Amendment is relevant for determining whether House Bill 744 comports with the Maryland constitution as well.

Mug shots are public records under Maryland law. 92 Op. Att'y Gen. 26 (2007) (concluding that a mug shot in the custody of a police department is an investigatory record and should be disclosed in response to a Public Information Act request unless the department determines that disclosure would be contrary to the public interest). House Bill 744 does not change the status of mug shots as public records. As a result, legislation that punishes the continuing publication of information originally publicly available raises a First Amendment concern.[1] *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (determining that First Amendment prohibited a lawsuit against television station for publishing rape victim's name obtained from court records); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (holding that court could not bar publication of juvenile offender's name when the court proceeding was open to the public); *Ostergren v. Cuccinelli*, 615 F.3d 263 (4th Cir. 2010) (finding unconstitutional a Virginia law that

[1] The First Amendment also gives protection to a person who publishes non-public government information. *See New York Times v. United States*, 403 U.S. 713 (1971) (announcing that the government failed to meet "the heavy burden" of justifying an injunction to prevent publication of classified government papers). In this situation, any justification for banning publication is likely to be particularly difficult given that the State itself considers mug shots to be public records subject to disclosure.

prohibited publication of publicly available land records, including Social Security numbers).

The level of scrutiny a court would apply to a law banning speech initially depends on whether the speech in question is considered to be commercial speech or not. *Central Hudson*, 447 U.S. at 561-62. Commercial speech is "expressly related solely to the economic interests of the speaker and its audience" and is "speech proposing a commercial transaction." *Id.* Arguably, the principal purpose of the web site operators targeted by House Bill 744 is to make money from posting mug shots, either by proposing a commercial transaction to remove the mug shot or through paid advertisements. At the same time, the fact that a fee may be charged in connection with speech does not necessarily render that speech commercial. *See Nefedro v. Montgomery County*, 414 Md. 585 (2010) (holding that fortune telling is not commercial speech despite that the individual telling the fortune charges a fee). In the absence of any case law addressing whether mug shot web sites involve commercial or noncommercial speech, we will analyze the statute's constitutionality under both standards.[2]

If a court determines the subject of House Bill 744 is noncommercial speech, it will assess the bill for constitutionality under the First Amendment standard applicable to laws regulating speech based on its content. That standard requires a showing that the legislation is "'narrowly tailored to promote a compelling Government interest.'" *Nefedro*, 414 at 605 (quoting *U.S. v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000)). The Supreme Court recently observed that "'it is the rare case' in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest. But those cases do arise." *Williams-Yulee v. The Florida Bar*, 2015 WL 1913912 (S. Ct. April 29, 2015) at *8 (citations omitted).

The State's interest in requiring the removal of certain mug shots is arguably compelling in several ways. First, requiring removal of those mug shots protects the privacy of individuals who are damaged by the availability of mug shots online, especially when the underlying records have been expunged, removed or shielded by a court.

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[2] It is also possible that a court would find the posting of mug shots to demand payment for removal is not speech at all. "[S]peech which, in its effect, is tantamount to legitimately proscribable nonexpressive conduct may itself be legitimately proscribed, punished, or regulated incidentally to the constitutional enforcement of generally applicable statutes." *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 243 (4th Cir. 1997) (upholding tort claim against book publisher who published a guide to commit murder, which a murderer then followed).

> [A] booking photograph is a unique and powerful type of photograph that raises personal privacy interests distinct from normal photographs. A booking photograph is a vivid symbol of criminal accusation, which, when released to the public, intimates, and is often equated with, guilt. Further, a booking photograph captures the subject in the vulnerable and embarrassing moments immediately after being accused, taken into custody, and deprived of most liberties.

Karantsalis v. U.S. Dept. of Justice, 635 F.3d 497, 503 (11th Cir. 2011) (determining that Marshall Service could deny Freedom of Information Act ("FOIA") request for mug shots). *Accord Times Picayune Publishing Corp. v. Dept. of Justice*, 37 F. Supp. 2d 472, 477 (E.D. La. 1999) ("a mug shot is more than just a photograph"); *World Publishing Co. v. Dept. of Justice*, 672 F.3d 825 (10th Cir. 2012) (privacy interest in booking photo supported exemption from FOIA request). *But see Detroit Free Press, Inc. v. Dept. of Justice*, 73 F.3d 93 (6th Cir. 1996) (mug shot must be produced in response to FOIA request).[3]

In addition, requiring removal of certain mug shots from the web sites in question supports the State's other civil justice efforts to give individuals an opportunity to clear their criminal records. Marylanders with criminal records face significant barriers to employment. Recognizing this reality, State laws have been enacted over the last several years to allow individuals to expunge some criminal records[4] and to prohibit employers from asking job applicants whether they have criminal convictions.[5] Additionally, the General Assembly recently passed the Maryland Second Chance Act, which will allow individuals to shield certain nonviolent, misdemeanor convictions from public view.[6]

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[3] Of course, it could be argued "that '[b]y placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby served.'" *Ostergren*, 615 F.3d at 273 (quoting *Cox Broadcasting*, at 420 U.S. at 495). *See also* 92 Op. Att'y Gen. at 50 (advising that "[g]iven the increasing use of digital photography and the potential for including digital photographs in criminal history databases, the Legislature may wish to address explicitly the status of mug shots" under Maryland law.

[4] Chapter 63 and Chapter 388, Laws of Maryland 2007, Chapter 616, Laws of Maryland 2008, and Chapter 362, Laws of Maryland 2010.

[5] Chapter 160, Laws of Maryland 2013.

[6] Maryland Second Chance Act, Senate Bill 526 and House Bill 244 of 2015.

The statute is arguably narrowly tailored because it targets only those web sites that appear to post the mug shots for the express purpose of inducing the subjects of the mug shots to pay for removal—a practice some have likened to extortion.[7] Additionally, the only mug shots that must be removed when a request is made are those involving records that have been expunged, removed or shielded by a court or where a court has vacated the judgment that resulted from the arrest or detention. It is these mug shots that the legislature determined unfairly violate an individual's privacy interest and undermine the State's other criminal justice efforts to remove job barriers. In comparison, in *Cox Broadcasting* the statute in question criminalized the publication of "the name or identity or any female who may have been raped or upon whom an assault with intent to commit rape may have been made." 420 U.S. at 471 n.1.

Some mug shots may be found on media web sites, which are not within the scope of the bill, thus there is an argument that the bill is fatally underinclusive. The Supreme Court, has recognized

> that underinclusiveness can raise "doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." ... Underinclusiveness can also reveal that a law does not actually advance a compelling interest. For example, a State's decision to prohibit newspapers, but not electronic media, from releasing the names of juvenile defendants suggested that the law did not advance its stated purpose of protecting youth privacy.

Williams-Yulee, 2015 WL 1913912 at *11 (citations omitted). The Court in *Williams-Yulee*, however, also recognized that "[a] State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns. We have accordingly upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests." Consequently, it is possible that a reviewing court would find that House Bill 744 is narrowly tailored to support a compelling State interest.

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[7] David Segal, *Mugged by a Mug Shot Online*, N.Y. Times, Oct. 5, 2013, available at http://nyti.ms/1a84Mic.

If a court were to view the posting of mug shots online as commercial speech, it would apply a 4-part test to determine whether the government restriction meets the First Amendment. *Central Hudson Gas*, 447 U.S. at 566. First, does the speech concern a lawful activity and is it misleading? Second, is the government's interest substantial? If the answer is yes to both those questions, the next questions are "whether the restriction directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to service that interest." *Id.* Although there is an argument that a mug shot provides a misleading impression of an individual, the mug shots in question are typically accurate public records. Thus, the remaining relevant inquiry is whether the State has a substantial interest that is directly advanced by House Bill 744 and whether the bill is no more restrictive than it needs to be.

In our view, if a court determines that the mug shots in question are commercial speech, a court would uphold House Bill 744 as facially constitutional under the First Amendment. The bill is limited to only those web sites that post mug shots and require payment for their removal. Additionally, as discussed previously, the State's substantial interest in protecting the privacy of individuals and removing job barriers is advanced by the bill. Although it is possible that a particular person's mug shot may be found on a media web site, press organizations do not routinely post every mug shot publicly available. Thus, limiting the reach of the bill to sites that publish a massive amount of mug shots and charge for their removal advances privacy interests. Moreover, limiting the right of removal to individuals whose criminal records have been expunged, removed, or shielded or where no criminal conviction resulted from the arrest is consistent with and helps advance the State's efforts in removing job barriers.

The bill, however, has another possible constitutional defect. It may violate the Commerce Clause because it applies to any web site, including those situated outside of Maryland. The Commerce Clause of the United States Constitution, Art. 1, § 8, cl. 3, grants to Congress the power to regulate commerce among the states. The Supreme Court has long interpreted this clause as a barrier to states from regulating interstate commerce even in the absence of federal law. *Gibbons v. Ogden*, 22 U.S. 1 (1824). "When a State proceeds to regulate commerce … among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do." *Id.* at 10.

> The constitutional grant of authority to Congress to regulate interstate commerce "has long been understood, as well, to

> provide 'protection from state legislation inimical to the national commerce [even] where Congress has not acted.'" This "negative command, known as the dormant Commerce Clause," prohibits States from legislating in ways that impede the flow of interstate commerce. The dormant Commerce Clause's limitation on State power, however, "is by no means absolute. In the absence of conflicting federal legislation the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected."

Star Scientific, Inc. v. Beales, 278 F.3d 339, 354-55 (4th Cir. 2002)(citations omitted).

The Supreme Court developed a two-tiered test for determining whether a state statute violates the Commerce Clause. "'When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests,' the statute is generally struck down 'without further inquiry.'" *Id.* at 355. The first tier "asks whether a 'statute clearly discriminates against interstate commerce,' or has the 'practical effect of regulating extraterritorially.'" *Volvo Trademark Holding Aktieboaget v. AIS Construction Equipment Corp.*, 416 F. Supp. 2d 404 (W.D.N.C. 2006).

In *Star Scientific*, the Fourth Circuit made clear that

> a State may not regulate commerce occurring wholly outside of its borders. Nor may a State pass laws that have "the 'practical effect' of regulating commerce occurring wholly outside the State's borders." This proposition is based on the common sense conclusion that "a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority," regardless of the State's legislative intent.

Id. at 355 (citations omitted).

Under the second tier, applicable in the situation where a state statute indirectly affects interstate commerce, a court will apply the test developed by the Supreme Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Id. at 142 (citation omitted).

House Bill 744 on its face does not discriminate between in-state and out-of-state web site operators. At the same time, it may reach a web site operator whose only "contact" with the State is that it published a mug shot associated with the commission of a Maryland crime. Thus, a reviewing court will examine "'the overall effect of the statute on both local and interstate activity.'" *MaryCLE, LLC v. First Choice Internet, Inc.* 166 Md. App. 481, 516 (2006). In that case, the court found that Maryland's anti-spam act, which did not discriminate against out-of-state senders of email on its face, passed the *Pike* test because its benefits outweigh the burden placed on email advertisers. *Id.* at 522.

In addition, the court found that the anti-spam act did not regulate extraterritorially because "its focus is not on 'when or where recipients may open the proscribed … messages. Rather, the Act addresses the conduct of spammers in targeting [Maryland] consumers.'" *Id.* at 523 (*quoting Washington v. Heckel*, 24 P.3d 404, 412 (Wash. 2001)). The court also noted that the anti-spam law did not prevent senders of email from soliciting residents in other states; it only regulated those sent to Marylanders. The act required a showing that the email advertiser used equipment in the State or sent prohibited email to a person the sender knew or should have known was a Maryland resident. Thus, it is possible that a court would find that by pulling mug shots from Maryland-based agencies, the web site operator has sufficient contacts with Maryland.

On the other hand, some courts have found that effective regulation of the internet requires federal legislation. *See, e.g., PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004); *American Library Ass'n v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997). Nevertheless, because House Bill 744 does not discriminate against interstate commerce on its face,

whether the bill violates the Commerce Clause will likely be made on a case-by-case basis and depend on the conduct of the specific web site operator being sued. Hence, we do not believe that House Bill 744 clearly violates the Commerce Clause.

In closing, although a prohibition on republishing online material that is a public record and not false gives us pause due to the First Amendment, we also note that according to the National Conference of State Legislatures at least nine other states[8] have enacted similar legislation in the past two years and none has been struck as unconstitutional.[9] For the reasons set forth above, it is our view that House Bill 744 is not clearly unconstitutional.

Sincerely,

Brian E. Frosh
Attorney General

BEF/SB/kk

cc: The Honorable John C. Wobensmith
Joseph M. Getty
Karl Aro

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[8] California, Colorado, Georgia, Illinois, Missouri, Oregon, Utah, Wyoming. In addition, the governor of Virginia signed a bill into law on March 23, 2015 that makes it a misdemeanor for the owner of a web site to both post an arrest photo and solicit, request, or accept money for removing the photograph. *See* Richmond Sunshine web page for Senate Bill 720, available at https://www.richmondsunlight.com/bill/2015/sb720/.

[9] There have been at least a couple suits brought against mug shot web sites. "In Ohio, a federal lawsuit against two mug shot websites, bustedmugshots.com and mugshotsonline.com, settled in December 2013. The sites agreed to pay $7,500 and not charge people for removing their photos. Both sites are run by Citizens Information Associates LLC, based in Austin, Texas. *Lashaway v. D'Antonio*, U.S.D.C. (N.D. Ohio), Case No. 3:13-cv-01733-JZ." *Jails Stop Posting Mug Shots to End "Extortion" by Profiteering Websites*, Prison Legal News, August 14, 2014, available at: https://www.prisonlegalnews.org/news/2014/aug/12/jails-stop-posting-mug-shots-end-extortion-profiteering-websites/. A class action suit was filed in Florida against mug shot web sites but class certification was denied. *Bilotta v. Citizens Information Associates LLC*, U.S.D.C. (M.D. Fla.), Case No. 8:13-cv-02811-CEH-TGW.

