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May 14, 2014

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

Re: Senate Bill 172, "Budget Reconciliation and Financing Act of 2014"

Dear Governor O'Malley:

We have reviewed Senate Bill 172, the Budget Reconciliation and Financing Act of 2014 ("BRFA"), and, with certain exceptions identified below, hereby approve it for constitutionality and legal sufficiency. The BRFA is an omnibus bill that executes a variety of actions generally related to the State budget and financing State and local government. These actions primarily take the form of transfers of special fund balances to the general fund, adjustments to mandated spending, and use of other funds to cover general fund costs. It is our view that this year's BRFA is constitutional and legally sufficient and that you may sign it. There are, however, a number of severable provisions of the BRFA that are very likely to be found unconstitutional because they violate the single-subject rule in Article III, Section 29 of the Maryland Constitution.[1] We will identify those provisions and, where possible, suggest appropriate remedial measures.[2] Finally, we identify and discuss a few additional issues in the BRFA, unrelated to the single-subject rule, and conclude that the affected provisions are constitutional.

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[1] We apply a "not clearly unconstitutional" standard of review for the bill review process. 71 *Opinions of the Attorney General* 266, 272 n.11 (Aug. 14, 1986). We have determined that the provisions discussed below do not satisfy even this most deferential test.

[2] While this Office has previously identified BRFA provisions that may be "difficult to defend" or may not be "consistent with the purposes of the BRFA," we have not heretofore provided remedial suggestions in our bill review letters for previous BRFAs. We do so here because of the number and significance of constitutionally defective provisions as well as the need for guidance with respect to some of them. We elaborate below.

I. Provisions Implicating the One-Subject Rule

A. The One-Subject Rule

Article III, § 29 of the Maryland Constitution provides, in relevant part, that "every Law enacted by the General Assembly shall embrace but one subject." It has traditionally been given a "liberal" reading so as not to interfere with or impede legislative action. *MCEA v. State*, 346 Md. 1, 13 (1997). This deferential approach has been taken in recognition of the nature of the legislative process, the compromises necessary in this process, and the complexity of the issues which necessitates multifaceted legislation. *Delmarva Power v. PSC*, 371 Md. 356, 368-69 (2002); *MCEA*, 346 Md. at 14.

The test as to whether a law violates the one-subject rule requires a reviewing court to determine whether the provisions of the bill are all "germane" to one another. *Migdal v. State*, 358 Md. 308, 317 (2000). The provisions of the bill must be "in close relationship, appropriate, relative, pertinent." *Porten Sullivan Corp. v. State*, 318 Md. 387, 402 (1990). Connection and interdependence between the provisions of a bill can be on either a horizontal or vertical plane. *MCEA*, 346 Md. at 15-16. Two matters can be regarded as a single subject, for purposes of § 29, either because of a direct connection between them, or because they each have a direct connection to a broader common subject to which the Act relates.

The Court of Appeals has explained that there are two purposes animating the one-subject rule:

> 1. To avoid the necessity for a legislator to acquiesce in a bill he or she opposes in order to secure useful and necessary legislation; to prevent the engrafting of foreign matter on a bill, which foreign matter might not be supported if offered independently....
>
> 2. To protect, on similar ground, a governor's veto power.

Porten Sullivan, 318 Md. at 408.

The BRFA is legislation introduced during times of fiscal difficulty to assist the Governor's efforts to balance the State operating budget and provide for the financing of

State and local government.[3] The BRFA implements actions to enhance revenues and reduce current and future year general fund expenditures. These actions often take the form of transfers of special funds to the general fund, the elimination, reduction, or suspension of mandated spending, and the enactment or increase of taxes, fees, or other revenue. By contrast, provisions that create funding mandates, increase State expenditures, or are otherwise inconsistent with the single subject of the BRFA, are not appropriate for inclusion in the bill and are of doubtful constitutional validity.

During the legislative session, this Office provided advice with respect to many of the provisions we address below. *See* Letter from Assistant Attorney General Bruce P. Martin, Principal Counsel to the Department of Budget and Management, to T. Eloise Foster, Secretary of the Department of Budget and Management (March 13, 2014); Letter from Assistant Attorney General Dan Friedman to the Honorable Maggie McIntosh and the Honorable Paul G. Pinsky (April 2, 2014). Those letters (copies of which are attached) reach the same conclusions about the application of the single-subject rule that we reach here.

B. The BRFA Provisions at Issue

The vast majority of the provisions within the BRFA fall well within the constitutional limits of what can be included within a single piece of legislation. Several, however, do not appear to do so. We explain why below, taking the provisions in turn. In questioning the constitutionality of these provisions, we do not mean to suggest that they do not represent wise legislative policy or that there would be any constitutional obstacle to the Legislature pursuing these same legislative goals through stand-alone legislation.

