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

May 16, 2011

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

Re: House Bill 1039

Dear Governor O'Malley:

We have reviewed House Bill 1039, "Horse Racing - Distribution of Video Lottery Revenues" for constitutionality and legal sufficiency. Notwithstanding several interpretive and technical issues presented by the bill discussed below, we believe that the bill may be signed into law. If the bill is signed, we recommend that new State Government Article ("SG"), § 9-1A-09(d)(4) concerning the Bowie Training Center not be implemented until the Legislature has had an opportunity to resolve various technical and interpretive issues outlined below.

House Bill 1039 alters the distributions and uses of the Purse Dedication Account (State Government Article ("SG"), § 9-1A-28) and the Racetrack Facility Renewal Account (SG § 9-1A-29), which receive revenues from the State's Video Lottery Terminal (VLT) program, subject to specified requirements. The bill also alters the conditions under which a racing licensee may convey the Bowie Training Center. Finally, it establishes a Thoroughbred Racing Sustainability Task Force.

Section 9-1A-09A - Sharing of revenues derived from wagering on simulcast races

As a condition of eligibility for funding under SG § 9-1A-28 and SG § 9-1A-29, House Bill 1039 requires that "parties," (defined as tracks, groups representing a majority of owners and trainers at each track, and the group that represents a majority of the breeders in the State) reach an agreement on or before July 1, 2011 (and lasting through

December 31, 2013) "regarding the sharing of revenues derived from wagering on simulcast races as such issues relate to:

(1) The Interstate Horseracing Act of 1978, 15 U.S.C. §§ 3001 through 3007;

(2) Pari-mutuel betting on out-of-state races under § 11-804 of the *Business Regulation Article*; and

(3) Intertrack betting under §§ 11-808 through 11-812 of the *Business Regulation Article*." SG, § 9-1A-09A(c).

If such an agreement is not reached among the parties on or before July 1, 2011, a party will be ineligible for funding from the Purse Dedication Account or the Racetrack Facility Renewal Account until, and unless, that party indicates to the Secretary of Labor, Licensing, and Regulation, in writing, its consent to participate in mediation and binding arbitration.

It is our view that this provision is not intended to alter the requirements of the sections referenced, including those "regarding the sharing of revenues derived from wagering on simulcast races," but to place additional requirements on those participants who are also "parties" as defined by the bill. Thus, these provisions should be read and interpreted as prescribing the various means by which a revenue sharing agreement is to be effectuated, while leaving the statutorily-prescribed role of the Maryland Racing Commission, under both the federal and state law, intact.

There is some question whether this requirement, reinforced by the possibility of the loss of funds, could be seen to interfere with the accomplishment of the aims of Congress in enacting the Interstate Horseracing Act of 1978, which could be said to contemplate both free negotiations between the parties and the power of nearby tracks to withhold consent. In the absence of any case law to that effect, and the provisions of 15 U.S.C. § 3001(a)(1), which reflects the view of Congress that horseracing is a traditional area of state regulation and that the states should have the primary responsibility for determining what forms of gambling may take place within their borders, it is our view that federal preemption is not clear. Therefore, under the standards that this Office employs, it is our view that you may sign and enforce this Section of the bill.

Section 9-1A-29(c) – Operating Assistance Grant for Laurel Park and Pimlico Race Course

HB 1039 amends SG § 9-1A-29(c) to provide that the Racetrack Facility Renewal Account may be used to provide grants "FOR LAUREL PARK AND PIMLICO RACE COURSE, UP TO $6,000,000 PER YEAR FOR OPERATING ASSISTANCE." We read that provision as permitting a total of $6,000,000 per year to be used for both Laurel Park and Pimlico Race Course, not $6,000,000 per year to each track. Nevertheless, although the bill purports to limit the amount of money that may be allocated to the two tracks, the General Assembly may not prevent the Governor from including additional funding in the budget. The Legislature is, of course, free to strike or reduce an appropriation that exceeds $6,000,000. 62 *Opinions of the Attorney General* 106 (1977) ("Restriction of the discretion of the Governor to fund, or not to fund, the Baltimore Subway project at a level which he deems to be appropriate is inconsistent with Article III, Section 52(3) of the Maryland Constitution which directs the Governor to formulate a 'complete plan of proposed expenditures' which, except for those mandatory appropriations specified in the Constitution, may be included, or not included, as the Governor deems appropriate."). If this reading does not agree with the intention of the General Assembly, the provision should be clarified in future legislation.