COMMERCE CLAUSE – ALCOHOLIC BEVERAGES LICENSES – RESIDENCY REQUIREMENTS

Bill/Chapter: House Bill 90 and Senate Bill 426/Chapter 171 of 2015

Title: Montgomery County – Alcoholic Beverages – License Requirements

Attorney General's Letter: General Approval letter dated April 23, 2015, footnote 1.

Issue: Whether bills that relax, but do not eliminate, residency requirements for certain alcoholic beverages license applicants in a county violate the Commerce Clause of the U.S. Constitution.

Synopsis: House Bill 90 and Senate Bill 426/Chapter 171 of 2015 repeal the requirement that an individual applying on behalf of certain business entities for a license in Montgomery County must be a resident of Montgomery County. Instead, the bills require the individual to be a resident of the State.

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, provided that the legislation represents an evenhanded effort to effectuate a legitimate State interest.

In reviewing the bills, the Attorney General stated that legal issues have been raised around the country with respect to residency, voter registration, and tax payment requirements. The Attorney General noted, however, that the bills alleviate some existing residency requirements, making it more likely that they would be upheld. The Attorney General did not think, therefore, that the bills raised constitutional issues.

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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April 23, 2015

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401

Dear Governor Hogan:

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

HOUSE	SENATE
HB 90[1]	SB 67
HB 121	SB 68
HB 167[2]	SB 83
HB 170[3]	SB 88[3]
HB 235	SB 107
HB 243[4]	SB 225[5]
HB 297[5]	SB 230[2]
HB 298	SB 350[4]
HB 386	SB 355[6]
HB 431	SB 370
HB 543[6]	SB 426[1]
HB 936[7]	SB 453[7]
HB 941	SB 929[8]
HB 1113	

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HB 1176[8]

HB 1188

Very truly yours,

Brian E. Frosh
Attorney General

BEF/SB/eb

cc: The Honorable John C. Wobensmith
Joseph M. Getty
Karl Aro

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[1] HB 90 and SB 426 are identical. The bills amend Article 2B, § 9-101(c)(1)(i) to add a reference to subparagraph (iv), which was added by the bills to the exceptions listed in the first sentence of subparagraph (i). This language was also amended by HB 527, which was form approved by this office on April 13, 2015 and signed into law as Chapter 92. Chapter 92 amends § 9-101(c)(1)(i) to remove the reference to subparagraph (iii), which is repealed by that Act. The necessary renumbering can be taken care of by the publishers of the Code. HB 90 and SB 426 amend various portions of §§ 9-101 and 10-103 to require that applicants for various alcoholic beverages licenses in Montgomery County need only be a resident of the State to meet the otherwise applicable requirements relating to residence, registration for voting, and paying taxes. In most instances, this is done by adding the language that in Montgomery County "an individual who is a resident of the State meets the registered voter, tax payer and residency requirements" of the law, and that is how all of the changes are described in the title. In one instance, however, the change is made by deleting the voter registration requirement and adding "resident of the State." While the language used is somewhat different than that in the title, the effect is the same and it is our view that the title is legally sufficient. Finally, while legal issues have been raised around the country with respect to residency, voter registration and tax payment requirements, the changes made by House Bill 90 and Senate Bill 426 alleviate some of these requirements, making it more likely it could be upheld. As a result, it is our view that the bills do not raise constitutional issues.

[2] HB 167 and SB 230 are identical. The bills amend the length of service award program ("LOSAP") for Calvert County by reducing the age to commence receipt of lifetime length of service award payments from 55 to 50, increasing the additional payments for service in excess of 25 years from $4 to $10 per month, eliminating the $500 maximum cap on monthly award payments, and permitting the designation of a non-spouse beneficiary to receive benefits in the event of death of the volunteer. We note that the Internal Revenue Code governs LOSAPs, 26 U.S.C. § 457(e)(11), and places a limitation on accruals in § 457(e)(11)(B)(ii), which requires that the actuarial value of any one year of service credit earned not exceed $3,000.

[3] HB 170 is identical to SB 88.

[4] HB 243 is identical to SB 350.

[5] HB 297 is not entirely identical to its crossfile SB 225. The difference appears on page 3, in lines 1 and 4 of each bill. SB 225 capitalizes the word "Director" twice in the new language on each line, while HB 297 does not capitalize the word. Neither reference is inaccurate nor ambiguous, and either bill or both bills may be signed.

[6] HB 543 is identical to SB 355.

[7] HB 936 is identical to SB 453.

[8] HB 1176 is identical to SB 929.

STATE LEGISLATION AND FEDERAL NONDISCRIMINATION REQUIREMENTS – COVERAGE FOR INFERTILITY SERVICES

Bill/Chapter: Senate Bill 416/Chapter 482 and House Bill 838/Chapter 483 of 2015

Title: Health Insurance – Coverage for Infertility Services

Attorney General's Letter: April 14, 2015

Issue: Whether legislation altering required conditions for mandated health insurance coverage of in vitro fertilization (IVF) in order to extend the mandated benefit to same-sex couples violates nondiscrimination provisions of federal law by maintaining, for opposite-sex couples only, a required condition for mandated coverage that the patient's spouse's sperm be used for the procedure.

Synopsis: Senate Bill 416/Chapter 482 and House Bill 838/Chapter 483 of 2015 alter required conditions for health insurance coverage of IVF in order to extend the mandated benefit to same-sex married couples. For same-sex married couples, a health insurance carrier that provides pregnancy-related benefits must provide coverage for IVF if the couple has a history of involuntary infertility, which may be demonstrated by a history of six attempts of artificial insemination over the course of two years failing to result in pregnancy, and meets other specified conditions for coverage. The legislation also clarifies IVF coverage requirements for heterosexual couples by specifying that for such couples, the patient's oocytes must be fertilized with the patient's spouse's sperm and the couple must have a history of involuntary infertility, which may be demonstrated by a history of intercourse of at least two years' duration failing to result in pregnancy.

Discussion: The Attorney General began by observing that statutory requirements under the State's IVF mandate make it impossible for any woman in a same sex marriage to qualify for the mandated benefit. To qualify for the benefit, the patient's eggs must be fertilized with the spouse's sperm. The bills seek to address this limitation by altering a requirement that a spouse's sperm be used for IVF in situations involving women in same-sex couples. The Attorney General then noted that the change to the IVF mandate, though necessary to alleviate discrimination against women in same-sex couples, inadvertently creates another source of differential treatment. It creates an inequality between same-sex couples, who can now qualify for the benefit if they meet the other statutory requirements, and opposite-sex couples in which the husband is unable to produce sperm, who cannot qualify for the benefit.

Section 1557 of the federal Patient Protection and Affordable Care Act (ACA) prohibits discrimination on the grounds of race, color, national

origin, sex, age, or disability, under "any health program or activity, any part of which is receiving federal financial assistance, or under any program or activity that is administered by an executive agency or any entity established under [Title I of ACA]." This provision has been interpreted as prohibiting discrimination on the basis of sexual orientation in plans covered by the ACA, such as qualified health plans offered on the Maryland Health Benefit Exchange.

The Attorney General concluded that it is unclear whether the differential treatment resulting from bills would violate the ACA, as the issue raised by the legislation would be a matter of first impression, and then advised that it may be desirable for the General Assembly to address the disparity in legislation next session.

Drafting Tips: **When drafting legislation that would result in differential treatment on the basis of gender or sexual orientation, a drafter should consider whether relevant federal statutes would prohibit the disparity resulting from the legislation. When analyzing a proposal for legislation that seeks to remedy discrimination against a protected class of individuals, a drafter should be alert to any potential inadvertent differential treatment that might result from the legislative proposal.**

BRIAN E. FROSH
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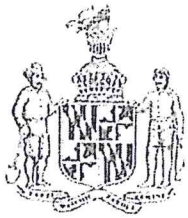
DEPUTY ATTORNEY GENERAL



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CORRECTED LETTER

April 14, 2015

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: Senate Bill 416 and House Bill 838 "Health Insurance – Coverage for Infertility Services"

Dear Governor Hogan:

Senate Bill 416 and House Bill 838 amend the in vitro fertilization mandate to address the fact that the current requirements for coverage make it impossible for any woman in a same sex marriage to qualify for the mandated benefit. To achieve this, it was necessary to alter the requirement that a spouse's sperm be used for the in vitro fertilization in situations involving women in same sex couples. While this change was necessary to alleviate the discrimination against women in same sex couples, it created an inequality between these same sex couples, who can now qualify for the benefit if they meet the other requirements, and opposite sex couples in which the husband is unable to produce sperm, who cannot qualify for the benefit. In short, in fixing one source of differential treatment on the basis of sexual orientation, the bill inadvertently created another. Discrimination on the basis of sexual orientation in plans covered by the Affordable Care Act is prohibited by that Act, *see* Letter from Leon Rodriguez, Director, Office of Civil Rights, dated July 12, 2012, interpreting 42 U.S.C. section 18116. Whether the differential treatment resulting

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from the bills would violate the Affordable Care Act would be a matter of first impression, and it is not clear how a court would rule. Thus, it may be desirable for the General Assembly to address this disparity in legislation next session.

Very truly yours,

Brian E. Frosh

Brian E. Frosh
Attorney General

BEF/SB/kk

cc: The Honorable John C. Wobensmith
Joseph M. Getty
Karl Aro

FEDERAL PRIVACY ACT – SOCIAL SECURITY NUMBERS – GAMING

Bill/Chapter: Senate Bill 4/Chapter 142 and House Bill 280, Senate Bill 510 and House Bill 274/Chapter 234, Senate Bill 443/Chapter 173, and House Bill 425/Chapter 246 of 2015

Title: Carroll County – Gaming Events; Frederick County – Gaming Events; Harford County – Charitable Gaming; Howard County – Casino Event – Authorized

Attorney General's Letter: General Approval letter dated April 24, 2015, footnote 1.

Issue: Whether bills that require a permit holder to provide to a county the Social Security number (SSN) of each winner of a prize violate the Privacy Act of 1974 (5 U.S.C. § 552a).

Synopsis: These bills authorize various county entities to issue gaming permits to specified organizations and require that the permit holders provide the permit issuers with certain personally identifying information about winners, including a winner's SSN.

Discussion: The Attorney General outlined the requirements of the federal Privacy Act of 1974, 5 U.S.C. § 552a, as they relate to SSNs. The Privacy Act provides that a federal, state, or local government agency that requests that an individual disclose the individual's SSN must inform that person whether the disclosure is mandatory or voluntary, under what statutory or other authority the SSN is solicited, and how the SSN will be used. Further, a federal, state, or local government agency cannot deny a right, benefit, or privilege provided by law because of an individual's refusal to disclose the SSN unless it is required by federal statute or is required by a federal, state, or local agency that is maintaining a record system that was in existence and operating prior to January 1, 1975, and the information is required under a statute or regulation adopted prior to that date.

The Attorney General concluded that while a SSN is required for reporting certain gambling winnings under federal law, disclosure of the SSN to a county is not. The Attorney General recommended, therefore, that although the bills could be signed into law, the disclosure of a SSN to a county permit entity would need to be implemented in compliance with the Privacy Act.

Drafting Tips: **When drafting a bill that requires the collection of personally identifiable information, the drafter should be aware that federal privacy law limits the circumstances under which an individual may be required to provide his or her SSN.**

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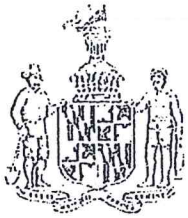

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April 24, 2015

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401

Dear Governor Hogan:

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

HOUSE	SENATE
HB 115	SB 4[1]
HB 180	SB 443[1]
HB 274[1]	SB 497[2]
HB 280[1]	SB 510[1]
HB 340	SB 542[3]
HB 425[1]	SB 863[4]
HB 452[2]	SB 868[5]
HB 562	SB 910
HB 599	
HB 600	

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Very truly yours,

Brian E. Frosh
Attorney General

BEF/SB/eb

cc: The Honorable John C. Wobensmith
Joseph M. Getty
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[1] HB 274, 280 and 425, and SB 4, 443, and 510 relate to the conduct of charitable gaming events. HB 425 relates to casino events in Howard County and SB 443 relates to gaming events in Harford County. HB 274 and it crossfile SB 510, which relate to gaming events in Frederick County, are identical. HB 280 and its crossfile SB 4, which relate to gaming events in Carroll County, have slight differences in the title. Specifically, in the second clause of the title, the SB 4 refers to the "Commissioners of Carroll County," while the HB 280 refers to the "Commissioners for Carroll County." In addition, in the fifth clause of the title, HB 280 refers to "compensation," while SB 4 refers to "certain compensation."

Each of the bills requires the permit holder to provide the name, address, and social security number of each winner of a prize for which issuance of Internal Revenue Service Form W-2G or a substantially similar form is required. The Privacy Act of 1974, 5 U.S.C. § 552a, provides that a federal, State, or local government agency that requests an individual to disclose his or her social security number shall inform the individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it. Pub. L. 93-579, § 7(b). The Privacy Act also prohibits a federal, State or local government agency from denying to any individual any right, benefit, or privilege provided by law because of the individual's refusal to disclose his or her social security number unless the disclosure is required by a federal statute, or the disclosure is to a federal, State or local agency maintaining a system of records in existence and operating before January 1, 1975, and is required under a statute or regulation adopted prior to that date. Pub. L. 93-579, § 7(a). While any initial disclosure required for Form W-2G is mandatory under federal law, the disclosure to the counties is not. Thus, although the bills may be signed into law, the social security number disclosure to the counties must be implemented in compliance with the Privacy Act.