Extension of Discounted Vehicle Certificate Fee for Rental Vehicles

Under § 13-802(a) of the Transportation Article the certificate of title fee for vehicles is generally set at $100. For fiscal years 2012 through 2014, however, § 13-802(b) establishes only a $50 fee for rental vehicles. The BRFA amends § 13-802(b) to extend the lower fee for rental vehicles through fiscal year 2016. The annual cost of this amendment to the Transportation Trust Fund is approximately $4.2 million a year.

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[3] It is our view that the BRFA can include local government financing measures only to the extent that they are elements of a legislative design with an intended effect on *State* government financing. Provisions exclusively concerning local government financing but that have no relationship to balancing the State budget are not germane to the subject of the BRFA.

Because the amendment would reduce rather than enhance State revenues for fiscal years 2015 and 2016, it cannot be "germane" to a bill that has as its purpose balancing the State budget and the financing of State government. Thus, it is our view that this provision very likely violates the one-subject rule. We recommend that the Motor Vehicle Administration be directed to collect the full $100 title fee from owners of rental cars beginning on July 1, 2014. Of course, if the General Assembly continues to see a public policy benefit, it may readopt the reduced fee through stand-alone legislation next session and further, if it wishes, it can rebate the extra $50 for each rental car titled in the interim.

Park Service Funding Mandate

An amendment to § 5-212(g) of the Natural Resources Article requires that 60% of State Park Service revenues be dedicated to Park Service operations in fiscal year 2016, 80% in fiscal year 2017, and 100% in fiscal year 2018 and beyond. Assuming that future Park revenues remain essentially the same as current revenues, the effect of the amendment would be to create a funding mandate of $8.1 million beginning in fiscal year 2016, $10.7 million in fiscal year 2017, and $13.4 million in fiscal year 2018. Because the fiscal year 2015 appropriation for Park Service operations is $5.8 million, the phased in funding mandate would result in a net increase in spending for Park Service operations of approximately $2.3 million in fiscal year 2016, $4.9 million in fiscal year 2017, and $7.6 million in fiscal year 2018. Because of this shift of Park Service revenue, it will take significant additional general fund expenditures to maintain other Department of Natural Resources operations at their current levels.

As this Office has previously advised, because the purpose of a BRFA is to help bring the State's budget into balance during a time of fiscal crisis, funding mandates are inappropriate in a BRFA. While some mandated funding provisions might be justified if included as "legislative reactions to budget action taken by the Executive," a specific, unrelated funding mandate, such as § 5-212(g), is "the hardest to defend." *See* Letter to the Honorable Robert L. Ehrlich, Jr. from Attorney General J. Joseph Curran, Jr. on House Bill 147 (May 19, 2005); Letter to the Honorable Norman H. Conway from Assistant Attorney General Bonnie A. Kirkland (Mar. 26, 2013). Accordingly, it is our view that this provision likely violates the one-subject rule. In other circumstances, when the legislature has attempted to create a funding mandate but failed either because of the timing (funding mandates may not apply to the budget bill under consideration in the same legislative session) or lack of specificity (funding mandates must be set forth in a dollar amount or by use of an objectively verifiable formula), this Office has treated the language as an expression of intent only, but not binding upon the Governor. *See, e.g.*, Bill Review Letter on Senate Bill 141 of 2010 (May 18, 2010) (citing Md. Const., Art.

III, § 52 (11), (12); 65 *Opinions of the Attorney General* 108, 110 (1980)). We recommend a similar treatment here.

Mandate that Speed Camera Revenue be Spent on Vehicle Purchases

An amendment to § 12-118(e) of the Transportation Article requires that, in fiscal years 2016 through 2018, at least $7 million of speed camera revenue be allocated annually to the State Police for the purchase of vehicles and related motor vehicle equipment. The amendment is unrelated to balancing the fiscal year 2015 budget, diverts the use of the money from other purposes, and creates no immediate savings. While the purchase of new vehicles may reduce maintenance costs in the long run, spending $21 million over three fiscal years will not result in a net savings during those years. Rather, the amendment seems to us to be an attempt to create a funding mandate for fiscal years 2016 through 2018.[4] As discussed above, funding mandates unrelated to other items in the BRFA should be accomplished in separate legislation as they have no relationship to balancing the budget or helping to finance State government. For these reasons it is our view that this provision likely violates the one-subject rule.[5] As with the previous provision, we recommend that you treat this as an ineffective funding mandate and, thus, as a non-binding expression of the intent of the General Assembly.[6]

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[4] We note the fiscal year 2015 budget bill was amended to restrict $7 million of the special fund appropriation such that it may only be used to purchase vehicles and vehicle equipment. The Governor is free to use the funds for that designated purpose or to simply allow the funds to revert to the special fund. We also note that the amendment requires that the special funds "be distributed" to the State Police, but does not by its terms appear to actually mandate an appropriation to expend those funds. For purposes of this letter, however, we interpret the provision as an attempt to mandate an appropriation.

