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OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY
May 15, 2009

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

Re: Senate Bill 450 and House Bill 489

Dear Governor O'Malley:

We have reviewed for constitutionality and legal sufficiency Senate Bill 450 and House Bill 489, nearly identical bills¹ addressing the authority of the Board of County Commissioners of Allegany County to incur debt on behalf of the Upper Potomac River Commission for specified types of projects. The bills would amend § 76-7 of the Public Local Laws of Allegany County ("PLL"). Because Allegany County has adopted code home rule under Article XI-F of the Constitution, the bills raise a serious constitutional issue regarding the General Assembly's authority to pass this legislation, which is applicable to a single code county. While we approve the bills for signing, to eliminate any cloud on the County's borrowing authority, we recommend that bonds not be issued under authority of this legislation until the County Commissioners enact a public local law reflecting the changes made in the bills.

The bills amend a section of the law governing the Upper Potomac Regional Commission, which was established by the General Assembly in 1935,² and which exercises jurisdiction over a regional entity, the Upper Potomac Regional District, an area encompassing parts of both Allegany and Garrett counties. PLL § 76-1, *et seq.* The Commission consists of three members, who serve six-year staggered terms, one appointed

¹ We note a minor stylistic difference in the bills. SB 450, § 76-7.A, cross-references Article 25B, §§ 14 through 21 of "the Code," while HB 489 refers to "the Annotated Code of Maryland." The House Bill reference is consistent with other cross references in the bills.

² The law governing the Commission, first enacted by Chapter 409, Laws of Maryland 1935, was initially uncodified. It appears to have been first codified in a 1955 edition of the Public Local Laws of Allegany County, which was legalized by the General Assembly, Chapter 319, Laws of Maryland 1955.

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by the County Commissioners of Allegany County, one appointed by the County Commissioners of Garrett County, and one named by the Governor. PLL § 76-2. The Governor designates the chair of the Commission. *Id.* The Commission has authority, among other things, "to regulate the flow of water in the Upper Potomac River and its tributary rivers and streams within said district and, in pursuance of such power, may erect, build, install and maintain dams, reservoirs and such other structures, with appurtenances and machinery, deemed necessary for regulating the flow of water..." PLL § 76-3.³ However, Senate Bill 450 and House Bill 489 address solely the power of the County Commissioners of Allegany County, which adopted code home rule under Article XI-F of the Constitution in 1974, to incur debt for the benefit of the Commission in connection with capital projects whenever the County Commissioners deem it advisable for the welfare of Allegany County.

Specifically, the bills eliminate a \$200,000 cap on the amount of loans that the County Commissioners may incur and the amount of bonds that the County Commissioners may issue on behalf of the Commission and eliminate a mandatory referendum requirement before a loan can be incurred or bonds issued. The bills also eliminate a maximum interest rate for bonds issued under PLL § 76-7, a 15-year limit on the term of the bonds, and multiple procedural requirements governing the issuance of bonds. The bills instead incorporate the authority that each code county possesses to issue bonds under Article 25B, §§ 14-21, Annotated Code of Maryland.⁴ The bills also exempt the bonds from the requirements of Article 31, §§ 9-11, Annotated Code of Maryland.⁵

³ The Commission owns the Savage River Dam, which is located in Garrett County, and is important for flood control in all of the Upper Potomac region. The reservoir created by the Dam is an important water supply source not only to the region, but to the Washington D.C. metropolitan area. The gates of the dam are in dire need of replacement. *See* Fiscal And Policy Note on SB 450/HB 489, p. 2. According to the Fiscal Note, the cost of the project is nearly \$6 million. The Commission also has authority to operate sewerage and industrial waste treatment facilities in the Luke-Westernport area and to issue revenue bonds to support such facilities. PLL § 76-10, *et seq.* However, the financing for waste treatment facilities is distinct and the waste treatment facilities are to be self-supporting.

⁴ Because bonds would be issued under the authority of Article 25B, §§ 14-21, Annotated Code of Maryland, the County Commissioners would need to enact a public local law to authorize the issuance of the bonds. As a result, although a referendum would no longer be required, the voters of Allegany County would retain the right to petition the public local law to referendum. Article XI-F, § 7 of the Constitution; Article 25B, §§ 10(h)(2) and 15. The term of the bonds issued under Article 25B of the Code could not exceed 40 years.

⁵ Article 31, §§ 9-11 provides procedures for the sale of bonds and places maximum maturity periods for bonds issued for particular purposes. While the bills expressly exempt these

Subject to limited exceptions, a county that has adopted code home rule under Article XI-F of the Constitution may “enact, amend, or repeal a public local law of that county.” Article XI-F, §§ 3 and 6. And, subject to limited exceptions not applicable here, the General Assembly is prohibited from enacting, amending, or repealing “a public local law which is special or local in its terms or effect within a code county.” Article XI-F, § 4. Rather, “[t]he General Assembly may enact, amend, or repeal public local laws applicable to code counties only by general enactments which in term and effect apply alike to all code counties in one or more of the classes provided for in Section 5 of [Article XI-F].” *Id.*⁶ The difficulty arises out of the definition of a “public local law” under Article XI-F of the Constitution:

“public local law” means a law applicable to the incorporation, organization, or government of a code county and contained in the county’s code of public local laws; but this ... term specifically does not include (i) the charters of municipal corporations under Article 11E of this Constitution, (ii) the laws or charters of counties under Article 11A of this Constitution, (iii) laws, whether or not Statewide in application, in the code of public general laws, (iv) laws which apply to more than one county, and (v) ordinances and resolutions of the county government enacted under public local laws.