[2] HB 452 and SB 497 are nearly identical. The Senate version contains grammatical errors on page 6, lines 24 and 25, which are not present in the House version. There also are two minor differences in the bills' titles. On page 2 of the House version, there is a comma, not present in the Senate version, after the word "organizations" in line 7, and the House version refers to "educational institutions" on page 2, line 9, whereas the Senate version refers to "educational organizations." The House version is preferable so we recommend that if both bills are signed, HB 452 be signed last.

[3] SB 542 has a grammatical error on page 5, line 25. "Recommended" should be "Recommend." This error can be fixed in next year's corrective bill.

[4] SB 863 has a title discrepancy. As introduced, the bill repealed the requirement stated in Environment Article § 4-202.1(b). As amended by the Senate Education, Health, and Environmental Affairs Committee, however, the requirement was reinstated but the purpose paragraph was not amended to reflect this change. The discrepancy may be corrected in next year's curative title.

[5] SB 868 establishes a new regulatory framework in the Public Utilities Article for "transportation network services," with the Public Service Commission exercising jurisdiction over transportation network companies and operators. Among other things, the bill establishes minimum insurance requirements for transportation network companies and operators, and it imposes certain obligations on insurers that issue motor vehicle insurance for vehicles used to provide transportation network services. With respect to insurers, new § 10-405(g)(2) of the Public Utilities Article provides that "any insurer potentially providing coverage under this section shall cooperate to facilitate the exchange of information" in connection with a claim coverage investigation following a vehicular accident. As the bill is drafted, the Maryland Insurance Commissioner lacks the authority to enforce this obligation imposed on insurers. *See* Insurance Article §§ 2-108 and 4-113(b)(1). If the General Assembly intended for the Insurance Commissioner to enforce the requirement that an insurer "cooperate to facilitate the exchange of information," it may wish to address this issue through subsequent legislation.

Also, there is a minor error in the bill's title. As introduced, the bill added a new subsection (rr) to § 1-101 of the Public Utilities Article, which is reflected in the function paragraph on page 6, line 4. Amendments to the bill struck new subsection (rr), however, the function paragraph was not amended to reflect this change. We suggest that this may be corrected in next year's curative bill.

Maryland Constitutional Issues

EXECUTIVE PRIVILEGE AND THE SEPARATION OF POWERS DOCTRINE – EXECUTIVE BRANCH BUDGET REQUESTS

Bill/Chapter: House Bill 943/Chapter 141 of 2015

Title: Economic Competitiveness and Commerce – Restructuring

Attorney General's Letter: April 27, 2015

Issue: Whether a bill requiring an executive agency to present its proposed budget to a commission that includes members of the General Assembly prior to submitting a budget request violates executive privilege and the separation of powers doctrine in Article 8 of the Maryland Declaration of Rights.

Synopsis: House Bill 943/Chapter 141 of 2015 restructures the principal economic development entities in the State, creating a new executive agency called the Department of Economic Competitiveness and Commerce (DECC). Among other things, the bill prohibits DECC from submitting a budget request before the Maryland Economic Development Commission has an opportunity to review it.

Discussion: Under the separation of powers provision in Article 8 of the Maryland Declaration of Rights, 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 the departments may assume or discharge the duties of another. The Governor's constitutional budget authority under Article III, § 52 includes the right to require from an Executive Branch agency "such itemized estimates and other information, in such form and at such times as directed by the Governor." The Attorney General has interpreted this section as making Executive Branch budget requests subject to executive privilege. The Governor cannot be compelled to disclose constitutionally privileged information to another branch of government. Noting that the commission includes members of the General Assembly, the Attorney General concluded that the bill could not require DECC to submit its budget requests to the commission. The Attorney General recommended that this provision of the bill be interpreted as a nonbinding expression of legislative intent.

Drafting Tips: **When drafting legislation that attempts to provide legislative oversight for an Executive Branch agency, the drafter should be mindful that the separation of powers doctrine prohibits the General Assembly from usurping or diminishing the constitutional power of the Executive Branch. A bill may recommend but may not require that an Executive**

Branch agency share constitutionally privileged information, such as budget requests, with a body that includes members from another branch of government.

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April 27, 2015

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

Re: House Bill 943, "Economic Competitiveness and Commerce – Restructuring"

Dear Governor Hogan:

We have reviewed and hereby approve HB 943 for constitutionality and legal sufficiency. We write this letter, however, to make the recommendations below.

Among other things, HB 943 prohibits the newly created Department of Economic Competitiveness and Commerce from submitting "a budget request before the [Maryland Economic Development] Commission reviews the request." (Page 23, lines 11-12.) The Governor's constitutional budget authority grants the Governor the right to require from an Executive Branch agency "such itemized estimates and other information, in such form and at such times as directed by the Governor." Article III, § 52(11). Moreover, the Attorney General has previously recognized that the disclosure of Executive branch budget requests is subject to Executive Privilege. 66 Op. Att'y Gen. 98 (1981) (advising that budget recommendations submitted to the Governor and the Department of Budget and Management are protected by Executive Privilege). Finally, we note that the Commission has legislative members; as a result, a reviewing court is likely to conclude that the separation of powers doctrine in Article 8 of the Declaration of Rights prohibits requiring the Governor to share constitutionally privileged information with another branch of government. In light of the foregoing, we recommend that this provision be interpreted as a non-binding expression of legislative intent.

In addition, Section 10 provides that "it is the intent of the General Assembly" that in FY16 "at least $1,000,000" in the DBED budget "be transferred by budget amendment

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to the Maryland Public–Private Partnership Marketing Corporation," and that "the office within the Department of Business and Economic Development that supports the growth of the life sciences industry in Maryland, be transferred to the Maryland Technology Development Corporation." Section 10 should be construed as authorization for the Governor to transfer funds by budget amendment, not as a mandatory requirement that the Governor transfer any funds or functions.

Very truly yours,

Brian E. Frosh
Attorney General

BEF/SB/kk

cc: The Honorable John C. Wobensmith
Joseph M. Getty
Karl Aro

SINGLE-SUBJECT RULE AND CONSTITUTIONAL LIMITS ON TAXATION OF NONRESIDENTS – BUDGET RECONCILIATION AND FINANCING ACT

Bill/Chapter: House Bill 72/Chapter 489 of 2015

Title: Budget Reconciliation and Financing Act of 2015

Attorney General's Letter: May 11, 2015

Issue: I. Whether provisions of the Budget Reconciliation and Financing Act (BRFA) that establish financial parameters for a nonbudgeted agency violate the single-subject rule of the Maryland Constitution.

II. Whether a provision of the BRFA limiting eligibility for refundable and nonrefundable State and county earned income tax credits to Maryland residents violates the Privileges and Immunities Clause, Equal Protection Clause, or Commerce 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. Among other things, the 2015 BRFA (House Bill 72/Chapter 489 of 2015) contains provisions relating to the Maryland Transportation Authority (MDTA), a nonbudgeted agency. These provisions reduce, for a five-year period, the statutory limit on the aggregate outstanding and unpaid principal balance of MDTA revenue bonds; prohibit MDTA from supplementing revenues credited to the Transportation Authority Fund with funds from the Transportation Trust Fund (TTF) or any other source; require MDTA to spend a minimum amount annually for operating and capital expenses; and require MDTA to maintain a certain level of funds for debt service. A separate provision of the bill allows only Maryland residents to claim refundable and nonrefundable State and county earned income tax credits.

Discussion:

I. Single-Subject Rule

Article III, § 29 of the Maryland Constitution requires that "every Law enacted by the General Assembly shall embrace one subject, and that shall be described in its title." This requirement, known as the single-subject rule, is satisfied when all provisions of a bill are "germane" to one another. In the context of the BRFA, the Attorney General has interpreted this requirement to mean that all provisions of the bill must relate to the single subject of adjusting the finances of State and local governments.

The Attorney General began the analysis of House Bill 72/Chapter 489 by identifying the overarching purpose of the provisions relating to MDTA – to address perceived concerns about the fiscal effects of a planned reduction in toll rates at MDTA facilities. The bill does this in two ways. First, the bill limits MDTA's ability to supplement toll revenues with funds from the TTF or the general fund. Second, the bill establishes minimum operational standards to ensure that MDTA does not attempt to offset decreases in toll revenues by substantially reducing the amount of cash it maintains on hand for debt service or the amount it spends on its capital or operating programs.

The Attorney General found the first of these provisions to be the easiest to defend on constitutional grounds. The Attorney General noted that by restricting MDTA's ability to use State funds to finance a reduction in toll rates, this provision could be viewed as preserving those funds for budgeted State programs. Thus, this provision could reasonably be interpreted as relating to the single subject of balancing the State budget and providing for the financing of State government. The Attorney General found the provision relating to minimum spending levels harder to defend, however. Observing that any type of spending mandate seems contrary to the BRFA's purpose, the Attorney General wrote that the provision raises "legitimate single-subject concerns." Nevertheless, the Attorney General concluded that the minimum spending requirements do not reach the level of "clearly unconstitutional," because they are at least arguably related to the broader purpose of preserving State funds.

II. Constitutional Limits on Nonresident Taxation

In a separate analysis, the Attorney General considered the constitutionality of a provision limiting eligibility for refundable and nonrefundable State and county earned income tax credits to Maryland residents. In general, the Privileges and Immunities Clause, the Equal Protection Clause, and the Commerce Clause of the U.S. Constitution limit a state's authority to apply different tax rules to nonresidents. A law may not be designed to benefit in-state economic interests by burdening out-of-state competitors. Moreover, any distinction in the law's treatment of residents and nonresidents must be based on reasonable grounds and must rationally further a legitimate state purpose.

The Attorney General determined that, as applied to the refundable earned income tax credit, the bill's residency requirements are likely constitutional because they support the State's legitimate interest in ensuring that tax refund payments go to low-income Maryland residents. The bill is more problematic, however, as applied to nonrefundable earned income tax credits. In this case, rather than precluding a nonresident from claiming a

tax refund, the residency requirement prohibits a nonresident taxpayer from applying the earned income tax credit to reduce his or her Maryland income tax liability. The Attorney General concluded that, although the differential treatment of residents and nonresidents for the purpose of determining income tax liability raises serious constitutional concerns, the provision was not clearly unconstitutional.

Drafting Tips: **The 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. It may be appropriate to include provisions dealing with the financing of a nonbudgeted agency in the BRFA, if the provisions are designed to preserve funds for budgeted State programs.**

When drafting tax legislation, a drafter should be mindful of constitutional limits on the State's authority to apply different tax rules to nonresidents. Any differences in the law's treatment of residents and nonresidents must be based on reasonable grounds and must rationally further a legitimate State purpose. A law that limits the ability of nonresidents to claim tax refunds from the State may be more likely to survive constitutional scrutiny than a law that results in higher State tax liability for nonresidents.

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May 11, 2015

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: House Bill 72, "Budget Reconciliation and Financing Act of 2015"

Dear Governor Hogan:

We have reviewed and hereby approve House Bill 72, the Budget Reconciliation and Financing Act of 2015 ("BRFA"), for constitutionality and legal sufficiency. While we approve the bill, we write to address two amendments to the bill that may raise noteworthy constitutional concerns.

The first, which both amends § 4-306 of the Transportation Article and adds Section 25 to the bill, establishes financial parameters, consistent with the Maryland Transportation Authority's ("MdTA") 2016-2020 financial forecast, to prevent any problems associated with a large decrease in toll revenues.[1] The amendment to § 4-306 reduces, for a five year period, the statutory limit on the aggregate outstanding and unpaid principal balance of MdTA revenue bonds. Section 25 prohibits MdTA from supplementing the Transportation Authority Fund with funds appropriated or transferred from the Transportation Trust Fund ("TTF") or with funds transferred from any other source; requires MdTA to spend a minimum amount annually for operating and capital expenses; and requires MdTA to maintain a certain level of funds for debt service. As MdTA is a non-budgeted agency, and as the predominant subject matter of these amendments is toll revenue, not tax revenue, we have considered whether this amendment to the BRFA violates the single-subject rule of Article III, § 29 of the Maryland Constitution.

[1] Moody's Investors Service, a credit rating agency, recently cited a decline in the debt service coverage ratio below the targeted level due to a toll decrease as a potential reason MdTA's credit rating could be downgraded. *See* "Moody's Affirms Aa3 on Maryland Transportation Authority's Transportation Facility Revenue Bonds," *Global Credit Research*, April 3, 2015.

The Court of Appeals has said that an act meets the single-subject requirement if its provisions are "germane" to the same subject matter. *Migdal v. State*, 358 Md. 308, 317 (2000); *Porten Sullivan Corp. v. State*, 318 Md. 387, 407 (1990). "Germane" means "in close relationship, appropriate, relative, [or] pertinent." Two matters can be regarded as a single subject because of a direct connection between them or because they each have a direct connection to a broader common subject. When single-subject questions have arisen in the context of the Budget Reconciliation and Financing Act, this Office has considered whether the various provisions of the bill deal with the single subject of adjusting the finances of State and local government. *See* Bill Review Letter on Senate Bill 172 of 2014 from Attorney General Douglas F. Gansler, dated May 14, 2014 (the purpose of the BRFA is "to balance the State operating budget and provide for the financing of State and local government"); Letter to William S. Ratchford, II from Richard E. Israel, dated April 1, 1993 ("one-subject of adjusting the finances of State and local government"); and Letter to the Honorable Christopher Van Hollen, Jr. from Robert A. Zarnoch, dated October 11, 1991 (the single subject of "budget balancing").