[5] It was brought to our attention that the existing language in § 12-118(e)(1)(ii) of the Transportation Article, which requires that $3 million be distributed to the State Police for vehicle and vehicle equipment purchase in fiscal years 2013 through 2015, was added by amendment to the 2011 BRFA and that our Office did not object. That provision, however, was enacted in conjunction with a fiscal year 2011 deficiency appropriation that provided for over $7 million in general fund relief. Because the mandated expenditure was designed to offset a related Executive budget action, we concluded that it was constitutionally acceptable. The same circumstances are not present here.

[6] In fiscal years 2016 through 2018 the Governor may either appropriate the $7 million for vehicle and vehicle equipment purchase, allow the money to remain in the special fund created under § 12-118(c)(2) of the Transportation Article, or appropriate the funds to the State Police to fund roadside enforcement activities. § 12-118(e)(2).

Stormwater Remediation Fees

Effective July 1, 2013, nine counties and Baltimore City were required to assess stormwater remediation fees and implement local watershed protection and restoration programs supported by the new fee revenues. 2012 Md. Laws, ch. 151. A number of bills to repeal or establish exemptions or modifications to the fees were introduced during the 2014 legislative session. While none of these bills passed, the BRFA was amended in conference committee to address some of the issues raised in the unsuccessful legislation. Section 18, an uncodified provision, would permit the Maryland Department of the Environment, before December 1, 2014, to enter into a memorandum of understanding with Carroll County or Frederick County to permit them to establish an alternative source of funding to be deposited into a local watershed protection and restoration fund.

In our April 2, 2014 letter to Delegate McIntosh and Senator Pinsky, this Office advised that a proposed amendment to the BRFA that would modify the method by which counties may satisfy their obligations to assess stormwater remediation fees was not germane to the subject of the BRFA and thus violated the one-subject rule. While the proposed amendment addressed in the April 2 letter was broader and applied to any county, and not just Carroll and Frederick counties, narrowing the scope of the provision does not change the fundamental constitutional infirmity. It remains our view that this provision very likely violates the one-subject rule. As a result, it is our advice that this provision is not effective in authorizing the Secretary of the Environment to enter into the memoranda of understanding contemplated by this provision.

Hotel Rental Tax

The bill amends § 20-402 of the Local Government Article to authorize charter counties to impose a hotel rental tax. It is our understanding that this provision resolves a long-standing political debate regarding hotel taxes in just one jurisdiction, Harford County. Although the authorization of a hotel tax is relevant to the financing of local government, it is unrelated to any other provision in the BRFA as introduced or amended, or to the primary purpose of the BRFA, which is to balance the State budget in times of fiscal distress. *See supra*, note 3. In our view, it is only appropriate to include local government financing in a BRFA to the extent that the local government financing is incidental to the financing of State government. Therefore, it is our view that the hotel rental tax authorization is not an appropriate subject for the BRFA. We do not, however, recommend any measures to remedy the constitutional flaws in this provision because it leaves to the *county* the decision whether to impose the tax. Harford County, then, will

have to decide for itself whether to attempt to impose a hotel tax based on this provision or to seek a more constitutionally defensible method when next the Legislature convenes.

Other Provisions

There are a number of other provisions of the BRFA that are of doubtful constitutionality under the one-subject rule:

- A conference committee amendment to § 9-1A-31(a) of the State Government Article would redirect a portion of certain video lottery terminal revenue that is currently slated to go to Baltimore City. In fiscal years 2015 through 2019, $500,000 of the impact aid that would otherwise go to the Pimlico area will instead go to communities near Laurel Race Course.[7] While this reallocation of funds does not result in an increase in total State expenditures, it is unrelated to any other provision in the BRFA, or to the primary purpose of the BRFA, which is balancing the State budget in times of fiscal distress. Because of this, it is our view that this provision is not an appropriate subject for the BRFA. Moreover, because the General Assembly may not directly appropriate money through a statute that is not a supplementary appropriations bill, Md. Const., Art. III, §§ 32 and 52; 75 *Opinions of the Attorney General* 124 (1990), the Governor must provide for an appropriation for the funds to be distributed to the grantees. In our view, the Governor is not required to provide an appropriation in fiscal year 2015, however, because the amendment to § 9-1A-31 does not constitute a valid funding mandate. Pursuant to Article III, § 52(11) and (12) of the Maryland Constitution, the General Assembly may not

[7] This Amendment also contains a minor drafting error. The amendment states that "$500,000 shall be provided annually for local impact aid to be distributed as provided under § 11-404(d) of the Business Regulation Article to help pay for facilities and services in communities within 3 miles of the Laurel Race Course." Section 11-404 (d) of the Business Regulation Article provides formulae for calculating local impact grants for the Laurel impact area, which if applied, would result in aid of approximately $50,850. Maryland Operating Budget Volume 2, p. II-458. We think it is clear, however, that the Legislature intended $500,000 to go to Laurel area impact grants and the reference to § 11-404(d) is only intended to mean that the money goes to the Laurel area (as opposed to another impact area), not to invoke the formulae.

mandate an appropriation for the fiscal year that is the subject of the budget then under consideration.[8]

- The bill amends Criminal Law Article, § 12-301.1, to establish a Maryland Amusement Game and Advisory Committee. The advisory committee would advise the State Lottery and Gaming Control Commission "on the conduct and technical aspects of the amusement game industry, including … the legality of skills-based amusement games." The establishment of the advisory committee appears unrelated to the funding of State government or balancing the budget and is thus an inappropriate subject for the BRFA.