Article XI-F, § 1(2). Interpreted literally, the definition appears to base the determination of what constitutes a “public local law” primarily on whether the codification of a legislative enactment is in the county’s code or the code of public general laws. 62 *Opinions of the Attorney General* 275, 277 (1977). In our view, however, the better interpretation, is to focus on the subject matter of the enactment and not merely on the placement or codification of the enactment. See, e.g., *Kent Island Defense League v. Queen Anne’s County Bd. of Elections*, 145 Md. App. 684, 693 (2002). Under either interpretation, the ability of the General Assembly to amend PLL § 76-7 appears questionable.

In determining whether the General Assembly exceeded its authority with respect to laws affecting a single code county, this office has looked to whether the law at issue referred to “matters of local concern” as distinguished from matters wholly or partly of

bonds from these provisions, a code county would ordinarily have the option of providing an exemption from these provisions under Article 25B, § 16(4).

⁶ Article XI-F, § 5 instructs the General Assembly to classify code counties into not more than four classes. The General Assembly has complied with this provision by grouping counties by geographic regions. Article 25B, § 2. Currently, Allegany County is the sole code county within the Western Maryland class.

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concern to the State. 64 *Opinions of the Attorney General* 110, 112 (1979). Establishing the Kent County Shoreline Commission was a matter of State concern (protection of wetlands and previous regulation of the area by the State). *Id.* Similarly, a bill concerning courts, jurors and fines in Kent County, the purpose of which was to eliminate certain conflicts between State and local law, concerned the judicial power, a State power. *Id.* Finally, a bill altering election districts and providing for the appointment of election officials in Kent County was found to be a matter of State concern (election laws). *Id.* A bill to require the appointment of a zoning people's counsel in Kent County, however, was determined to be a matter of purely local concern, in which case the General Assembly had exceeded its authority. *Id.* In 1983, we found that House Bill 918, a bill to enlarge Worcester County's power to make appropriations, and House Bill 931; a bill to enlarge Allegany County's authority to close roads, both concerned purely local matters. *See* Bill Review letter dated May 26, 1983. We advised that, "because of the uncertainty concerning the respective powers of the General Assembly and code counties," the bills could be signed, but that "the two counties may wish to enact ordinances along the same lines as the bills," thus providing the counties with "the power described in the bills, though the source of the power would be unclear." *Id.*

To be sure, any debt incurred under provisions of the bills is for the benefit of the Commission -- an entity whose jurisdiction extends beyond Allegany County. Thus, one might argue that the legislation does not constitute a public local law in that it affects more than one county and is thus a matter of state concern. However, PLL § 76-7, the sole provision amended, affects only the authority of the County Commissioners of Allegany County to issue debt and the resulting liability falls solely on the taxpayers of Allegany County. Article 25B, § 19, Annotated Code of Maryland. Furthermore, as long as the project promotes a public purpose benefitting Allegany County, which improvements by the Commission clearly do, the fact that the project may lie outside the county is of no consequence. *Cf. Wilson v. Bd. of County Comm'rs of Allegany County*, 273 Md. 30, 327 A.2d 488 (1974) (upholding county's issuance of industrial revenue bonds in connection with paper mill pollution abatement efforts, including projects beyond county limits, as those projects would facilitate cleaner environment within Allegany County). While the bills might be interpreted as authorized under Article XI-F, § 8 of the Constitution,⁷ as explained above, the bills go beyond eliminating the \$200,000 cap. Although Article XI-F, §8 reserves

⁷ Article XI-F, § 8 provides "Notwithstanding any other provisions of this Article, the General Assembly has exclusive power to enact, amend, or repeal any local law for a code county which (1) authorizes or places a maximum limit upon the rate of property taxes which may be imposed by the code county; or (2) authorizes or regulates the maximum amount of indebtedness which may be incurred by the code county. Public local laws enacted by the General Assembly under this section prevail over any public local laws enacted by the code county under other sections in this Article."

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to the General Assembly the right to cap the total indebtedness of a code county, the General Assembly has not imposed such a cap on the total debt that a code county might incur since Article XI-F was added to the Constitution in 1966.

Given the limited guidance interpreting Article XI-F of the Constitution, we cannot say that Senate Bill 450 and House Bill 489 are clearly unconstitutional; but as explained above, the bills raise a serious constitutional issue. Thus, we approve the bills for signing, and recommend that the County Commissioners of Allegany County adopt a public local law making identical changes to PLL § 76-7 before issuing bonds. Whether the appropriate authority lies with the General Assembly or with the County Commissioners to amend this section, the desired result will have been achieved one way or another.⁸

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/BAK/WRV/mlb

cc: The Honorable George C. Edwards
The Honorable LeRoy E. Myers, Jr.
The Honorable John P. McDonough
William M. Rudd, Esquire
Joseph Bryce
Karl Aro

⁸ In reviewing HB 931 in 1983, described above, we noted that, because the respective powers of code home rule counties and the General Assembly continue to be a subject of confusion, we strongly recommended that this area be the subject of study of executive or legislative study. Letter from Attorney General Sachs to Governor Hughes, May 26, 1983, on House Bills 918 and 1931 (1983). We reiterate that suggestion today.