The amendment to § 4-306 of the Transportation Article and the addition of § 25 to the BRFA appear to address perceived concerns about MdTA's ability to access funding from the TTF or general fund to finance a reduction in toll rates charged at MdTA facilities. Section 25 restricts MdTA's ability to supplement toll revenues with funds from the TTF or any other source, and it establishes certain limitations, in the form of minimum operational standards that are consistent with MdTA's current financial forecast, to ensure that MdTA does not otherwise attempt to pay for a toll rate decrease by substantially reducing the amount of cash it maintains on hand for debt service or the amount it spends on its capital or operating programs. As an important purpose of the amendment appears to be the preservation of the TTF and other State funds, there arguably is a nexus between the amendment and the single subject of balancing the State budget and providing for the financing of State and local government. By restricting MdTA's ability to use State funds to finance a reduction in toll rates, the amendment seeks to preserve those funds for budgeted State programs.[2]

[2] To the extent that funds have been lawfully appropriated from the State Treasury to an agency, the funds may be expended. Moreover, no statute can limit the constitutional power of the Governor or General Assembly in the appropriation process. 62 *Opinions of the Attorney General* 106, 107-108 (1977). *Id.* Here, however, the only limitation on the Governor's authority to appropriate funds relates to TTF funds. It would appear the Governor could still include a general fund appropriation in the budget bill, but he could not appropriate funds from the TTF or transfer funds from any source.

We recognize, however, there is an argument that the minimum spending levels in § 25(1) and (2) of the amendment are inconsistent with the purpose of the BRFA. Spending requirements in the BRFA, even those that are not technically constitutional spending mandates, appear to be contrary to the single subject of balancing the budget and adjusting the finances of State and local government.[3] On the other hand, when viewed in the context of the amendment's other provisions, the minimum spending requirements in § 25(1) and (2) appear to serve a function that is related to the amendment's purpose of preserving the TTF and other State funds. Faced with the restriction on using State funds to finance a reduction in toll rates, MdTA arguably could seek to finance a toll reduction by making cuts to its operating and capital programs or by reducing its debt service coverage. The amendment's spending limits address this concern by preventing MdTA from making substantial changes that are inconsistent with the spending and debt service levels specified in its current financial forecast. Thus it is our view that the minimum spending requirements in § 25(1) and (2) are not clearly unconstitutional, although they do raise legitimate single-subject concerns and would be the hardest provisions in the BRFA to defend. Accordingly, when read in its entirety, we cannot conclude that the amendment is "clearly unconstitutional."[4]

The other amendment to the BRFA that may raise a constitutional concern relates to the State and county earned income tax credit set forth in § 10-704 of the Tax-General Article. Under § 10-704, an eligible individual may claim a nonrefundable State earned income tax credit in an amount equal to 50% of the individual's federal earned income tax credit[5] or the individual's State income tax liability for the tax year, whichever is less. In

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[3] We note also that the amendment was adopted in Conference Committee. Amendments that are adopted in such a way as to avoid normal review and consideration may be vulnerable to a single-subject challenge. *See, e.g.*, *Migdal v. State*, 358 Md. at 322.

[4] The Office of the Attorney General "applies a 'not clearly unconstitutional' standard in reviewing bills passed by the General Assembly prior to their approval or veto by the Governor." 93 Op. Att'y Gen. 154, 161 n.12 (citing 71 Op. Att'y Gen. 266, 272 n.12 (1986)). "This standard of review reflects the presumption of constitutionality to which statutes are entitled and the Attorney General's constitutional responsibility to defend enactments of the Legislature, while also satisfying the duty to provide the Governor with our best legal advice." *Id.*

[5] The amount of the federal earned income tax credit varies depending on the taxpayer's household income and the number of qualifying children. As an example, the maximum amount of the federal earned income tax credit that may be claimed in tax year 2015 by a taxpayer with two qualifying children is $5,548. *See* 2015 EITC Income Limits, Maximum Credit Amounts and Tax Law Updates, *Internal Revenue Service*.

the event the nonrefundable credit would reduce a taxpayer's liability to zero, the taxpayer may claim a refundable State earned income tax credit equal to 25.5% of the federal credit, minus any pre-credit State income tax liability.[6] An eligible individual also may claim a nonrefundable earned income tax credit against the county income tax, and a county may provide, by law, a refundable county earned income tax credit.[7]

As introduced, the BRFA amended § 10-704 so as to limit eligibility for the State refundable earned income tax credit to Maryland residents. The bill was then amended to similarly limit eligibility for the State nonrefundable earned income tax credit, as well as both the refundable and nonrefundable county earned income tax credit, to Maryland residents. While we believe the provisions limiting the *refundable* State and county earned income tax credit to Maryland residents are on sound constitutional footing, those provisions limiting the nonrefundable earned income tax credit raise constitutional concerns.

The Privileges and Immunities Clause, the Equal Protection Clause,[8] and the Commerce Clause of the U.S. Constitution limit a state's authority to apply different tax rules to nonresidents. *See Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 298 (1998) (quoting *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60, 79 (1920)) ("Where nonresidents are subject to different treatment, there must be 'reasonable ground for ... diversity of treatment.'"); *Zobel v. Williams*, 457 U.S. 55, 60 (1982) (generally a law will survive equal protection scrutiny "if the distinction it makes rationally furthers a legitimate state purpose"); *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988) ("the Commerce Clause prohibits ... measures designed to benefit in-state economic interests by burdening out-of-state competitors").

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[6] The amount of the State refundable earned income tax credit is set to gradually increase from 25.5% of the federal earned income tax credit in tax year 2015 to 28% of the federal earned income tax credit in tax year 2018. TG § 10-704(b)(2)(ii).

[7] No Maryland county has established a refundable county earned income tax credit, though Montgomery County has a grant program that operates in a similar fashion. *See* Fiscal Note to House Bill 72 – Revised, March 24, 2015, at 12.

[8] The equal protection guarantees embodied in Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment to the U.S. Constitution generally are considered to be in *pari materia*. *See Hornbeck v. Somerset Cnty. Bd. of Educ.*, 295 Md. 597, 640 (1983) (the State and federal equal protection guarantees "generally apply in like manner and to the same extent; nevertheless, the two provisions are independent of each other so that a violation of one is not necessarily a violation of the other").

As applied to the refundable earned income tax credit, the effect of the residency requirement is that only Maryland residents may receive a tax refund payment. Thus the State is ensuring that State money is used to promote the purpose of the earned income tax credit program, i.e., the safety and welfare of low-income Maryland residents. However, in the case of the nonrefundable earned income tax credit, the constitutional argument for the different tax treatment is not as strong. In that case, rather than precluding a nonresident from claiming a tax refund, the residency requirement prohibits a nonresident taxpayer from applying the earned income tax credit to reduce his or her Maryland income tax liability. While we believe this latter scenario raises constitutional concerns, we do not believe the amendment is clearly unconstitutional.

Sincerely,

Brian E. Frosh
Attorney General

BEF/DS/kk

cc: The Honorable John C. Wobensmith
Joseph M. Getty
Karl Aro

LOCAL LAW – CHARTER HOME RULE – EXPRESS POWERS

Bill/Chapter: Senate Bill 541/Chapter 38 of 2015

Title: Baltimore City – Property Tax Credit – Supermarkets

Attorney General's Letter: General Approval letter dated April 13, 2015, footnote 3.

Issue: Whether a bill that authorizes a charter home rule jurisdiction to pass local legislation allowing a property tax credit against the personal property tax violates Article XI-A, § 4 of the Maryland Constitution, which prohibits the General Assembly from enacting a public local law on any subject covered by the express powers granted to a jurisdiction in its charter.

Synopsis: Senate Bill 541/Chapter 38 of 2015 authorizes Baltimore City to grant, by law, a property tax credit for personal property owned by a supermarket that completes eligible construction and is located in a food desert retail incentive area designated by Baltimore City. The property tax credit for a taxable year may not exceed the amount of property tax imposed on the personal property of a supermarket in that year.

Discussion: Baltimore City has adopted charter home rule and is governed by the express powers enumerated in its charter. Article XI-A, § 4 of the Maryland Constitution prohibits the General Assembly from enacting a public local law on any subject covered by the express powers enumerated in Article II of the Baltimore City Charter, one of which is to "assess for tax purposes, levy annually and collect taxes . . .". The Attorney General noted that the courts have held that the entire subject of taxation has not been covered by the enumerated powers of the Express Powers Act for charter counties, so the General Assembly may enact legislation on those matters where it has retained jurisdiction. Applying that precedent to the bill, the Attorney General concluded that granting a tax credit, which reduces or erases a tax obligation, is the antithesis of the assessment, levy, and collection authority in the Baltimore City Charter and therefore does not violate charter home rule.

Drafting Tips: **When drafting legislation that solely affects a charter home rule jurisdiction, the drafter should be aware of the limitations imposed on the General Assembly regarding legislation affecting the express powers granted in its charter. The drafter should determine whether the subject of the bill is covered under the express powers and, if so, consider whether the bill could be drafted in a way that does not impair the jurisdiction's authority. In the absence of alternatives, the drafter should alert the sponsor to the possibility that the bill could be found unconstitutional.**

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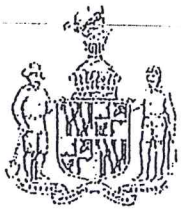

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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 13, 2015

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401

Dear Governor Hogan:

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

HOUSE	SENATE
HB 76[1]	SB 20[6]
HB 296[2]	SB 102[1]
HB 507[3]	SB 325[4]
HB 697[4]	SB 353
HB 848[5]	SB 362[7]
HB 864[6]	SB 439[9]
HB 902[7]	SB 484[5]
HB 971[8]	SB 541[3]
HB 1035[9]	SB 641[8]
	SB 663[2]

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Very truly yours,

Brian E. Frosh

Brian E. Frosh
Attorney General

BEF/SB/kk

cc: The Honorable John C. Wobensmith
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[1] HB 76 is not entirely identical to its crossfile SB 102. A difference appears in the title of the bills. HB 76, at page 1, line 5, states "clarifying," while SB 102, page 1, line 5 states "providing." The language of the Senate bill is preferable, so we recommend that if both bills are signed, that SB 102 be signed last.

[2] HB 296 is identical to SB 663. Both bills are legally sufficient, but only one of the bills should be signed because these are bond bills.

[3] SB 541 is identical to HB 507. The legislature amended Tax-Property Article § 9-304, an existing section of the Tax-Property Article that only affects Baltimore City, which raises a home rule question. The General Assembly is prohibited from passing local legislation that impacts solely the City on any subject covered by the express powers enumerated in Article II of the Baltimore City Charter. One of those enumerated powers is "to assess for tax purposes, levy annually and collect taxes." Article II, § 39. The Court of Appeals has held that the entire subject of taxation has not been covered by the enumerated powers of the Express Powers Act, Local Govt. Article, Title 10 for the charter counties, so the General Assembly can enact legislation on those matters where it has retained jurisdiction. *Montgomery County v. Maryland Soft Drink Ass'n*, 281 Md. 116, 129-30 (1977). *See also Waters Landing Limited Partnership v. Montgomery County*, 337 Md. 15 (1994). A similar rule would apply to Baltimore City. SB 541 and HB 507 authorize Baltimore City to grant a credit against property taxes. A credit that cancels the obligation to pay a property tax is the antithesis of the assessment, levy and collection authority and is not within the express powers of Baltimore City Charter. Accordingly, the General Assembly may pass legislation addressing property tax exemptions/credits for Baltimore City.

[4] HB 697 and SBI 325 are identical. While we approve the bills, we write to point out a minor inconsistency in the title. The title reflects that the bill is "altering the maximum term of

certain loans on certain real estate that may be included in the reserve investments of life insurers." The bill does not alter the maximum term of the loans, but limits the application of the existing maximum term. The provisions of the bill, however, are adequately described by the portion of the title that states that it is "generally relating to the reserve investments of life insurers."

[5] HB 848 is not entirely identical to its crossfile SB 484. The difference appears on page 3, in lines 3 through 5 of each bill. HB 848 places quotation marks around the words "Anne Arundel County Public Schools Funding Accountability and Transparency Act," while SB 484 contains no quotation marks. Neither reference is inaccurate nor ambiguous, and either bill or both bills may be signed.

[6] HB 864 and SB 20 are crossfiled bills, but are not identical. SB 20 has a technical drafting error. It does not acknowledge in the function paragraph or in the body of the bill text the prior enactment of Chapter 102 of the Acts of the General Assembly of 2012 and Chapters 47 and 105 of the Acts of the General Assembly of 2014. This language refers to bills for other counties that are affected by Election Law Article, § 2-201(l), but which do not take effect until June 1, 2015. If both bills are signed, HB 864 should be signed last. If only one bill is signed, the House bill should be signed.

[7] HB 902 is identical to SB 362. HB 902 is identical to SB 362. Both bills are legally sufficient, but only one of the bills should be signed.

[8] HB 971 is identical to SB 641. In addition, we write to suggest that a certain provision be implemented consistent with federal law. Section (b)(3) adds "data sharing services among counties and other appropriate treatment providers" to those functions that are eligible for funding. Sharing of substance abuse treatment data is restricted by federal regulations, 42 C.F.R. Part 2. Personally identifying information may not be shared except in a few narrow circumstances. While language of the provision quoted above is very broad, it should be implemented to ensure that providers are alerted that data is shared only in accordance to federal law.

[9] We approve House Bill 1035 and Senate Bill 439 for constitutionality and legal sufficiency. House Bill 1035 and Senate Bill 439 are identical. We write to point out a cross-reference issue that arose from amendments to the bills. At page 3, line 26, cross-references to paragraphs (f) and (g) of § 14-833 are deleted from the existing language that now appears as § 14-833(a)(1). This deletion was correct in the first reader version of the bill, because (f) and (g) apply only in Baltimore City, and in the first reader all property in Baltimore City would have been covered by new § 14-833(a)(2). The bill was later amended, however, so that § 14-833(a)(2) applies only to owner-occupied residential property and other Baltimore property will be covered by § 14-833(a)(1). For that reason, the cross-references to § 14-833(f) and (g) should be restored to § 14-833(a)(1).