- We also reviewed a related provision of the BRFA that delays the effective date of the imposition of certain amusement license fees until July 1, 2016. On its face, a delay in imposition of licensing fees would appear to reduce general funds during that delay and, thus, would seem to run counter to the purposes of the BRFA. However, the Legislature had information before it that the State, as a practical matter, could not have collected the licensing fee before 2016 anyway. Thus, we can only say that the provision is not related to the proper purpose of the BRFA not that it is directly counter to it.

This list is not exhaustive. We have highlighted these three provisions as examples of provisions of the BRFA that are of doubtful constitutionality under the one-subject rule.

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[8] As with the State Police funding provisions discussed in footnote 6 above, a question was raised about whether our advice on this provision is consistent with our advice on similar provisions in the 2011 BRFA. In 2011, the General Assembly amended the BRFA to make grants to State and non-State entities of $500,000 from the admissions and amusement tax revenue. Unlike the amendment to this year's BRFA, however, the 2011 BRFA amendment was part of a larger package of measures that redirected $3.7 million of admissions and amusement tax revenue to the general fund to help balance the budget and, thus, in total, was consistent with the purposes of a BRFA. Moreover, our bill review letter noted that the 2011 provision, like this one, did not constitute a constitutional funding mandate. *See* Bill Review Letter to Governor Martin O'Malley, May 17, 2011, n.2.

II. Other Constitutional Issues Not Involving the One-Subject Rule

A. Comptroller v. Wynne

Section 16 of the BRFA provides that

> notwithstanding any other provision of law, the Comptroller shall set the annual interest rate for an income tax refund that is a result of the final decision under Maryland State *Comptroller of the Treasury v. Brian Wynne, et ux.*[,] 431 Md. 147 (2013) at a percentage, rounded to the nearest whole number, that is the percent that equals the average prime rate of interest quoted by commercial banks to large businesses during fiscal year 2015, based on a determination by the Board of Governors of the Federal Reserve Bank.

The *Wynne* case involved only two taxpayers—a married couple filing jointly—who appealed an assessment issued by the Comptroller after the agency determined that there was a deficiency in a single tax year. The Court of Appeals found that the limitation of a tax credit violated the Commerce Clause. The State of Maryland has petitioned for certiorari to the United States Supreme Court and that decision is currently pending. If the decision of the Court of Appeals is affirmed, however, the Wynnes will be entitled to a refund, as may other taxpayers who are in a similar position as the Wynnes. Many of those other taxpayers have already applied for refunds on the strength of the Court of Appeals decision and, if that decision is upheld, many more will likely follow. This BRFA provision sets the interest rate for those other taxpayers if they are successful on their claims.

We believe that the provision is constitutional and legally sufficient. The Court of Appeals has stated on numerous occasions, dating back for decades, that "[e]ntitlement to interest on a tax refund is a matter of grace which can only be authorized by legislative enactment." *Comptroller v. Fairchild Industries, Inc.*, 303 Md. 280, 284 (1985) (citations omitted); *see also Comptroller v. Science Applications Int'l Corp.*, 405 Md. 185, 198 (2008) ("[t]ax refunds in Maryland are 'a matter of grace' with the legislature"); *Comptroller v. Campanella*, 265 Md. 478, 487 (1972). Thus, determining the interest rate is a perfectly acceptable exercise of legislative power.

We have also determined that the provision is appropriate BFRA material because it will result in savings in the State budget. It is possible that the State could be faced with

paying these refunds this summer shortly after the fiscal year begins. If that occurs, the refunds will be paid from the general fund with the payments being offset in the March 2015 reconciling local income tax distribution. Thus, the general fund will be fronting the money on behalf of local governments, which will have a direct fiscal effect on the State. Moreover, if refunds are substantial (and we are told that the Comptroller's Office estimates that if the decision is affirmed the cost could be $190 million without interest), the State may need to transfer funds from other interest-bearing accounts to pay the claims. Lessening the interest payments on those claims—especially on the largest claims, which we expect to happen quickly—reduces the State's need to sacrifice its own investments to manage cash mid-year. Thus, it is our view that this provision is appropriate for inclusion in the BRFA.

B. Sustainable Communities Tax Credits

Section 11 permits the transfer of $19 million to the general fund and for that reason it is certainly consistent with the purposes of the BRFA. The $19 million reflects the amount of Sustainable Communities Tax Credit certificates that were issued in fiscal years 2006 through 2010 but have never been claimed or extended. We address the question of whether the termination of these stale tax credit certificates violates the constitutional rights of the certificate holders.