Section 9-1A-28(H)(1)(II) - Collective Bargaining

Among the conditions that are placed on the receipt of operating assistance under House Bill 1039 is that the holder of a racing license to race at Rosecroft Raceway must "recognize collective bargaining agreements that were in place as of June 1, 2008." Ordinarily, such a requirement would be preempted by the National Labor Relations Act. *International Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1975). In this case, however, the National Labor Relations Board has exercised its authority under 29 U.S.C. § 164(c) to decline jurisdiction over labor disputes involving the horseracing and dogracing industries. 29 C.F.R. § 103.3. This action leaves the State free to regulate in this area. *New York Racing Association Inc., v. New York State Labor Relations Board*, 708 F.2d 46, 53 (2nd Cir. 1983). As a result, in our view this provision is not preempted by federal law.

Section 9-1A-09(D)(4) - Bowie Training Center

Under current law, if a VLT operation license is issued to a racetrack location at Laurel Park, the licensee is required to maintain the operation of the Center or, if State law no longer requires the Center to operate as a training facility, to convey the

property to the State as preserved land under Program Open Space. Further, under current BR § 11-519, the owner of the Bowie Training Center is required to operate the Center as a thoroughbred training facility to provide more stall space for a race meeting that a licensee holds. The owner is responsible for the cost to improve, maintain, and operate the Center. As long as the Center is used for this purpose, the Racing Commission has general regulatory jurisdiction over the Center.

House Bill 1039 amends current SG § 9-1A-09(e)(4) (renumbered by the bill to be (d)(4)) to provide:

(i) **A RACING LICENSEE OF** a racetrack location at Laurel Park shall:

1. maintain the operation of the Bowie Training Center; or

2. convey the property associated with the Bowie Training Center as preserved land.

(ii) **1. WHEN THE BOWIE TRAINING CENTER IS NO LONGER REQUIRED BY THE STATE TO BE OPERATED AS A THOROUGHBRED TRAINING FACILITY, THE STATE SHALL HAVE THE RIGHT OF FIRST REFUSAL AS GRANTEE FOR ANY CONVEYANCE UNDER SUBPARAGRAPH (I) OF THIS PARAGRAPH.**

2. THE CITY OF BOWIE SHALL HAVE THE SECOND RIGHT OF REFUSAL AS GRANTEE FOR ANY CONVEYANCE UNDER SUBPARAGRAPH (I) OF THIS PARAGRAPH.

3. A GRANTEE UNDER SUBSUBPARAGRAPH 1 OR 2 OF THIS SUBPARAGRAPH MAY NOT BE REQUIRED TO OPERATE THE BOWIE TRAINING CENTER AS A TRAINING FACILITY.

The changes to (d)(4) made by HB 1039 appear to be an attempt to graft into the bill concepts proposed by SB 491 of 2011, which did not pass. SB 491 would have authorized the owner of the Center to convey the property associated with the Center to the State, Prince George's County, or the City of Bowie, none of which would have been required to operate the Center as a training facility.

As amended, subsection (d)(4) raises numerous interpretive and technical issues.

First, HB 1039 applies to one entity, "a racing licensee of a racetrack location at Laurel Park" (Laurel Racing Association, Inc.), while BR § 11-519 places requirement on a different entity, namely the owner of the Center. The Center is owned by Southern Maryland Agricultural Association, which is jointly owned by Southern Maryland Racing, Inc. (49.5%), wholly owned by The Maryland Jockey Club of Baltimore City, Inc. and Prince George's Racing, Inc. (50.5%), wholly owned by Laurel Racing Association Limited Partnership, 50% of which is owned by its general partner Laurel Racing Association, Inc. Thus, it is not clear that the bill is obligating the actual owner of the Center to maintain or convey the property.