BOND BILLS – TIMING REQUIREMENTS

Bill/Chapter: House Bill 750/Chapter 272 and Senate Bill 116 of 2015

Title: Maryland Consolidated Capital Bond Loans of 2013 and 2014 – Baltimore City – Skatepark of Baltimore at Roosevelt Park

Attorney General's Letter: General Approval letter dated April 24, 2015, footnote 3.

Issue: Whether bond bills that are passed before the enactment of the budget bill violate the requirements of Article III, § 52(8) of the Maryland Constitution if the bills do not authorize an additional appropriation but merely change the name of the grantee and extend the deadline for presenting evidence of matching funds.

Synopsis: House Bill 750/Chapter 272 and Senate Bill 116 of 2015 change the name of the grantee of the Skatepark of Baltimore at Roosevelt Park project, as established by the Maryland Consolidated Capital Bond Loans of 2013 and 2014, to the Mayor and City Council of the City of Baltimore. The bills also extend the deadline for the grantee to present evidence that a matching fund will be provided.

Discussion: The Attorney General noted that the bills deal with supplementary appropriation and are governed by Article III, § 52(8) of the Maryland Constitution. Under this provision, the General Assembly may not "finally act" on an appropriation bill until taking final action on the budget bill. The General Assembly took final action on these bills before taking final action on the budget bill. The Attorney General concluded, nonetheless, that the bills are constitutional because they do not authorize an additional appropriation, but merely change the name of the grantee and extend the deadline for presenting evidence of matching funds.

The Attorney General then advised the legislature to exercise caution in acting on bond bills in the future and to note that if the legislature, prior to adoption of the budget bill, was to approve a bond bill creating a new authorization or "repurposing" an existing authorization, the Attorney General would conclude the bond bill to be in violation of the Maryland Constitution.

Drafting Tips: **When drafting a bond bill that creates a new authorization or repurposes an existing authorization, the drafter should remind the sponsor that the bill may be invalid under the Maryland Constitution if passed before the budget bill is enacted. If a bond bill does not authorize an additional appropriation, but merely changes the name of the grantee or extends the deadline for presenting evidence of matching funds, however, the bill may be passed before the budget bill is enacted.**

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April 24, 2015

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401

Dear Governor Hogan:

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

HOUSE	SENATE
HB 156[1]	SB 116[3]
HB 356[2]	SB 133[1]
HB382	SB 254[2]
HB 430	SB 695[4]
HB 509	SB 744[6]
HB 566	SB 816[5]
HB 750[3]	SB 913
HB 755[4]	
HB 775	
HB 779[5]	
HB 925[6]	
HB 939	
HB 1290	

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Very truly yours,

Brian E. Frosh

Brian E. Frosh
Attorney General

BEF/SB/eb

cc: The Honorable John C. Wobensmith
Joseph M. Getty
Karl Aro

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[1] HB 156 is identical to SB 133.

[2] HB 356 is identical to SB 254.

[3] HB 750 and SB 116 are identical. While we approve HB 750 and SB 116 for constitutionality and legal sufficiency, we note that bond bills, like HB 750 and SB 116, are supplementary appropriation bills and, as such, are governed by Article III, Section 52(8) of the Maryland Constitution. That provision, among other requirements, prohibits the General Assembly from "finally act[ing]" on a supplementary appropriation bill "until after the Budget Bill has been finally acted upon by both Houses." The General Assembly took final action on HB 750 and SB 116 before taking final action on the Budget Bill. Because the bills do not authorize an additional appropriation but merely change the name of the grantee and extend the deadline for presenting evidence of matching funds, we do not think they violate this Constitutional provision. However, we urge the legislature to exercise caution in acting on bond bills in the future and note that if the legislature, prior to final adoption of the Budget Bill, were to approve a bond bill creating a new authorization or "repurposing" an existing authorization to a new purpose, we would be compelled to come to the opposite conclusion.

[4] HB 755 is identical to SB 695.

[5] HB 779 is identical to SB 816.

[6] HB 925 and SB 744 are identical. The bills extend the termination dates for previously authorized grants, which were set to expire on December 1, 2014, but have not been cancelled. While we approve HB 925 and SB 744 for constitutionality and legal sufficiency, we note that bond bills, like HB 925 and SB 744, are supplementary appropriation bills and, as such, are governed by Article III, Section 52(8) of the Maryland Constitution. That provision, among other requirements, prohibits the General Assembly from "finally act[ing]" on a supplementary

appropriation bill "until after the Budget Bill has been finally acted upon by both Houses." The General Assembly took final action on HB 925 and SB 744 before taking final action on the Budget Bill. Because the bills do not authorize an additional appropriation but extend the termination dates for previously authorized grants, and those grants have not been cancelled, we do not think the bills violate this Constitutional provision. However, we note that these bills likely approach the limit of what is constitutionally permissible. Accordingly, we urge the legislature to exercise caution in acting on bond bills in the future and note that if the legislature, prior to final adoption of the Budget Bill, were to approve a bond bill creating a new authorization or "repurposing" an existing authorization to a new purpose, we would be compelled to reach a different conclusion.

INCREASED COMPENSATION OF A PUBLIC OFFICER – MEMBERS OF A COUNTY BOARD OF LICENSE COMMISSIONERS

Bill/Chapter: House Bill 617/Chapter 264 of 2015

Title: Prince George's County – Alcoholic Beverages – Licenses, Salaries, Inspectors, and Bottle Clubs, PG 307-15

Attorney General's Letter: April 27, 2015

Issue: Whether a bill increasing the salary for a member of a county board of license commissioners violates the prohibition against in-term compensation increases for public officials found in Article III, § 35 of the Maryland Constitution.

Synopsis: This bill makes several changes to alcoholic beverages licensing provisions in Prince George's County, including provisions relating to residency requirements and capital investment requirements for certain licenses. The bill also increases the salaries of members of the Board of License Commissioners and the board's attorney, decreases the number of part-time liquor inspectors, and increases the salaries of part-time liquor inspectors. Finally, the bill enhances enforcement provisions relating to bottle clubs in the county.

Discussion: Article III, § 35 of the Maryland Constitution provides, in pertinent part: "the salary or compensation of any public official [may not] be increased or diminished during his [or her] term of office except those whose full term of office is fixed by law in excess of 4 years." The Attorney General noted that members of the Board of License Commissioners of Prince George's County are considered public officers. The Board of License Commissioners of Prince George's County serve a term of less than four years. The Attorney General concluded that the salary increase of House Bill 617 can take effect only at the beginning of the next terms of members.

Drafting Tips: **In drafting legislation related to the compensation of public officers, a drafter must be aware of the limitations of Article III, § 35 of the Maryland Constitution. If a sponsor requests a bill that would provide additional compensation to a public officer for services already rendered or for a contract that has already been formed, the drafter should advise the sponsor of this constitutional barrier. To address this issue, the drafter should suggest the legislation include a special section clarifying that a salary increase does not apply to the current term.**

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OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 27, 2015

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: House Bill 617, "Prince George's County – Alcoholic Beverages – Licenses, Salaries, Inspectors, and Bottle Clubs"

Dear Governor Hogan:

We have reviewed House Bill 617 for constitutionality and legal sufficiency. While the bills may be signed into law, we write to point out a few issues raised by the bills.

The bills amend Article 2B, § 9-217(f)(3). That paragraph is repealed by Senate Bill 223, "Annual Corrective Bill," which was signed on April 14, 2015. It is now Chapter 22. The changes made by House Bill 617 will be given effect, however, because Section 3 of Senate Bill 223 provides:

> AND BE IT FURTHER ENACTED, That the provisions of this Act are intended solely to correct technical errors in the law and there is no intent to revive or otherwise affect law that is the subject of other acts, whether those acts were signed by the Governor prior to or after the signing of this Act.

The bills also increase the salaries of the members of the Board of License Commissioners for Prince George's County, but do not have the ordinary uncodified language about the application of that increase. Maryland Constitution, Article III, § 35 provides that the salary or compensation of a public officer may not be increased or diminished during the public officer's term, except those whose full term of office is fixed by law in excess of four years. Members of the Board of License Commissioners are public officers, *Nesbitt v. Fallon*. 203 Md. 534, 545 (1954), and they serve a term of less than four

years, Article 2B, § 15-101(r)(3). Thus, the salary increase can take effect only at the beginning of the next terms of the members.

Finally, provisions of the bills added by amendment provide that the Board of License Commissioners or an inspector of the Board may order that a bottle club be closed immediately if the Board or the inspector determines that the public health, safety, or welfare requires an emergency action. When immediate closure is ordered written notice must be given, the Board must hold a hearing within three days, and any decision must be issued within three days after the hearing. This process would appear to more than satisfy the requirements for a pre-hearing deprivation as established in *Barry v. Barchi*, 443 U.S. 55, 64 (1979). A question arises, however, about the meaning of certain orders that can be entered by the Board. Specifically, the bills permit the Board to "order the permanent closure of the bottle club" or "impose conditions under which the bottle club may reopen." The definition of "bottle club" includes restaurants, hotels, clubs, rooms, dance studios, discos, places of public entertainment, and other places that are open to the public but do not have an alcoholic beverages license. Article 2B, § 20-108.1(a)(2)(ii) and (iii). It is unclear whether this language means that the power to close a bottle club permanently also means that the underlying business can never again operate, or that the building itself cannot be used. On the other hand, the definition of a "bottle club" is a place that is operating in violation of the law. *See* Article 2B, § 20-108.1(a)(2)(i)2 (defining bottle club) and § 20-108.1(c)(2)(ii) (prohibiting the actions that define a bottle club). Thus, there is a question about what conditions, other than not being a bottle club, the Board could impose on the operation of a bottle club.

Very truly yours,

Brian E. Frosh

Brian E. Frosh
Attorney General

BEF/SB/kk

cc: The Honorable John C. Wobensmith
Joseph M. Getty
Karl Aro

COMMISSIONS, COUNCILS, AND TASK FORCES – VOTING POWERS OF *EX OFFICIO* MEMBERS

Bill/Chapter: Senate Bill 403 and House Bill 375/Chapter 417 of 2015

Title: Education – Maryland Council on Advancement of School-Based Health Centers

Attorney General's Letter: General Approval letter dated May 5, 2015, footnote 2.

Issue: Whether bills that provide for the appointment of a certain number of "voting members" and a certain number of "*ex officio* members" to an advisory commission should be interpreted as denying voting powers to the *ex officio* members.

Synopsis: Senate Bill 403 and House Bill 375/Chapter 417 of 2015 replace the Maryland School-Based Health Center Policy Advisory Council at the Maryland State Department of Education with the Maryland Council on Advancement of School-Based Health Centers. In specifying the members of the council, the bills provide for "15 voting members," who are appointed by the Governor, and "6 *ex officio* members."

Discussion: The Attorney General noted that by distinguishing between voting members and *ex officio* members, the bills seem to indicate that the *ex officio* council members are to be nonvoting members. The bills, however, do not expressly provide that *ex officio* council members lack the power to vote. Citing the *Black's Law Dictionary* definition of an *ex officio* member, the Attorney General concluded that "unless otherwise provided, an *ex officio* member of a body has all the privileges of membership, including the right to vote." The Attorney General suggested that the General Assembly resolve the ambiguity regarding council members' voting rights through future legislation.

Drafting Tips: **When drafting a bill establishing a commission, council, or task force, the drafter should clearly articulate any limitations on the rights and privileges of *ex officio* members. Unless otherwise specified, an *ex officio* member has the same privileges as the other members serving on the commission, council, or task force.**

BRIAN E. FROSH
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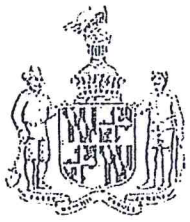
DEPUTY ATTORNEY GENERAL



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May 5, 2015

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401

Dear Governor Hogan:

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

HOUSE	SENATE
HB 110	SB 335[5]
HB 137[1]	SB 403[2]
HB 375[2]	SB 564[6]
HB 485[3]	SB 573[4]
HB 770[4]	
HB 847[5]	
HB 938[6]	
HB 1182	

104 LEGISLATIVE SERVICES BUILDING · 90 STATE CIRCLE · ANNAPOLIS, MARYLAND 21401-1991
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Sincerely,

Brian E. Frosh
Attorney General

BEF/SB/eb

cc: The Honorable John C. Wobensmith
Joseph M. Getty
Karl Aro

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[1] We have reviewed HB 137 for constitutionality and legal sufficiency. While we approve the bill, we note an inaccuracy in the title that can be addressed in the curative bill for next year. House Bill 137 adds new fees for licensees that provide live entertainment or provide outdoor table service. These fees are to be charged in addition to the annual license fees, which are also increased by the bill. The title, however, states that the bill is for the purposes of "altering . . . an annual fee for providing live entertainment or outdoor service." While the basic annual fees are altered, those are not mentioned, a change that is nevertheless covered by language in the title that states that it "generally relates to fees for holders of alcoholic beverages licenses." The fees for live entertainment and outdoor table service are not altered, however, but added.

[2] HB 375 and SB 403, which are identical, repeal the Maryland School Board Health Center Policy Advising Committee and establish the Maryland Council on Advancement of School-Based Health Centers. In specifying the 21 members of the council, the bills provide for "15 voting members," who are appointed by the Governor, and "6 ex officio members." By referring to the council's appointed members as "voting members," the bills seem to indicate that the six ex officio council members are to be non-voting members. However, the bills do not expressly provide that the ex officio members lack the right to vote. 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). Unless otherwise provided, an ex officio member of a body has all the privileges of membership, including the right to vote. *See Robert's Rules of Order* at 483, 497 (11th ed. 2011). To resolve this ambiguity regarding council members' voting rights, we suggest that the General Assembly clarify the issue through future legislation.