Section 11 provides that

> notwithstanding any other provision of law, on or before June 30, 2014, the Governor may transfer $18,971,632 from the Sustainable Communities Tax Credit Reserve Fund established under § 5A-303(d) of the State Finance and Procurement Article to the General Fund, which is the amount of commercial tax credit certificates that were issued in fiscal years 2006 through 2010 and that have not been claimed under § 5A-303(f)(4) of the State Finance and Procurement Article or extended under § 5A-303(c)(3)(ii) of the State Finance and Procurement Article.

By this provision, the BRFA terminates some 35 Sustainable Communities Tax Credit certificates for which the State had reserved nearly $19 million.[9] The question that

[9] You should also be aware that HB 510 of this session made wholesale revisions to the Sustainable Communities Tax Credit, including adding, for the first time, provision for the termination of unused credits. *See* House Bill 510 of 2014, § 3. Of course, if SB 172 is signed, its provisions will "trump" the termination provisions of House Bill 510, § 3.

we have investigated is whether this termination violates the constitutional rights of the holders of these stale tax credit certificates (the "holders"). We have determined that it does not. The Due Process Clause of the 14th Amendment to the United States Constitution requires governments to afford due process before they may deprive persons of life, liberty, or property. Here, this analysis requires us to determine first if the holders' interest in their stale tax credit certificates constitutes a property right and, if so, whether there was sufficient notice and opportunity for them to be heard.

A property interest in a government benefit attaches when an individual has "more than a unilateral expectation" of receiving the benefit; the individual must have "a legitimate claim of entitlement to it." *Mallette v. Arlington County*, 91 F.3d 630, 634 (4th Cir. 1996) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). "Entitlement" to a benefit, as opposed to mere "expectation," depends upon the degree to which the government's decision-maker has discretion to award or not award the benefit. *Id.* If the law mandates, or effectively mandates, award of a benefit in a given situation, then the individual possesses a property interest. *Id.* At the stage in the process applicable to these holders, known as a Part 3 review, the Maryland Historical Trust has little discretion and simply (1) reviews reported expenditures for consistency with the project approval and then (2) issues a tax credit certificate up to the amount of the initial certificate. Given this, we believe that a reviewing court is likely to find that at least for these holders, their receipt of the tax credit is more of an "entitlement" than an "expectation," and thus likely a constitutionally-protected property interest.

Once a property interest is established, the second step of the due process analysis is to determine whether the individual deprived of the interest was provided the "minimum measure of procedural protection warranted under the circumstances." *Mallette*, 91 F.3d at 634. In cases where legislatures altered or removed individualized government benefits, the courts have held that "the procedural component of the Due Process Clause does not impose a constitutional limitation on the power of [the legislature] to make substantive changes in the law of entitlement to public benefits." *Pashby v. Delia*, 709 F.3d 307, 328 (4th Cir. 2013) (citing *Atkins v. Parker*, 472 U.S. 115, 129 (1985)). In such instances, "the legislative determination process provides all the process that is due." We think that, between HB 510 and SB 172, the holders had sufficient notice that the Legislature was concerned with the problem of stale tax credit certificates and intended to terminate them, although the celerity of that termination was not yet clear. We think that is more than sufficient to comport with due process as

described in the *Pashby* line of cases. Thus, we find the termination of the stale tax credits to be facially constitutional.[10]

Conclusion

We find that although Senate Bill 172 contains numerous provisions detailed above that are very likely to be found to be in violation of the one-subject requirement of Article III, § 29 of the Maryland Constitution, the bill as a whole is constitutional and legally sufficient because the offensive provisions are severable. Md. Code Ann., Art. 1, § 23; Senate Bill 172, § 19. *See also* General Provisions Article, § 1-210 (effective October 1, 2014).

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/DF/kk

cc: The Honorable John P. McDonough
Jeanne D. Hitchcock
Karl Aro

[10] We also understand that the Maryland Historical Trust has contacted the holders of these stale tax credit certificates to warn them of the impending deadline and to encourage them to seek payment before the bill's effective date. We believe that this minimizes the risks of an "as applied" challenge as well.

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**STATE OF MARYLAND
DEPARTMENT OF BUDGET AND MANAGEMENT**

March 13, 2014

T. Eloise Foster
Secretary
Department of Budget and Management
45 Calvert Street
Annapolis, Maryland 21401

Dear Secretary Foster:

You have requested advice concerning Senate Bill 172, the Budget Reconciliation and Financing Act of 2014 (BRFA). Specifically, you have asked whether certain amendments to the bill approved yesterday by the Senate violate the single subject rule under Article III, §29 of the Maryland Constitution or are otherwise improper. It is my view that because several of the amendments create funding mandates, increase State expenditures, or are otherwise inconsistent with the single subject of the BRFA, they are not appropriate for inclusion in the bill.

