

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



DAN FRIEDMAN
Counsel to the General Assembly

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

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

April 27, 2009

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

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 11, "Anne Arundel County Tourism and Economic Development Promotion Act of 2009." We write to discuss several issues that were raised during the course of the Bill's passage.

Under current law, Anne Arundel County ("County") may impose, by ordinance, and collect a sales and use tax on, among other things, space rentals. Article 24, § 9-602(a). Under this authority, the County has imposed a 7% hotel tax. Revenue generated within the boundaries of the City of Annapolis ("City") from the tax on space rentals is to be collected and retained by the City. Art. 24, § 9-602(b)(2).

Senate Bill 11 requires the County to collect revenue generated within the boundaries of the City of Annapolis from the hotel tax. The bill further requires the County to distribute from the revenue generated within the City certain percentages of the revenue to the Arts Council of Anne Arundel County, Inc. ("Arts Council"), the Annapolis and Anne Arundel County Conference and Visitors Bureau ("Bureau"). The percentages increase from fiscal years 2012 to 2014, with the balance after these distributions going the City. The County is further required to distribute 7% of its share of hotel tax revenue in fiscal years 2010 and 2011 to the Bureau and certain increasing percentages to both the Bureau and the Arts Council beginning in 2012. After the distributions, the balance of the County's share is to be credited to the County's general fund. The bill requires the Bureau and the Arts Council to report to the County Executive and the members of the General Assembly representing Anne Arundel County on their use of the hotel tax revenue during the preceding fiscal year. Finally, SB 11 requires the County, in fiscal years 2010 and 2011 to distribute, from the County's share of hotel tax revenue, \$260,000 to the Arts Council.

Charter Home Rule

Anne Arundel County is a charter county and thus enjoys charter home rule under Article XI-A of the Maryland Constitution. Generally, the General Assembly is prohibited from enacting a public local law for a single charter county on any subject covered by the express powers granted to charter counties under Article 25A, § 5 of the Annotated Code. Art. XI-A, § 4. The Express Powers Act, however, expressly grants only the authority to impose property taxes, but does not grant general taxing authority, thus such power may be conferred by public local law. *Montgomery County v. Maryland Soft Drink Ass'n, Inc.*, 281 Md. 116, 130-31 (1977); *City of Annapolis v. Anne Arundel County*, 347 Md. 1, 10 (1997). Thus, the General Assembly retains the authority to enact local tax laws for the charter counties, and, in our view, SB 11 would not violate charter home rule.

Distribution of Hotel Tax to a Private Entity

We have also determined that the Bureau serves a public purpose, and public funding of the Bureau is legal. The Bureau's 1990 Articles of Incorporation state among its purposes:

To attract quality visitors to Annapolis and Anne Arundel County through targeted advertising and marketing...

To initiate brochure development, publication and distribution.

To operate the City Dock Visitor Information Center.

To serve as the official tourism representative for the City of Annapolis and Anne Arundel County.

Further, the Bureau's ByLaws, Article II, state as the purpose of the corporation:

to plan, produce and promote programs designed to increase the volume of visitors, vacation, and conference/meeting business within Annapolis and Anne Arundel County. The Corporation shall serve as liaison between private and public agencies concerned with the economic benefits of the travel and conference industry in Annapolis and Anne Arundel County. The corporation shall actively seek out and encourage cooperative promotional efforts between its members, State and regional organizations

to increase travel and conference/meeting business in Annapolis and Anne Arundel County.

Article 15 of the Maryland Declaration of Rights provides that "fines, duties and taxes may properly and justly be imposed, or laid with a political view for the good government and benefit of the community." The Court of Appeals has "consistently interpreted Article 15 to require a public purpose for all taxes." *Ogrinz v. James*, 309 Md. 381, 393 (1987).

Further, the Court of Appeals has said that "[w]hat is a public purpose for which public funds may be expended is not a matter of exact definition." *Horace Mann League v. Board*, 242 Md. 645, 685 (1966). In *Snowden v Anne Arundel County*, 295 Md. 429, 435 (1983), however, the Court stated that its "cases have consistently upheld the propriety of payment of public funds to private institutions or individuals, as long as a public purpose is served thereby," and that "the legislative body is primarily entrusted with ensuring that the public purpose requirement is fulfilled." In *Frostburg v. Jenkins*, 215 Md. 9, 16 (1957), the authorization to use public funds to finance the construction of buildings to be sold to manufacturing companies was upheld, the Court noting that the expenditure of public funds to encourage industrial development in the city, had "a substantial relation to the public welfare and can fairly be said to serve a public purpose." In *Ogrinz*, the Court of Appeals upheld a statute that created a one-time tax on attorneys and dedicated the proceeds of the tax as the initial policyholders' surplus of the Legal Mutual Society, finding that the availability of malpractice insurance is important to the public as well as to lawyers and their clients." 309 Md. at 394.

The General Assembly has already directed that hotel tax revenue be distributed to a similar entity. Article 24, § 9-301 *et seq.* grants to 17 counties the authority to impose a hotel tax. Additionally, the statute requires that certain distributions be made to various funds and entities. For example, after a reasonable sum to be distributed to the County's general fund for administrative costs, Frederick County is required to distribute "the remaining balance to the Tourism Council of Frederick County, Inc. with a portion of the balance designated by the County Commissioners to be used for a visitor center." Art. 24, § 9-318(b)(5). The Tourism Council is a non-profit organization much like the Bureau.