[3] HB 485, in part, amends § 13-247 of the Election Law Article, but without correcting an outdated reference to a type of campaign finance committee no longer authorized. The

"personal treasurer" form of campaign finance entity referenced in § 13-247(1), and continued in this bill, was abolished in 2006 by the repeal of former § 13-206. *See* Ch. 510, 2006 Laws of Maryland. To correct this minor error and eliminate any potential confusion that may result from continuing the outdate reference, we recommend that the General Assembly include in next year's corrective bill an amendment deleting the words "a personal treasurer or" from § 13-247.

[4] HB 770 and SB 573 are identical and may be signed into law. We write, however, to note a minor discrepancy in the title. Language in the bills at page 20, lines 21 to 26 provides that a company "shall comply with the minimum valuation standard prescribed by the Commissioner by regulation" under certain circumstances. The title, however, describes this provision as "authorizing a company, under certain circumstances, to comply with a minimum standard of valuation prescribed by the Commissioner by regulation." This discrepancy may be corrected in next year's curative bill.

[5] HB 847 is not entirely identical to its crossfile SB 335. The differences appear in the purpose paragraphs and the new language contained in proposed § 16-310(b)(5)(iv)1.A of the Education Article in each bill. In the House Bill, on page 1, in line 12, there is a reference to the "Maryland Higher Education" Commission, while the Senate Bill strikes the reference to "Maryland Higher Education." Additionally, the Senate Bill, on page 3, in line 18, makes reference to "THE REQUIREMENTS UNDER," which was not included in the House Bill. None of the references are inaccurate or ambiguous, and either bill or both bills may be signed.

[6] HB 938 is identical to SB 564.

SPECIAL LAWS – ALCOHOLIC BEVERAGES LICENSES

Bill/Chapter: Senate Bill 369/Chapter 345 and House Bill 932 of 2015

Title: Prince George's County – City of College Park – Class D Beer and Wine License

Attorney General's Letter: May 7, 2015

Issue: Whether bills that authorize the conversion and transfer from one location to another of a specific alcoholic beverages license violate the prohibition on special laws found in Article III, § 33 of the Maryland Constitution.

Synopsis: Senate Bill 369/Chapter 345 and House Bill 932 of 2015 authorize a Class D (on-sale) beer and wine license issued for premises in the 7100 block of Baltimore Avenue in the City of College Park to be converted into a Class D (on- and off-sale) beer and wine license for premises located in the 7100 to 7200 block of Baltimore Avenue in the City of College Park. The bills deal with a single license.

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." The Attorney General listed several factors that Maryland courts consider when determining whether a particular piece of legislation is a "special law." These include (1) whether the legislation is intended to benefit or burden a particular member or members of a class instead of an entire class; (2) whether a particular individual or business sought and received special advantages from the legislature; (3) whether the legislation has the effect of singling out a particular individual or entity for special treatment; and (4) whether legislatively drawn distinctions are "arbitrary and without reasonable basis."

The Attorney General observed that the bills met many of these criteria. The legislative record indicated that the bills were intended to allow a specific individual – the holder of an alcoholic beverages license issued for the establishment – to move the license to another location so that the individual could open a new gourmet coffee shop and specialty food store selling craft beer and wine for on- and off-premises consumption. Moreover, the bills applied to such a small geographic area that they could not possibly affect a broader class of license holders.

Nevertheless, the Attorney General concluded that the bills did not rise to the level of special laws because they seemed to serve a public as well as a private purpose. Local officials testified in favor of the bills, arguing that the license transfer and new business authorized by the bills would further the city's broader economic and community development goals. Moreover, this public purpose was one that the general law was inadequate to serve. Article 2B, § 9-217 effectively prohibits the Board of License Commissioners from issuing or transferring an alcoholic beverages license with off-sale privilege in Prince George's County. Consequently, the new business envisioned for the converted license would be almost impossible to establish without the specific authorization of the General Assembly.

The Attorney General noted that "this type of closely focused legislation is not uncommon with respect to alcoholic beverages licenses." The General Assembly has imposed strict limitations on alcoholic beverages licensing in the interest of public welfare. When these limitations conflict with the needs of a particular community, the Attorney General suggested that the General Assembly may reasonably choose to carve out a narrow exception to the general law rather than to effect a broader change.

Drafting Tips: **When drafting legislation that affects a license held by a single individual or entity, the drafter should be mindful of the constitutional prohibition on special laws. A bill that affects a single license holder is more likely to survive constitutional scrutiny if it facilitates economic or community development plans that could not be carried out under the general law. This may be especially true in the case of alcoholic beverages licenses, where general licensing restrictions often conflict with the needs of particular communities.**

BRIAN E. FROSH
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ELIZABETH F. HARRIS
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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 7, 2015

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: House Bill 932 and Senate Bill 369, "Prince George's County – City of College Park – Class D Beer and Wine License"

Dear Governor Hogan:

We have reviewed House Bill 932 and Senate Bill 369, identical bills entitled "Prince George's County – City of College Park – Class D Beer and Wine License," for constitutionality and legal sufficiency. In doing so, we have considered whether the bills, which permit the transfer and conversion of a specific Class D license in College Park from one location to another, violate the prohibition of special laws found in Article III, § 33 of the Maryland Constitution. In accordance with our longstanding practice, we review bills by a deferential standard and recommend a veto only when the proposed legislation is clearly unconstitutional. While these bills have some indicia of being special laws, we have concluded that they could be upheld against a special law challenge and thus are not clearly unconstitutional.

House Bill 932 and Senate Bill 369 both authorize the conversion of a Class D (on-sale) beer and wine license issued for premises in the 7100 block of Baltimore Avenue in College Park to a Class D (on- and off-sale) beer and wine license for premises located in the 7100 to 7200 block of Baltimore Avenue in College Park. It is our understanding from written testimony in the committee file that the license is currently held by the owner of Plato's Diner, and that the owner of that license would like to establish a gourmet coffee shop that will also sell specialty foods, wine, and craft beer, all of which would be available for consumption on or off the premises.

Article III, § 33 of the Maryland Constitution provides, in relevant part, that "the General Assembly shall pass no special Law, for any case, for which provision has been made, by an existing General Law." Thus, "a law is constitutionally impermissible under § 33 if two conditions are met: (1) the law is a 'special law' and (2) a 'general law' relating to the same subject matter already exists." *Department of the Environment v. Days Cove Reclamation Co.,* 200 Md. App. 256, 264-265 (2011), citing *Jones v. House of Reformation*, 176 Md. 43, 55-56 (1939).

As explained in the *Days Cove* case, in determining whether a particular piece of legislation, is a special law, the Court of Appeals has considered certain factors, though no one is conclusive in all cases. *Days Cove*, 200 Md. App. at 265. Those include:

> "whether [the legislation] was actually intended to benefit or burden a particular member or members of a class instead of an entire class"; whether the legislation identifies particular individuals or entities; whether "a particular individual or business sought and received special advantages from the Legislature, or if other similar individuals or businesses were discriminated against by the legislation"; whether the legislation's substantive and practical effect, "and not merely its form," show that it singles out one individual or entity, from a general category, for special treatment; and whether "the legislatively drawn distinctions are arbitrary and without any reasonable basis."

Cities Service Co. v. Governor, 290 Md. 553, 569-70 (1981). One last consideration is the public interest underlying the enactment, and the inadequacy of the general law to serve that interest. *Id.* at 570.

In this case, the legislative record, while sparse, indicates that the bills are intended for the benefit of a specific person, and would allow that person, the holder of a particular Class D (on-sale) beer and wine license to move that license to another location and convert it to a Class D (on- and off-sale) license. Moreover, while neither the name of the person nor the name of the business is specified in the bills, the area where the license is now located is drawn so narrowly that only one business qualifies. Moreover, the bills permit the transfer and conversion of only one license, so that they cannot be said to cover an open class.

The legislative record also shows, however, that this change was sought, not only by the owner of the license, but also by the College Park City-University Partnership and

the Mayor of the City of College Park. Testimony of the College Park City-University Partnership reflects that the license transfer and the new business are a part of an overall plan "to make College Park a top 'college town' by 2020," with the goal of attracting more University faculty and staff to live in College Park and Prince George's County, thereby "reducing commutes, improving the local economy, tax base, and increasing community involvement." Written testimony of Eric Olson, Executive Director to the Education, Health and Environmental Affairs Committee on Senate Bill 369, March 2, 2015. One of the ways that the Partnership seeks to do this is by increasing the number of "unique, locally owned retail and restaurants," such as the one envisioned for the converted Plato's Diner license. *Id.* Similarly the Mayor testified that residents of the City have "continuously expressed their hopes for more upscale, convenient and diverse dining and entertainment venues," and that the proposed business plan would help the City achieve these goals. This testimony would support the conclusion that the legislatively drawn distinction was not without any reasonable basis and that the change does serve a public, and not merely a private, purpose.

Finally, the public purpose in question is not one that the general law is adequate to serve. Article 2B, § 9-217(l) effectively prohibits the Board of License Commissioners from issuing or transferring an alcoholic beverages license with an off-sale privilege in the County. Thus, without this specific authorization from the General Assembly, the creation of this new business would not be as easily accomplished, but would be possible only if the holder of one of the grandfathered on- and off-sale licenses had an appropriate location and was interested in undertaking this type of business.

It is worthy of note that this type of closely focused legislation is not uncommon with respect to alcoholic beverages licenses. Alcoholic Beverages licensing is so tightly controlled in the interest of the public welfare that the law sometimes stands in the way of development that would be of benefit to the community. In such instances, the Legislature may well wish to provide that public benefit without effecting a broader change in the law. In this type of situation:

> Courts should not be too ready to strike down such legislation on the theory that the same thing could have been worked out under existing general laws. It is said in 6 R.C.L. 417 (section 413): "In cases of state constitutional prohibition against the passage of special laws where a general law may be made applicable, it is a rule that the question of applicability * * * is one for the Legislature to determine, and that such a

> statute will not be declared unconstitutional, except where it clearly appears that the Legislature was mistaken in its belief that a general law could not be made applicable." * * * "An important test in determining whether legislation is special or general is to consider not the form merely, but the substance."

Jones v. House of Reformation, 176 Md. 43, 56-58 (1939).

Because there seems to be a public purpose behind the bills and the general law is not adequate for this purpose, it is our view that House Bill 932 and Senate Bill 369 are not clearly unconstitutional under Article III, § 33.

Sincerely,

Brian E. Frosh
Attorney General

BEF/KR/kk

cc: The Honorable John C. Wobensmith
Joseph M. Getty
Karl Aro

CONSTITUTIONAL FUNDING MANDATES – CAPITAL IMPROVEMENT PROGRAM

Bill/Chapter: House Bill 923 and Senate Bill 490/Chapter 355 of 2015

Title: Capital Grant Program for Local School Systems with Significant Enrollment Growth or Relocatable Classrooms

Attorney General's Letter: General Approval letter dated May 7, 2015, footnote 1.

Issue: Whether a bill that mandates an appropriation in the capital budget is binding on the Governor.

Synopsis: House Bill 923 and Senate Bill 490/Chapter 355 of 2015 establish the Capital Grant Program for Local School Systems with Significant Enrollment Growth or Relocatable Classrooms, a program that provides supplemental grants for public school construction in eligible local school systems. The bills also require the Governor, beginning in fiscal 2016, to include $20 million annually in the Capital Improvement Program of the Public School Construction Program that may be used only to award grants under the program.

Discussion: Article III, § 52 of the Maryland Constitution authorizes the General Assembly to impose mandated spending in the budget for specific programs and purposes. The Governor must include such appropriations in the budget bill. These constitutional obligations, however, apply only to the State operating budget.

The Attorney General began the analysis by noting that, despite the absence of express language, the bills purport to require the Governor to include program funds in the capital budget. The Attorney General pointed out that the General Assembly's authority to mandate appropriations does not apply to other legislation, including supplementary appropriation bills such as the capital budget. Consequently, the Attorney General advised that the bill's provisions requiring the payment to the grant program should be interpreted as a nonbinding expression of legislative intent only and not as a constitutional funding mandate.

Drafting Tips: **A drafter should be aware that the Maryland Constitution provides specific requirements for how the General Assembly may appropriate State funds. Specifically, the General Assembly may only mandate an appropriation in the State operating budget. A funding mandate that violates this constitutional limitation will be considered a nonbinding expression of legislative intent and merely optional for the Governor. The drafter should discuss this issue with the sponsor if proposed legislation seeks to impose mandated spending.**

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May 7, 2015

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401

Dear Governor Hogan:

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

HOUSE	SENATE
HB 923[1]	SB 210[2]
HB 934[2]	SB 490[1]
HB 999[3]	SB 723[3]
HB 1105[4]	SB 761[4]

Sincerely,

Brian E. Frosh
Attorney General

BEF/SB/eb

cc: The Honorable John C. Wobensmith
Joseph M. Getty
Karl Aro

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[1] HB 923 and SB 490 are identical and establish a Capital Grant Program for Local School Systems with Significant Enrollment Growth or Relocatable Classrooms, and purport to require the Governor to annually include $20.0 million to fund the program by adding Education Article, § 5-313(e), page 3, lines 20-25 (HB 923) page 3, lines 17-22 (SB 490). Although nothing in the bill language expressly states that the funds are to be included in the Capital Budget, the sponsor of HB 923 described the bill as "requir[ing] that an additional $20 million a year be added into the Capital Budget for public school construction." (Appropriations Committee hearing, March 3, 2015.) The sponsor of SB 490 also described the bill as requiring the Governor "to include the additional funding in the Capital Budget beginning in fiscal 2017." (Budget and Taxation Committee hearing, March 10, 2015.) The Maryland Constitution does not obligate the Governor to introduce or submit any legislation other than the Budget Bill. While the Executive Budget amendment, Art III, § 52, authorizes the General Assembly to enact legislation to mandate certain appropriations for the Governor to include in the Budget Bill, § 52(4), (11), and (12), these constitutional obligations only apply to the State operating budget. Thus, the General Assembly's authority to mandate appropriations does not apply to other legislation, including supplementary appropriation bills such as the Capital Budget. Accordingly, it is our view that ED § 5-313(e) as enacted by this bill should be viewed as an expression of legislative intent. In addition, each bill contains a grammatical error. On page 3, line 17 of HB 923 and on page 3, line 14 of SB 490, "allocate" should be "allocates".