Article III, §29 of the Maryland Constitution provides, in relevant part, that "every Law enacted by the General Assembly shall embrace but one subject." The purposes of this provision are to prevent logrolling, and to protect the veto power of the Governor. *Porten Sullivan Corp. v. State*, 318 Md. 387, 402 (1990). It has traditionally been given a liberal reading so as not to interfere with or impede legislative action. *MCEA v. State*, 346 Md. 1, 13 (1997). This deferential approach has been taken in recognition of the nature of the legislative process, the compromises necessary in this process, and the complexity of the issues which necessitates multifaceted legislation. *Delmarva Power v. PSC*, 371 Md. 356, 368-69 (2002); *MCEA* v. *State*, 346 Md. 1, 14 (1997).

The test as to whether a law violates the one subject requirement requires a reviewing court to determine whether the provisions of the bill are all "germane" to one another. *Migdal v. State*, 358 Md. 308, 317 (2000). That is, whether the provisions are "in close relationship, appropriate, relative, pertinent." *Porten Sullivan*, 318 Md. at 402.

Connection and interdependence between the provisions of a bill can be on either a horizontal or vertical plane. *MCEA*, 346 Md. at 15-16. Two matters can be regarded as a single subject, for purposes of § 29, either because of a direct connection between them, or because they each have a direct connection to a broader common subject to which the Act relates.

The Budget Reconciliation and Financing Act is legislation introduced during times of fiscal difficulty to assist the Governor's efforts to balance the State operating budget and provide for the financing of State and local government. The BRFA executes actions to enhance revenues and reduce current and future year general fund expenditures. These actions often take the form of transfers of special funds to the general fund, the elimination, reduction or suspension of mandated spending, and the enactment or increase of taxes, fees or other revenue.

Amendment No. 3, seeks to establish a Maryland Amusement Game and Advisory Committee. The advisory committee would advise the State Lottery and Gaming Control Commission "on the conduct and technical aspects of the amusement game industry, including . . . the legality of skills-based amusement games." The establishment of the advisory committee appears unrelated to the funding of State government or balancing the budget and is thus an inappropriate subject for the BRFA. The same amendment would also delay the effective date of the imposition of certain amusement license fees until July 1, 2016. The delay in implementation of the license fee until fiscal year 2017 would have a negative impact on State revenues for fiscal years 2015 and 2016 and, for that reason, is not appropriate for inclusion in the BRFA.

Amendment No. 7 would authorize charter counties to impose a hotel rental tax. While authorization of a hotel tax is relevant to the financing of local government it is unrelated to any other provision in the BRFA as introduced or amended, or to the primary purpose of the BRFA, which is balancing the State budget in times of fiscal distress. Therefore, it is my view that the hotel rental tax authorization is not an appropriate subject for the BRFA.

Amendment No. 8 seeks to require that a specified portion of State Park Service revenues be dedicated to Park Service operations. Assuming future park revenues remain essentially the same as current revenues, the effect of the amendment would be to create a funding mandate of $8.1 million beginning in fiscal year 2016, $10.7 million in fiscal year 2017, and $13.4 million in fiscal year 2018. As this Office has previously advised, because the purpose of a BRFA is to help bring the State's budget into balance during a time of fiscal crisis, funding mandates have no place in a BRFA. While some mandated funding provisions might be justified if included as "legislative reactions to

budget action taken by the Executive," a specific, unrelated funding mandate such as Amendment No. 8 is "the hardest to defend." *See* Letter to the Honorable Robert L. Ehrlich, Jr. from Attorney General J. Joseph Curran, Jr. on House Bill 147 (May 19, 2005); Letter to the Honorable Norman H. Conway from Assistant Attorney General Bonnie A. Kirkland (Mar. 26, 2013).

Amendment No. 11 alters the method of determining local education aid maintenance of effort (MOE) requirements by providing that wealth per pupil should be calculated using September 1 net taxable income for fiscal years 2015 through 2017, and November 1 beginning in fiscal year 2018. The provision would have no impact on the amount of State education aid to local jurisdictions but instead is designed to clarify how the counties calculate their MOE requirements. The amendment is unrelated to any other provision in the BRFA, or to the primary purpose of the BRFA, which is balancing the State budget in times of fiscal distress. Because the clarification of the county MOE requirements is not part of a larger plan regarding education aid, it is my view that this provision is not an appropriate subject for the BRFA.

Amendment No. 12 would permit the Secretary of Information Technology to require that the Health Benefit Exchange information technology projects be subject to oversight by the Department of Information Technology. A justification for this amendment is that it is designed to reduce State expenditures by putting the Health Benefit Exchange under tighter procurement and budget control. However, the fiscal savings are speculative and the Department of Legislative Services (DLS) has determined that the fiscal impact is "indeterminate." Nevertheless, because the purpose of the amendment seems related to fiscal oversight and control designed to reduce expenditures it is, at least, defensible for inclusion in the BRFA.

