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May 18, 2009

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

Dear Governor O'Malley:

Re: House Bill 960

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 960, "Prince George's County – Board of Education – Expenditures." We write to bring to your attention to: (1) a threatened legal challenge to the bill; (2) a settlement agreement of which we have just become aware; and (3) the bill's interaction with other legislation. We also caution that the bill must be carefully applied so as not to violate the prohibition against in-term compensation increases under Article III, §35 of the Maryland Constitution.

House Bill 960, an emergency measure, relates to the expenditures of the Prince George's County Board of Education ("Board"), a State agency. The bill provides that each elected member of the Board may be provided health insurance and other fringe benefits regularly provided to employees of the Board under the same terms and conditions extended to the other Board employees. The bill was amended to provide that this provision is to be applied only prospectively and may not be applied or interpreted to have any effect on or application to any member of the Board elected before November 2010. The bill was further amended to prohibit the Board from expending "any funds for the purpose of leasing, acquiring, or purchasing property under or in connection with a lease entered into in June of 2008 for consolidation of administrative offices of the Board."¹

¹ Pursuant to a Lease entered into by the Board with Washington Plaza, LLC ("Washington Plaza"), the Board leased property located at 8903 & 8905 Presidential Parkway, Upper Marlboro, office buildings and related parking areas to house the Board's headquarters. Washington Plaza is to make certain improvements to the property. We have received a letter

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Impairment of Contract

Article I, Section 10, Clause 1 of the United States Constitution provides "No State shall ... pass any ... Law impairing the Obligation of Contracts ..." Once an impairment is established, the question becomes whether the impairment is of a type that violates the Contract Clause. *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 427 (1934).

The interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals.

Manigault v. Springs, 199 U.S. 473, 480 (1905). Therefore, impairment "may be constitutional if it is reasonable and necessary to serve an important public purpose." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977).

Impairments of a state's own contracts, however, are subject to more rigorous judicial scrutiny than are laws impairing contracts between private parties. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 n.15 (1978). "[A] State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors." *United States Trust*, 431 U.S. at 30-31. To survive constitutional challenge, then, the State must demonstrate (1) that the law is reasonable and necessary to achieve to an important public purpose, and (2) there is no more moderate course that would serve its purpose equally well.

Nearly one hundred years ago, the Court of Appeals of Maryland addressed a case in which a private company brought suit against the State, alleging that the State, by passage of the legislation, impaired its contract and that the State was motivated purely

from Garth E. Beall, Esq. who represents Washington Plaza (letter attached). In his letter, Mr. Beall asserts that the provision of HB 960 that prohibits the Board from expending funds for the lease violates the Contract Clause of the United States Constitution. For the reasons discussed herein, we disagree with Mr. Beall's conclusion.

by “commercial and business purposes” rather than any purposes related to the operation and maintenance of the prison system. *Jones Hollow Ware Co. of Baltimore City v. Crane*, 134 Md. 103 (1919). The Court of Appeals upheld the statute, noting that “the operation of prisons and jails ... is a purely governmental function, [and] ... the exercise of its sovereign powers, ... [and] a public necessity.” *Id.* at 115.

Similarly, a strong argument can be made that providing for a system of public education is a governmental function and that HB 960 is within the State’s ambit to regulate solely by virtue of its police power. The public school system in Maryland is a comprehensive statewide system, created by the General Assembly in conformance with the mandate of Article VIII, § 1 of the Maryland Constitution, to establish, throughout the State, a thorough and efficient system of free public schools. The county school boards were “created by the General Assembly as an integral part of that state system.” *Zimmer-Rubert v. Board of Education of Baltimore County*, 179 Md. App. 589, 599 (2008). Even though the county boards are vested with control of educational matters affecting each county, these boards more generally support the statewide function of providing an efficient system of public schools and, therefore, regulations relating to education fall within the State’s police power. Thus, under the *Jones Hollow Ware* rationale, the very fact that this contract involves education may be sufficient to prevent HB 960 from being an impermissible impairment of contract.

Moreover, we certainly need not explain to you the unprecedented economic times in which the entire country finds itself, nor the continuing fiscal crisis and predicted budget shortfalls in our State. Over the last several years, you and the Legislature have had to look at every revenue source and expenditure in State government and make difficult decisions to keep our budget balanced. Limiting the Board’s ability to expend appropriated funds in furtherance of the lease agreement, though clearly an impairment of a contract, may well be found to fall within the State’s police power as a regulation that promotes the education of the people. *Barbier v. Connolly*, 113 U.S. 27, 31 (1885) (citing that “[t]he police power of the State encapsulates the State’s ability to prescribe regulations ‘to promote the health, peaces, morals, education, and good order of the people’”). This action makes available necessary funds for the Board to spend on educational resources and improve education in the County.² As stated above, an

² We also note that the General Assembly, to further ensure that education resources would not be expended for this purpose, enacted a budget reduction, contingent on the Board proceeding with the purchase or lease of a new administration building. This contingent cut is itself contingent on the failure of HB 960. See Section 41 of HB 101, the “Budget Reconciliation and Financing Act of 2009,” an omnibus bill the primary purpose of which is to balance the state budget.

impairment of contract may be found not violate the Contract Clause so long as it was both necessary and reasonable. In conjunction with actions taken in the Budget Bill (HB 101) and the Budget Reconciliation and Financing Act (HB 101), HB 960 exercises legitimate State authority and tailors the State's action as narrowly as possible to ensure that the impairment is reasonable under the circumstances. Therefore, it is our view that HB 960 does not constitute an unconstitutional impairment of contract. It is quite possible, however, that the Washington Plaza may have a cause of action in contract against the Board.