[2] HB 934 and its cross-filed bill SB 210 are not identical. The titles are slightly different. The purpose paragraph of HB 934 on page 2, lines 18-19 uses the phrase "institution of higher education" whereas the purpose paragraph of SB 210, lines 18-19 uses the phrase "institution of postsecondary education". Although it is not legally significant, if both bills are signed, because

the bill text uses "institution of postsecondary education", we recommend signing the Senate Bill last.

[3] HB 999 is identical to SB 723. Both bills repeal the prohibition against a certified nurse practitioner practicing in the State unless the nurse practitioner has an approved attestation concerning standards of practice and collaboration with other health care providers. The bills also repeal the related requirement that the State Board of Nursing maintain a nurse practitioner's attestation and make it available to the State Board of Physicians upon request. The titles of the bills, when introduced, specifically referred to both of these provisions; however, amendments to both bills erroneously deleted that portion of the title that specifically referred to the repeal of the requirement that the State Board of Nursing maintain an attestation. Nonetheless, it is our view that there is no constitutional title defect. The titles specifically state that the bills "repeal[] a certain prohibition against a certified nurse practitioner practicing in the State unless the nurse practitioner has an approved attestation that the nurse practitioner has an agreement for collaboration and consulting with a certain physician and will practice in accordance with certain standards." Because the titles provide clear notice that the bills repeal the requirement that a certified nurse practitioner maintain an approved attestation, and the repeal of this provision makes the related requirement that the Board of Nursing maintain an attestation effectively meaningless, it is our view that the titles provide sufficient notice that the bills also repeal the requirement that the Board maintain an attestation. Accordingly, House Bill 999 and Senate Bill 723 are recommended for signature, and either bill or both bills may be signed.

[4] HB 1105 and its nearly identical cross-filed bill SB 761 are slightly different. On page 39, lines 14-15 of HB 1105, the bill states "shall report its findings and recommendations, and proposed legislation" whereas SB 761 at page 39, lines 11-12 states "shall report its findings, recommendations, and proposed legislation". SB 761 language is preferable so if both bills are signed, the Senate bill should be signed last.

UNIFORMITY IN TAXATION – PARTIAL PROPERTY TAX CREDITS FOR COUNTY ECONOMIC DEVELOPMENT PROJECTS

Bill/Chapter: Senate Bill 925/Chapter 211 of 2015

Title: Washington County – Property Tax Credit – Economic Development Projects

Attorney General's Letter: General Approval letter dated April 24, 2015, footnote 6.

Issue: Whether a bill authorizing a county to grant a property tax credit against the county's property tax to a new business entity in the county that makes capital improvements and creates jobs violates the uniform taxing requirements provided in Article 15 of the Maryland Declaration of Rights.

Synopsis: Senate Bill 925/Chapter 211 of 2015 authorizes Washington County to grant, by law, a property tax credit against the county's real property taxes imposed on real property owned or leased by a new business entity in the county if (1) the business entity invests at least $10 million in capital improvements in the county and (2) the improvements result in the creation of 100 new permanent full-time positions. If the bill's requirements for the credit are met, the credit equals a percentage of the property tax imposed. Specifically, in the first five taxable years, the business entity is entitled to a full credit. In the following 10 years, the bill provides for a partial property tax credit of 75% in tax years 6 through 10 and 50% in tax years 11 through 15. The credit is phased out entirely after 15 years.

Discussion: The Attorney General began by noting that Article 15 of the Maryland Declaration of Rights requires property taxes to be assessed uniformly. The courts give legislatures wide discretion in awarding full credits or exemptions from taxation when reasonable and for a public purpose. The *partial* property tax credit in this bill, the Attorney General pointed out, nevertheless raises uniformity concerns because partial credits necessarily result in different rates of taxation within the same class or subclass of properties. Despite this, according to the Attorney General, the courts have accepted a five-year reassessment cycle as not being in violation of the uniformity clause, recognizing that the property tax system cannot be administered in perfect uniformity. Furthermore, the Attorney General has previously opined that a homestead tax credit (for homeowners whose assessment increased by more than a specified percentage) was not in clear violation of the uniformity clause so long as the credit did not extend beyond its tenth year. Based on these two instances, the Attorney General concluded that the bill should be considered constitutional insofar as the partial credit extends only for 10 years, therefore not exceeding the "safe harbor" time period.

Drafting Tips: **When drafting a bill establishing or authorizing a partial property tax credit, 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 credit should be drafted as a temporary adjustment, effective for the shortest period acceptable to the sponsor, and no longer than 5 to 10 years.**

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April 24, 2015

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401

Dear Governor Hogan:

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

HOUSE	SENATE
HB 313[1]	SB 298[1]
HB 526[2]	SB 508[3]
HB 642[3]	SB 673[2]
HB 738[4]	SB 925[6]
HB 1288[5]	SB 937[5]

Very truly yours,

Brian E. Frosh

Brian E. Frosh
Attorney General

BEF/SB/eb

cc: The Honorable John C. Wobensmith
Joseph M. Getty
Karl Aro

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[1] HB 313 is not entirely identical to SB 298. A difference appears in the titles in each bill. HB 313 on page 2, in lines 6 and 7, includes "stating that certain provisions of law apply to a financing or lease agreement between a dealer and a buyer", which makes reference to a portion of each bill that was deleted by amendment. This language was appropriately deleted from the title of SB 298. The language of the Senate bill is preferable, so we recommend that if both bills are signed, SB 298 be signed last.

[2] HB 526 and SB 673 are companion bills, but there is a slight difference in the titles of the bills. When the change was made to include only nonprofit beer festivals, the change from "beer festival permit" to "nonprofit beer festival permit" in each place that the term appeared in the title of the Senate Bill was made, but one place was missed in the House Bill, at page 1, line 5. For that reason, we would recommend that if both bills are to be signed, the Senate Bill be signed last.

[3] HB 642 is not entirely identical to SB 508. A difference appears in the new language of proposed § 6-113(b) of the Education Article in each bill. SB 508, on page 4, line 2, refers to "LOCAL SCHOOL SYSTEM," while HB 642, page 5, line 2, refers only to "SCHOOL." The language of the Senate bill is preferable, so we recommend that if both bills are signed, SB 508 be signed last.

[4] HB 738 has an error in the title that is potentially misleading. The purpose paragraph was amended to say that the bill applies to the "formation of a procurement contract for architectural services or engineering services", but the bill applies to all procurement contracts. While the bill may be signed into law, we recommend that the title be corrected in next year's curative bill.

[5] HB 1288 is not entirely identical to SB 937. The difference appears in the short titles of the bills. HB 1288 is entitled "Alcoholic Beverages – Sale of Powered Alcohol – Prohibition",

while SB 937 is entitled "Alcoholic Beverages – Powdered Alcoholic Beverages – Ban on Sales". Neither short title is inaccurate nor ambiguous, and either bill or both bills may be signed.

[6] SB 925 authorizes Washington County to grant a property tax credit to certain business entities that make capital improvements to their real property and create jobs. For the first 5 taxable years, the tax relief represents a full credit. For the following 10 years, however, the bill provides for only a partial property tax credit to properties in the same class or subclass as other properties that do not meet the bill's qualifying criteria. Article 15 of Maryland's Declaration of Rights requires property tax be assessed uniformly. The creation of partial credits raises uniformity concerns. An agricultural use assessment which was considered a partial exemption/credit was rejected by the court in *State Tax Comm'n v. Gales*, 222 Md. 543 (1959). *See also Nat'l Can Corp. v. State Tax Comm'n*, 220 Md. 418 (1959); 37 Op. Att'y. Gen. 424 (1952); 62 Op. Att'y Gen. 54 (1977). On the other hand, the Court of Appeals has also recognized that the property tax system cannot be administered in perfect uniformity. Accordingly, the Court of Appeals has accepted a five-year reassessment cycle as not being in violation of the uniformity clause. *Rogan v. Co. Comm'rs of Calvert Co.*, 194 Md. 299, 309 (1949). Additionally, the Attorney General's Office opined that the homestead tax credit was not in clear violation of the uniformity clause until it was extended beyond its tenth year. 72 Op. Att'y Gen. 350, 354 (1987). SB 925 authorizes Washington County to grant a partial credit for a 10 year period, but the partial credit does not extend beyond 10 years.

RETROACTIVE LEGISLATION – CLARIFICATION OF EXISTING LAW – INTEREST ON SECURITY DEPOSITS

Bill/Chapter: House Bill 782/Chapter 455 and Senate Bill 408 of 2015

Title: Real Property – Residential Leases – Interest on Security Deposits

Attorney General's Letter: May 5, 2015

Issue: Whether bills that are intended to resolve an ambiguity in current statutory law regarding when interest accrues on security deposits may constitutionally apply retroactively.

Synopsis: Legislation enacted in 2014 established a new rate at which interest accrues on security deposits under residential leases and established a formula to calculate interest to be paid at monthly intervals when a security deposit is held for less than one year. House Bill 782/Chapter 455 and Senate Bill 408 of 2015 clarify that interest accrues at monthly intervals from the day the tenant gives the landowner or mobile home park owner the security deposit. No interest is due or payable (1) unless the landlord or park owner has held the security deposit for a minimum of six months or (2) for any period less than a full month. The bills apply to any interest accruing on a security deposit under a residential lease or mobile home park rental agreement on or after January 1, 2015.

Discussion: In *Dua v. Comcast Cable of Maryland*, 370 Md. 604, 629 (2002), the Court of Appeals struck down legislation that retroactively changed the amount of late fees a cable company could charge consumers, holding that retrospective statutes abrogating vested property rights (including contractual rights) violate Article 24 of the Maryland Declaration of Rights and Article III, § 40 of the Maryland Constitution. Citing *Dua*, the Attorney General noted the possibility that there are tenants that either rented for less than six months or for a partial month after January 1, 2015, who may have an argument that they have a vested right to interest under the existing law or their rental contract.

The Attorney General determined, however, that a review of the legislative history shows that the General Assembly intended to clarify existing law. Because the tenants were not entitled to interest under existing law, applying the bills retroactively to all leases on or after January 1, 2015, does not retrospectively abrogate any vested rights.

Drafting Tips: **When drafting legislation that is to be applied retroactively, the drafter should consider whether the application of that provision would impair a vested right that existed before the effective date of the legislation. If the legislation merely clarifies existing law and does not abrogate any vested rights, the legislation may apply retroactively without violating the Maryland Constitution.**

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

May 5, 2015

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: House Bill 782/Senate Bill 408, "Real Property – Residential Leases – Interest on Security Deposits"

Dear Governor Hogan:

House Bill 782 and Senate Bill 408 are identical. While we approve these bill for legal sufficiency and constitutionality, we write to comment about a potential issue regarding retroactivity. House Bill 782 and Senate Bill 408 seek to resolve an ambiguity in current statutory law regarding when interest accrues on security deposits. The resolution of that ambiguity should not raise any constitutional concerns. Nevertheless, an argument could be made that House Bill 782 and Senate Bill 408 apply retroactively to leases that were not covered by legislation enacted last year, thus the bills impair vested rights of tenants holding those leases.

During the 2014 Session, the General Assembly amended sections 8-203 and 8A-1001 of the Real Property Article and established a new rate at which interest accrues on security deposits under residential leases through the enactment of Senate Bill 345 (Chapter 488) and House Bill 249 (Chapter 489). Chapters 488 and 489 provided that the legislation "shall be construed to apply only prospectively and may not be applied or interpreted to have any effect on or application to any residential leases entered into before the effective date of this Act." Chapters 488 and 489 further provided that the effective date was January 1, 2015. Section 2 of House Bill 782 and Senate Bill 408 provides, "this Act shall apply to any interest accruing on a security deposit under a residential lease or mobile home park rental agreement on or after January 1, 2015." Because House Bill 782 and Senate Bill 408 apply only to interest that accrues under leases entered into after January 1, 2015 (which are the leases to which Chapters 488 and 489 apply), the bills in our view would not impair

existing obligations of contract or interfere with vested rights. At the same time, there is a possible retroactive application of House Bill 782 and Senate Bill 408 that may lead to an argument that the bills interfere with vested rights.

The existing law has some ambiguities and conflicts that House Bill 782 and Senate Bill 408 would resolve. These include whether interest is for due for partial months and for deposits held less than 6 months. House Bill 782 and Senate Bill 408 make clear that interest is not due on any deposit held for less than six months or for partial months. It is possible, however, that there are tenants that either rented for less than 6 months or for a partial month after January 1, 2015. These tenants may have an argument that they have a vested right to interest under the existing law or their rental contract. *Dua v. Comcast Cable of Maryland*, 370 Md. 604 (2002). In the *Dua* case, the Court determined that legislation which retroactively changed the amount of late fees a cable company could charge consumers violated Article 24 of the Maryland Declaration of Rights and Article III, § 40 of the Maryland Constitution. The Court reiterated that no matter how rational the reason for doing so, "it is clear that retrospective statutes abrogating vested property rights (including contractual rights) violate the Maryland Constitution." *Id.* at 629. The counter-argument is that House Bill 782 and Senate Bill 408 simply clarified existing law that they were not entitled to interest. A review of the legislative history shows that the General Assembly intended to clarify the existing law, thus it is our view that applying House Bill 782 and Senate Bill 408 retroactively to all leases on or after January 1, 2015 does not retrospectively abrogate any vested rights.