Amendment No. 13 redirects a portion of the Racetrack Facility Renewal Account to local racetrack impact aid to prevent a reduction in the funding given as grants to local jurisdictions. This provision would reduce the State grants allocated to racetracks for capital construction and improvements in order to ensure that adequate funds are available to fully fund horse racing impact aid to Baltimore City, the City of Laurel, and Anne Arundel and Howard counties under Business Regulation Article, § 11-404. While this reallocation of funds does not result in an increase in total State expenditures, it is unrelated to any other provision in the BRFA, or to the primary purpose of the BRFA, which is balancing the State budget in times of fiscal distress. Because of this, it is my view that the redirection of racetrack facility renewal funds to local racetrack impact aid is not an appropriate subject for the BRFA.

Amendment No. 15 would amend the Transportation Article to require that $7 million of speed camera revenue be allocated annually to the State Police for the purchase vehicles. The amendment creates no immediate savings and is unrelated to balancing the fiscal year 2015 budget. The amendment simply creates a funding mandate. As discussed above, funding mandates unrelated to other items in the BRFA should accomplished in separate legislation as they have nothing to do with balancing the budget or helping to finance State government.

Amendment No. 16, which would repeal a sunset and permanently set the certificate of title fee for rental vehicles at $50 would cost the Transportation Trust Fund $4.2 million a year. Because the amendment would reduce rather than enhance State revenues I can discern no justification that would support the inclusion of this provision in the BRFA.

Amendment No. 23 would permit the Governor to transfer $10.8 million from the Baltimore City Community College fund balance to DoIT's Major Information Technology Development Fund "to ensure the implementation of Enterprise Resource Planning." The BRFA is typically used to transfer money from special funds to balance the budget, not to transfer to special funds to meet other policy objectives. While the General Assembly may authorize, but not require, the Governor to transfer funds, this proposal is inappropriate for the BRFA because it does not help to balance the budget or to finance State government.

Sincerely,

Bruce P. Martin
Assistant Attorney General

cc: Dan Friedman, Counsel to the General Assembly
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April 2, 2014

The Honorable Maggie McIntosh, Chair
House Environmental Matters Committee
House Office Building, Room 251
Annapolis, Maryland 21401

The Honorable Paul G. Pinsky
Senate of Maryland
James Senate Office Building, Room 220
Annapolis, Maryland 21401

Re: Proposed Amendment to Senate Bill 172, the Budget Reconciliation and Financing Act of 2014

Dear Chairwoman McIntosh and Senator Pinsky:

You have each separately inquired about the constitutionality of a proposed amendment to Senate Bill 172, the Budget Reconciliation and Financing Act of 2014 ("BRFA"). The proposed amendment, currently "on hold" in conference committee on the Budget, would modify the method by which counties could satisfy their obligation to collect stormwater remediation fees pursuant to Section 4-202.1 of the Environment Article ("EN") of the Maryland Code. It is my view that the proposed amendment violates the one subject rule of Article III, § 29 of the Maryland Constitution.

Article III, § 29 of the Maryland Constitution provides in relevant part that "every Law enacted by the General Assembly shall embrace but one subject." The purposes of this provision are to prevent logrolling and to protect the veto power of the Governor. *Porten Sullivan Corporation v. State*, 318 Md. 387, 402 (1990). This provision has traditionally been given a liberal reading so as not to impede legislative action. *MCEA v. State*, 346 Md. 1, 13 (1997). The courts' deferential approach recognizes the nature of the legislative process, the compromises necessary in this process, and the complexity of the issues which necessitates multifaceted legislation. *Delmarva Power v. PSC*, 371 Md. 356, 368-369 (2002); *MCEA* v. *State*, 346 Md. 1, 14 (1997).

The test as to whether a law violates the one subject requirement requires a reviewing court to determine whether the provisions of the bill are all "germane" to one another. *Migdal v. State*, 358 Md. 308, 317 (2000). That is, whether the provisions are "in close relationship, appropriate, relative, pertinent." *Porten Sullivan*, 318 Md. at 402.

Connection and interdependence between the provisions of a bill can be on either a horizontal or vertical plane. *MCEA*, 346 Md. at 15-16. Two matters can be regarded as a single subject, for purposes of § 29, either because of a direct connection between them, or because they each have a direct connection to a broader common subject to which the Act relates.

The single subject of the BRFA is the financing of State government. More specifically, BRFAs over the last 20 years have been used to balance budgets, raise revenue, make or authorize fund transfers, redistribute funds, and cut mandated appropriations. While the individual provisions in the BRFA address numerous areas of State government, "the genesis of budget reconciliation acts was to help bring the State's budget into balance during a time of fiscal crisis." *Bill Review Letter on House Bill 147 of 2005* (May 19, 2005). The proposed amendment concerns only the methods by which local government may collect monies for stormwater remediation programs. Although this local funding supplements State funding for compliance with its federally-mandated Watershed Improvement Plan ("WIP"), the amendment neither changes the amount nor makes more secure the local funding component. Thus, it is unrelated to the funding of State government or balancing the State's budget and thus its inclusion in the BRFA violates the one subject rule of Article III, § 29.