It is fair to say that promotion of a city, county, region or state for tourism and conference/business purposes serves a public purpose. Such activities attract people to the area and ultimately bring revenue to the private sector as well as tax dollars to government. Like the Tourism Council, the Bureau includes public officers: the Mayor

of Annapolis and an appointee of the County Executive serve on the Bureau's Executive Committee; and the City's Director of Economic Development and the President of the Anne Arundel County Economic Development Corporation serve on the Board of Directors of the Bureau, demonstrating the Bureau's connection with the public sector. Thus, it is our view that the Bureau serves a public purpose, and public funding of the Bureau is legal.

Conflict with County Charter

It is also our view that SB 11 does constitute a violation of the Anne Arundel County Charter. Last year, the Anne Arundel County Council passed Bill No. 30-08 to eliminate three special funds, including the Conference and Visitors Fund and the Economic Development Fund because, according to the County Office of Law, the dedication of revenues to these funds violated the County Charter. We do not question the Office of Law advice or the County Council's legislative action to repeal the special funds. Nonetheless, the General Assembly is free to enact public local laws to regulate appropriations.¹

A County Charter and its amendments are expressly subject to the public general law as well as the Constitution. Md. Const, Art. XI-A, § 1, and a public general law would be favored over a conflicting county charter provision. *Wilson v. Board of Supervisors of Election*, 273 Md. 296 (1974). The prohibition on the General Assembly enacting local laws, however, only applies where a subject is covered by the Express Powers Act. Md. Const, Art. XI-A, § 4. As stated above, general taxing authority is not granted under the Express Powers Act.

As the Court stated in *Annapolis v. Anne Arundel County*, 295 Md at 14:

Since the authority to enact budgets and appropriate funds is not an "express power" of charter counties within the meaning of Article XI-A, §§ 3 and 4, of the Constitution, it follows that charter counties are not authorized by § 3 to repeal local laws enacted by the General Assembly regulating appropriations, and that the General Assembly is not precluded

¹ In its April 14, 2008 Memorandum to members of the Anne Arundel County Council regarding Bill No. 30-08, the Office of Law advised that [despite the charter provision], a "special fund also may be created where State law imposes a restriction on the use of revenues."

by § 4 from enacting such a local law for a charter county. In fact, the General Assembly, subsequent to Anne Arundel County's adoption of a charter, has enacted local laws regulating the appropriation by Anne Arundel County of tax revenues authorized by the General Assembly. *See, e.g.,* Ch. 494 of the Acts of 1977; Code (1957, 1996 Repl.Vol.), Art. 24, § 9-602(b).

The Court went on to distinguish the enactment at issue from other appropriate enactments:

Ch. 1041 was not like other enactments by the General Assembly simply directing Anne Arundel County to appropriate specific revenues for certain purposes. Instead, Ch. 1041 regulated appropriations of any future undesignated new state revenue in a manner totally inconsistent with the budget and appropriation system of the 1964 Anne Arundel County charter.

Id. at 16. The required distribution under SB 11 is like the former, directing the County to appropriate specific revenues for certain purposes.

Finally, when public local laws are passed, “it has been the consistent advice of this office such a local authorization is subject to charter limitations only if the legislation clearly states an intent that the limitations apply.” *See* Letter of Advice to the Honorable Derek E. Davis from Assistant Attorney General Kathryn M. Rowe, dated May 18, 2007.²

Agreement Between Anne Arundel County and the Bureau

Finally, we have reviewed SB 11 with regard to the interaction between the bill and a 2001 agreement (“Agreement”) between the County Executive and the Annapolis and Anne Arundel County Conference and Visitors Bureau, Inc. (“Bureau”).

² While questions might arise under Article XI-A of the Constitution if the General Assembly were to enact a public local law that would in effect preempt the authority of an individual charter county derived directly from Article XI-A to structure county government via its charter, that clearly is not the case with Senate Bill 11. The maximum dedication under the bill is 32% of the County share of the hotel tax, reached in Fiscal 2013, with the remaining revenues earmarked for the County’s general fund.

The Honorable Martin J. O'Malley
April 27, 2009
Page 6

Under the Agreement, the County "grants to the Bureau an amount equal to 7% of the hotel tax actually, collected" ... "up to the amount of the appropriation in the County's annual budget as approved by the County Council." Paragraph 1. The Agreement describes the purposes of the grant and includes, among others, provisions relating to financial statements and reports, monitoring and audits, conflicts of interest, and confidentiality of information. The Agreement further states that it "shall remain in full force and effect until terminated by *either party* after giving sixty (60) days written notice to the other party." Paragraph 10 (emphasis added). While the first paragraph purports to make a grant of 7% of actual revenue received, it also appears to be subject to the County's budget and appropriation process, and thus may be less. The bill specifies a mandatory and greater percentage of the revenue to be dedicated to the Bureau. Additionally, while the Agreement may be terminated by either the Bureau or the County (with required notice), the changes made by SB 11, if enacted, could be modified only by subsequent enactment of the General Assembly.

In accordance with the foregoing, we hereby approve the constitutionality and legal sufficiency of Senate Bill 11.

Very truly yours,


Douglas F. Gansler
Attorney General

DFG/BAK/kk

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