Sincerely,

Brian E. Frosh
Attorney General

BEF/SB/kk

cc: The Honorable John C. Wobensmith
Joseph M. Getty
Karl Aro

Miscellaneous Legislative Issues

TITLE DEFECT – PURPOSE PARAGRAPH – MATERIAL SUBJECT MATTER

Bill/Chapter: House Bill 634/Chapter 445 of 2015

Title: Prince George's County Board of Education – Authority to Establish a Certified County-Based Business Participation Program, PG 408-15

Attorney General's Letter: May 7, 2015

Issue: Whether a bill that includes a certain provision that is not specifically reflected in the bill's purpose paragraph violates Maryland constitutional title requirements.

Synopsis: As introduced, House Bill 634/Chapter 445 of 2015 authorized the Prince George's County Board of Education, in consultation with the Chief Executive Officer of the Prince George's County Public Schools, to establish a Certified County-Based Business Participation Program. An amendment to the bill, however, also authorized minimum goals and incentives for county-based *minority* business participation. This change was not reflected in the purpose paragraph.

Discussion: Article III, § 29 of the Maryland Constitution requires that the subject matter of every bill be described in its title. Maryland courts have explained that the purpose of this requirement is to inform legislators and the public of the general nature of the subject matter of pending legislation. Although the title need not be an index to all of the details of the bill, it must reflect material changes in the law.

The Attorney General maintained that the amended bill's expansion of the program from one that favored county-based businesses generally to one that could also separately favor county-based minority businesses added a material element that should have been reflected in the title. Further, the failure to reflect the change in the title could potentially mislead legislators and the public as to the nature of the bill, given the controversy surrounding minority business programs. Consequently, the Attorney General concluded that, while the bill may be enacted, the authority to create a minority-based portion of a county-based business program may not be exercised until the title is corrected in the next curative bill.[1]

[1] The Attorney General also raised constitutional concerns relating to federal equal protection standards and concluded that if minority-based measures are included in a program established under House Bill 634, the program must be implemented in a manner that meets the constitutional standards that have been applied to other race-based programs.

Drafting Tips: **Article III, § 29 of the Maryland Constitution requires the subject of every bill to be addressed in its title. The title must provide adequate notice to the reader regarding the legislation's content and legal effect. When drafting legislation and amendments to legislation, the drafter should take great care to ensure that each material element in the bill is specifically covered by the purpose paragraph of the title.**

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May 7, 2015

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: House Bill 634, "Prince George's County Board of Education – Authority to Establish a Certified County-Based Business Participation Program"

Dear Governor Hogan:

We have reviewed House Bill 634, "Prince George's County Board of Education – Authority to Establish a Certified County-Based Business Participation Program" for constitutionality and legal sufficiency. While the bill may be signed into law, a severable portion thereof may not be given effect because it is not reflected in the title. As is discussed below, if the title is cured, allowing the implementation of that portion of the bill, certain requirements must be met. It is our view that steps toward meeting these requirements may be taken before the title is cured, so long as the program itself is not put in place.

As introduced, House Bill 634 required the Superintendent of the Prince George's County schools in consultation with the County Board of Education to establish and implement a Certified County-Based Business Participation Program to be used in county board procurement. The bill has been amended to make the program discretionary rather than mandatory and to grant the authorization to the Board of Education in consultation with the Superintendent, rather than the other way around. The amendments also allow the program goals to include minimum goals and incentives for maximizing certified county-based minority business participation. While the first two of these changes are reflected in amendments to the title of the bill, the authority to create race- and gender-based goals and requirements is not.

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Article III, § 29 of the Maryland Constitution provides that "every Law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title." This requirement is intended to ensure that the title will inform the members of the legislature and the public about the nature of the bill. *Ogrinz v. James*, 309 Md. 381, 398 (1987). It does not require that the title be an index to all of the details of the bill, *Eutaw Enterprises v. Baltimore City*, 241 Md. 686, 699 (1966); *Calvert County v. Hellen*, 72 Md. 603, 606 (1890), or that it disclose precisely how the purpose of the bill is to be carried out, *Mealey v. Hagerstown*, 92 Md. 741, 746 (1901). The title must, however, reflect material changes in the law, *Quenstedt v. Wilson*, 173 Md. 11, 22 (1937), and "must not be misleading by apparently limiting the enactment to a much narrower scope than the body of the Act is made to compass." *Luman v. Hitchens Bros. Co.*, 90 Md. 14, 23 (1899). Thus, a matter may be related to the subject of the bill, and yet be so material that it must be mentioned separately in the title. An example can be found in the case of *Bell v. Prince George's County*, 195 Md. 21 (1950), where the title to a bill relating to amusement devices was found invalid because the title did not reflect that the bill permitted the use of some amusement devices for gaming.

There is little question that all of the provisions of House Bill 634 relate to a single subject. The expansion of the authorized program from one that would favor county-based businesses generally to one that could also separately favor county-based minority businesses, however, added a material element that should have been reflected in the title. It goes without saying that programs for minority contractors have been controversial in this State and elsewhere and have been the source of much litigation nationwide. Failure to include this portion of the bill in the title has the potential to mislead both legislators and members of the public with respect to the nature of the bill. For that reason, it is our view, as is ordinarily the case where material matters are left out of the title, that the bill must be limited to the matters that are reflected in the title. *Clark's Park v. Hranicka*, 246 Md. 178 (1967) (immunity provision regarding false arrest not given effect where title mentioned only shoplifting and not false arrest); *State v. King*, 124 Md. 491 (1915) (applicability of provision on loans secured by liens limited to liens on dwelling houses when the title was limited to dwelling houses); *State v. Cumb. & Pa. R. Co.*, 105 Md. 478 (1907) (court described provision allowing State's Attorney to move for forfeiture of charter for violation of prohibition on allowing tracks to connect with or be used by B&O as a radical change in current law that was not reflected in the title, and held it could not be given effect); *Steenken & Berkmeier v. State*, 88 Md. 708 (1898) (bonding requirement for stevedores held void because it was not reflected in the title of the bill, which referred only to licensing); *Stiefel v. Md. Institute for the Blind*, 61 Md.

144 (1884) (no effect could be given to new provision in bill when title mentioned only the repeal of the old provision).

Because this title defect can easily be addressed in next year's curative bill, we also address the constitutional requirements that must be met if minority-based measures are to be included in the program authorized by House Bill 634. It is well-settled law that race-based classifications are subject to strict scrutiny under the Equal Protection Clause. *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411, 2419 (2013); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-494 (1989). As a result, such classifications "are constitutional only if they are narrowly tailored to further compelling governmental interests." *Adarand*, 515 U.S. at 227. The Supreme Court has recognized that "remedying the effects of past or present racial discrimination" is a compelling interest. *Shaw v. Hunt*, 517 U.S. 899, 909 (1996); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989).

To rely on this compelling interest, however, the government must demonstrate "a strong basis in evidence for its conclusion that remedial action [is] necessary." *Croson*, 488 U.S. at 500, citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78 (1986) (plurality opinion). The established way to make this showing is an availability and utilization study, that is, a study that shows "a significant statistical disparity between the number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality's prime contractors." *Concrete Works of Colo., Inc. v. City and Cnty. of Denver*, 36 F.3d 1513, 1522 (10th Cir.1994). Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest. *Croson*, 488 U.S. at 509. It is our understanding that the County has recently hired a contractor to conduct a new disparity study in the County. To the extent that the study, when completed, demonstrates that there is a statistically significant disparity between the availability and utilization of minority contractors in the relevant market in which the County (including the Board of Education) is a participant, that evidence could form the basis for a minority-based program. Anecdotal evidence would also be helpful.

If a disparity is established, it is also necessary that the program be narrowly tailored to accomplish the aims of the program. Any goals that are set must be closely related to the evidence provided in the disparity study. *Grutter*, 539 U.S. at 339; *Fisher*, 133 S. Ct. at 2420; *Croson*, 488 at 507-508. In addition, it is generally necessary to first consider race-neutral alternatives. *Croson*, 488 at 507. Other factors include the

flexibility and duration of the relief including the establishment of contract by contract goals, the availability of waiver provisions and the impact of the relief on the rights of third parties. *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion); *Midwest Fence Corp. v. US DOT*, 2015 WL 1396376 (N.D. Ill. March 24, 2015). All of these factors should be considered if a minority-based county business program is to be created. We also note that the requisite link between compelling interest and remedy, coupled with the need for flexibility, including setting goals on a contract by contract basis and making waivers available, would generally make the use of mandatory set-asides inappropriate in a minority- or gender-based program.

In conclusion, while the bill may be signed into law, it is our view that the authority to create a race-based portion of a county-based business program may not be exercised until or unless the title is corrected in future legislation. If such a program is to be established at that time, it must be implemented in a manner that meets the constitutional standards that have been applied to other race-based programs.

Sincerely,

Brian E. Frosh
Attorney General

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cc: The Honorable John C. Wobensmith
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TITLE DEFECTS – INACCURATE PURPOSE PARAGRAPH

Bill/Chapter: House Bill 9/Chapter 393 of 2015

Title: Maryland Licensure of Direct-Entry Midwives Act

Attorney General's Letter: May 5, 2015

Issue: Whether a clause in a bill's purpose paragraph stating that midwives are required to take certain actions is constitutionally sufficient to reflect the bill's scope of practice provisions which authorize, rather than require, those actions.

Synopsis: House Bill 9/Chapter 393 of 2015 creates the Direct-Entry Midwifery Advisory Committee within the State Board of Nursing and establishes procedures for obtaining and renewing a license to practice direct-entry midwifery. The purpose paragraph of the bill states that midwives are required to provide certain notifications to certain health care providers, but the body of the bill authorizes, rather than requires, certain notifications to health practitioners as within the permitted scope of practice for a midwife.

Discussion: Article III, § 29 of the Maryland Constitution requires that the subject matter of every bill be described in its title. Maryland courts have explained that the purpose of this requirement is to inform legislators and the public of the general nature of the subject matter of pending legislation so that, if interested, they may examine the body of the bill for its specific provisions. The Attorney General observed that the purpose paragraph reflects that the bill requires midwives to take certain actions, but while many of the actions described are in fact expressly required in the body of the bill, others are only authorized under the bill's scope of practice provisions. Therefore, the purpose paragraph does not accurately reflect the bill's provisions, as amended. The Attorney General advised that these errors in the title can be corrected in next year's curative bill[1].

[1] The Attorney General also noted that a clause in the purpose paragraph prohibiting the board from "taking other action" against certain midwives for failure to submit certain reports was not reflected in the body of the bill. The Attorney General raised further concerns over the purpose paragraph, arguing that while a particular provision in the bill may be covered by the "generally relating to" clause, specificity is warranted when it requires that certain midwives be assisted during delivery by a second individual with certain qualifications. The Attorney General concluded that these deficiencies also could be corrected in the curative bill.

Drafting Tips: **Article III, § 29 of the Maryland Constitution requires the subject of every bill to be addressed in its title. The title must provide adequate notice to the reader regarding the legislation's legal effect. The drafter, therefore, should take great care to ensure that each element in the bill is covered by a purpose paragraph that sufficiently reflects the substance of the body of the bill. The "generally relating to" clause should not be relied on as an alternative to title specificity.**

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May 5, 2015

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: House Bill 9, "Maryland Licensure of Direct-Entry Midwives Act"

Dear Governor Hogan:

We have reviewed House Bill 9 for constitutionality and legal sufficiency. We write to point out errors in the title that can be corrected in next year's curative bill and errors in the body of the bill that can be cured in next year's corrective bill.

The errors are:

(1) At page 1, line 11 to page 2, line 7 the title reflects that the bill is "requiring certain midwives to notify certain health care practitioners of certain births, transfer certain records, make certain recommendations, develop certain plans for certain patients, obtain certain informed consent agreements, comply with certain data collection and reporting requirements, complete and submit certain birth certificates, make certain records and information available to certain individuals, and display a certain notice under certain circumstances." Many of these actions are in fact required in the body of the bill. Others, however, such as notifying health practitioners when a birth occurs, transferring records, and making recommendations, are not expressly required, but are included in the scope of practice at page 14, lines 28 and 29 and page 14, line 31 to page 15, line 5. A scope of practice provision sets out the actions that are permitted, not those that are required. In addition, while the provision at page 15, lines 3 to 5 initially included a recommendation to the patient as a part of the scope of practice, it now includes a referral of the newborn to a pediatric health care practitioner instead.

(2) At page 2, lines 22-24 the title reflects that the bill is "prohibiting the Board from renewing the license of certain licensed direct-entry midwives under certain circumstances, or taking other action against certain licensed direct-entry midwives for the failure to submit certain reports." Page 27, lines 11-14 says that a "licensed direct-entry midwife who fails to comply with the reporting requirements under this section shall be prohibited from license renewal until the information required under subsection (a) of this section is reported." There is no prohibition of other actions that the Board might take, and the bill expressly provides for reprimand, probation, suspension, or revocation for violations of the subtitle at page 42, lines 1-4, and page 43, line 11.

(3) Page 21, lines 18-25 of the bill requires that a direct-entry midwife be assisted at the time of delivery by a second individual who has certain qualifications. This requirement is not reflected in the title, though it is arguably covered by the general purpose of "establishing a licensing and regulatory system for the practice of direct-entry midwifery under the State Board of Nursing."

(4) At page 10, line 4, the word "under" is repeated.

(5) At page 13, line 13, the cross reference should be to § 8-6C-18(e)(2) rather than to 8-6C-18(e)(1)(ii).

(6) Beginning at the top of page 32, and continuing to page 33, line 19, the paragraphs are misnumbered as a result of the deletion of the original paragraph (3). This correction would also require the correction to the cross reference to § 8-6C-12(a)(11) that appears at page 34, lines 7 and 14.

Sincerely,

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Attorney General

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