Second, it is not clear whether to conveyance of the property is unconditional, as it appears to be under paragraph (4)(i), or conditioned on a determination that the Center is no longer required by the State to be operated as a training facility, based on the first phrase of paragraph (4)(ii) 1. Current law conditioned conveyance on State law no longer requiring the Center to operate as a training center, but that language was deleted by amendment. The inclusion of the phrase "when the [Center] is no longer required by the State to be operated as a thoroughbred training facility" indicates that it may have been intended not to be an unconditional option to convey the property.

Third, it is not clear whether the property associated with the Center may only be conveyed to either the State or the City of Bowie or may be conveyed to anyone, including a private third party. There is no express limitation under (d)(4)(i) 2 as there was in SB 491.[1] And by expressly stating that a grantee under subparagraph (ii) 1 or 2 (the State or the City of Bowie) may not be required to operate the Center as a training facility, the implication is that a different grantee might be required to operate the Center as a training facility.[2]

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[1] SB 491 would have allowed the property to be conveyed only to the State, Prince George's County, or the City of Bowie.

[2] This office previously advised that there is nothing in BR § 11-519 that prohibits an owner from conveying the Center to another owner, but that a "new" owner must continue to operate it as a training facility. *See* Letter of Advice to the Honorable Geraldine Valentino-Smith from Assistant Attorney General Bonnie A. Kirkland, dated March 31, 2011.

Fourth, if the bill is interpreted to authorize the property to be conveyed to a private party, it is unclear whether the property must continue to be used as a training facility, as suggested by subparagraph (ii) 3, subject to the requirements of BR § 11-519, or whether it must be conveyed as "preserved land," as is seemingly required under subparagraph (i) 2.[3]

Fifth, it is also unclear whether the provision would amount to a governmental taking in violation of the takings clause of the Fifth Amendment to the U.S. Constitution or Article III, § 40 of the Maryland Constitution, both of which prohibit governmental entities from taking private property for public use without payment of just compensation. However, because current State law makes no provision for the property associated with the Center to be conveyed, to a governmental entity or otherwise, an authorization to convey the property subject to the restriction that it be conveyed as preserved land should be interpreted as a loosening of current governmental restrictions on the use of the property and thereby not amount to a taking. If, however, the bill is judicially determined to constitute a taking, the owner would be entitled to just compensation.

Finally, additional technical issues include the following:

- SG § 9-1A-09(d)(4) was originally codified in the Video Lottery statute ("VLT Law") to place a requirement on the holder of a VLT operation license to continue to maintain and operate the Bowie Training Center and to preserve the property under Program Open Space if and when it was no longer required to be operated as a training facility. As amended, it is no longer related to the VLT Law or a VLT operation licensee and would more properly be codified in Title 11 of the Business Regulation Article ("BR").

- The State's right of first refusal under paragraph (4)(ii) 1 is conditioned on the Center no longer being required by the State to be operated as a training facility. No similar language is included in paragraph (4)(ii) 2 granting the City of Bowie second right of refusal. In our view, the first clause of paragraph (4)(ii) 1 should be read to apply to the City of Bowie's second right of refusal and should be redrafted as a lead-in to both (ii) 1 and 2.

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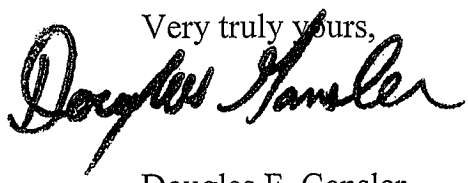
[3] *See supra*, note 2.

Because of the numerous technical and interpretive issues presented by this paragraph, it is our view that this provision should not be given effect and that it should be reenacted in future legislation to be codified in the Business Regulation Article, clarified and reconciled with BR § 11-519. Nevertheless, it is our view that HB 1039 as a whole is constitutional and legally sufficient.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/BAK/kk

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