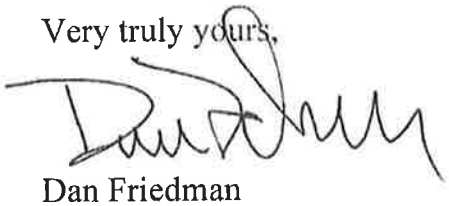
Another concern is that this proposed amendment has many of the hallmarks that have doomed bills under the one subject rule in the past. For example, the Court of Appeals has looked skeptically on amendments that are adopted in such a way as to avoid the legislative committee of jurisdiction. *See, e.g., Migdal*, 358 Md. at 322. Here, the stormwater remediation fees were originally imposed by legislation considered by the House Environmental Matters ("ENV") Committee and Senate Education, Health & Environmental Affairs ("EHEA") Committee. This amendment, if allowed, avoids those committees and would instead be recommended to the House and Senate by the budget committees, the Senate Budget & Taxation ("B&T") Committee and the House Appropriations ("APP") Committee. Similarly, the Court of Appeals has looked skeptically on amendments that were previously rejected as stand-alone legislation. *Migdal*, 358 Md. at 322. Here, modifications to the stormwater remediation fees were a popular topic for the introduction of legislation this session, but those that have been acted upon have been uniformly rejected by the committees of jurisdiction, including:

Bill	Short Title	Status
House Bill 50	Stormwater Management - Watershed Protection and Restoration Program - Repeal	Unfavorable (ENV)
House Bill 55	Anne Arundel County - Watershed Protection and Restoration Program - Exemption (Anne Arundel County Rain Tax Exemption Act of 2014)	Unfavorable (ENV)
House Bill 97	Stormwater Management - Watershed Protection and Restoration Program - Repeal	Unfavorable (ENV)
House Bill 155	Environment - Stormwater Management - Exemption From Watershed Protection and Restoration Program	Unfavorable (ENV); Withdrawn
House Bill 324	Frederick County - Stormwater Management - Watershed Protection and Restoration Program - Exemption	Unfavorable (ENV); Withdrawn
House Bill 895	Stormwater Management - Watershed Protection and Restoration Program - Repeal	Unfavorable (ENV)
House Bill 952	Baltimore County - Watershed Protection and Restoration Program - Exemption	Unfavorable (ENV); Withdrawn
House Bill 1139	Environment - Stormwater Remediation Fees - Reduction of Fees	Awaiting action in ENV
Senate Bill 5	Stormwater Management - Watershed Protection and Restoration Program - Repeal	Unfavorable (EHE)
Senate Bill 135	Watershed Protection and Restoration Program - Enforcement by Department of the Environment - Moratorium	Unfavorable (EHE)
Senate Bill 277	Frederick County - Stormwater Management - Watershed Protection and Restoration Program - Exemption	Unfavorable (EHE)
Senate Bill 315	Environment - Stormwater Remediation Fee - County Tax Limitations	Unfavorable (EHE)
Senate Bill 316	Anne Arundel County - Watershed Protection and Restoration Program - Exemption (Anne Arundel County Rain Tax Exemption Act of 2014)	Unfavorable (EHE)
Senate Bill 359	Watershed Protection and Restoration Programs - Impervious Surface - Definition	Unfavorable (EHE)
Senate Bill 464	Stormwater Management - Watershed Protection and Restoration Program - Repeal	Unfavorable (EHE)
Senate Bill 1084	Baltimore County - Stormwater Remediation Fee - Application and Limitation	Awaiting action in EHE

Thus, it is my view that a reviewing court will consider this factor against the amendment as well. Finally, some have suggested that the stated purpose of the BRFA is too narrow and if we just consider its purpose more broadly, we can construct an umbrella large enough to shelter even this amendment from the application of the one subject rule. The Court of Appeals, however, has rejected such exercises, instructing that a too broad topic, like "corporations" cannot protect non-germane provisions. *Migdal*, 358 Md. at 318-19. Frankly, the whole raison d'être for this amendment to have emerged at this time and in this manner was to force members to vote for an unpalatable provision to save the other, meritorious provisions of the BRFA. This is precisely what the constitutional provision was intended to avoid. *See Porten Sullivan*, 318 Md. at 408 (describing the bill considered there as a "textbook example of legislation designed to frustrate [the] purposes [of the one subject rule]").

In the end, it is plain to me that this proposed amendment is very likely to be found to be unconstitutional.[1]

Very truly yours,



Dan Friedman
Counsel to the General Assembly

[1] Despite this, it is my view that this provision is severable from the other provisions of the BRFA. *See, e.g., Porten Sullivan*, 318 Md. at 410 (reciting "strong presumption" in favor of severability); Md. Ann. Code, Art. 1, §23 (presumption of severability).