Severability

If Section 2 of HB 960 (containing the prohibition against the expenditure of funds for the lease) were found to be invalid, it is our view that it would be found to be severable from the remainder of the bill. The issue of severability is one of legislative intent. The Court of Appeals has stated that when considering severing a phrase from the balance of a bill, "[u]ltimately, the issue involves ascertaining what would have been the intent of the Legislature had the partial invalidity been known." *Burning Tree Club v. Bainum*, 305 Md. 53, 82 (1985) (opinion of Chief Judge Murphy, joined by Judges Smith and Orth). There is no indication that HB 960 would have been rejected without the addition of the amendment. Thus, we believe that a finding that Section 2 of the bill was invalid would not affect the validity of the remainder of the bill.

Settlement

It has come to our attention that a tentative settlement agreement has been reached between the Board and Washington Plaza. It also is our understanding that on Monday, May 18, 2009, the Board is scheduled to meet to ratify the settlement agreement.

We have not seen any proposed settlement agreement, and thus have no opinion as to its contents. The language of HB 960, however, prohibits the expenditure of "*any funds for the purpose of leasing, acquiring, or purchasing property under or in connection with a lease entered into in June of 2008* for consolidation of administrative offices of the Board." (emphasis added). It is our view that the payment of funds under a termination agreement may be considered "in connection with" the lease of June 2008, and thus could be prohibited under HB 960 if approved.

Interaction with Other Legislation

As noted above, HB 101 contains a provision to accomplish much of the same goal as HB 960. *See* note 2. That Section provides, in part:

- (a) *Subject to subsection (b) of this section, \$36,000,000 of State Foundation Program funds (Budget Code R00A02.01) to be disbursed to the Prince George's County Board of Education in fiscal year 2010 shall be reduced, contingent upon the Board proceeding with the purchase or lease of a new administration building under or in connection with a lease entered into in June of 2008.*
- (b) *Subsection (a) of this section is contingent on the failure of House Bill 960...*

The explanation for similar, though not identical, language in the Budget Bill³ states that the "language restricts funds to the Prince George's County Board of education *until the Board of Education terminates or cancels any contract to purchase or lease a new administration building.*" (emphasis added).⁴ Thus, in our view, if HB 960 is vetoed, \$36 million in the County's education funding would be reduced, only if the Board proceeds with the purchase or lease of a new administration building. In other words, if you veto HB 960, and if the Board terminates the lease, and thus does not proceed with the purchase or lease of a new administration building, the reduction will not take effect.

Health Insurance and Fringe Benefits

As stated above, the bill provides that each elected member of the Board may be provided health insurance and other fringe benefits regularly provided to employees of the Board under the same terms and conditions extended to the other Board employees. Currently, no health insurance or other fringe benefits are provided to members of the Board. The bill was amended by adding § 3 to provide that this provision is to be applied

³ Budget Bill language was also added that provides that "contingent on the failure of HB 960, disbursement of \$36,000,000 of this appropriation to be disbursed to the Prince George's County Board of Education is contingent on the Board of Education terminating, cancelling, or not proceeding with any contract to purchase or lease a new administration building and paying no damages due to terminating, cancelling, or not proceeding with any contract." HB 100 item R00A02.01. Because the language prohibiting the payment of damages was not included in regular legislation that modifies the statutory education formula, it would in effect alter the statutory education funding formula, and thereby run afoul of the prohibition against "legislating in the budget." *Bayne v. Secretary of State*, 283 Md. 560 (1978).

⁴ *See* Joint Chairmen's Report, 2009 Session, pp. 133-34.

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only prospectively and may not be applied or interpreted to have any effect on or application to any member of the Board elected before November 2010.

It seems clear that this amendment was intended to prevent a violation of Article III, §35 of the Maryland Constitution, which, in pertinent part, provides: that "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."⁵ The application of this aspect of HB 960 will be constitutional if the provision of health insurance and other benefits is made effective during the next term of office. Because HB 960 provides that the benefits shall be under the same terms and conditions extended to other employees of the Board, to which Art. III, §35 does not apply, a significant change in such benefits may occur at any time in the future, and §3 of the bill will be ineffective to prevent a violation of Article III, §35. Of course, this does not render the bill itself unconstitutional, but rather suggests that this issue must be considered when significantly increasing or decreasing such benefits. Because this provision will have no application until after the November 2010 election, if you choose to veto the bill, legislation may be enacted next session to both provide the benefits after the new terms begin in 2011 and prevent a potential constitutional issue.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/BAK/mlb

Attachment

cc: The Honorable John P. McDonough
Joseph C. Bryce
Karl Aro

⁵ Because the term of the members of the Prince George's County Board of Education is 4 years, MD. EDUC. ANN. CODE, §3-1002(g), the constitutional provision applies.