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April 28, 2017

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: *House Bill 386 - Montgomery County - Economic Development - Business Improvement Districts MC 12-17*

Dear Governor Hogan:

We have reviewed House Bill 386, titled "Montgomery County - Economic Development - Business Improvement Districts MC 12-17." We write to raise a constitutional issue with its application to municipalities in Montgomery County only. We believe that there is a significant risk that a court would find the application to municipalities violates Article XI-E of the Maryland Constitution. Even if a court determines that the provision in question is unconstitutional in application to municipalities, it is our view that the provision is severable and will not impact the constitutionality of the bill's application to Montgomery County. Thus, we approve House Bill 386 for constitutionality and legal sufficiency.

The Maryland Constitution, in Article XI-E, § 1, states that "the General Assembly shall act in relation to the incorporation, organization, government, or affairs of any such municipal corporation only by general laws *which shall in their terms and in their effect apply alike to all municipal corporations* in one or more of the classes provided for in Section 2 of this Article." (Emphasis added). Similarly, Article XI-E, § 5, generally prohibits municipal corporations from levying any tax "unless it shall receive the express authorization of the General Assembly for such purpose, by a general law *which in its terms and its effect applies alike to all municipal corporations* in one or more of the classes provided for in Section 2 of this Article." (Emphasis added). The General Assembly has grouped all municipalities into a single class. Local Government Article, § 4-102. Current State law expressly authorizes counties and municipalities to "adopt a local law to create a business improvement district in accordance with" Subtitle 4, Title 12 of the Economic Development Article. House Bill 386 states that Subtitle 4 "does not apply in Montgomery County," and goes on to create separate provisions for the creation of business improvement districts solely applicable to Montgomery County and its municipalities.

Under the new provisions applicable only in Montgomery County, the tax base of the business improvement district is broadened from the current Statewide provisions to include all real property that is not exempt from paying real property taxes, except condominium units and cooperative housing corporation units that exist on or before the date of establishment of the district, homeowners associations, or residential property with fewer than four dwelling units. Any condominium or a cooperative housing corporation, however, may petition to join a new or expanding business improvement district under specified conditions. Other differences in House Bill 386 from the current Statewide provisions include the reduction of the minimum threshold of property owners necessary to create or expand a district; the alteration of the notification requirements prior to creation of a district; and range in size of the board of directors of a district corporation.

Municipal corporations need authorization from the General Assembly to create special taxing districts. *See* 68 *Opinions of the Attorney General* 295, 298-299 (1983) (citing *Campbell v. City of Annapolis*, 289 Md. 300 (1981)). House Bill 386 is a public general law but applies only to Montgomery County and its municipalities. As a result, we believe that there is a significant risk a court would find its application to municipalities violates Article XI-E. *See Mayor & Alderman of City of Annapolis*, 52 Md. App. 256, 267-68 (1982) (holding that a State law which granted to Anne Arundel County only the power to disapprove a municipal annexation and send it to referendum was unconstitutional); *Gordon v. Commissioners of St. Michaels*, 278 Md. 128, 133-34 (1976) (holding that Article XI-E “specifies that the power of the General Assembly to act relative to the affairs of municipal corporations is ‘only by general laws which shall in their terms and in their effect apply alike to all municipal corporations in one or more of the classes’ for which provision is made, and since this act applies only to Talbot County municipalities, it follows that it is unconstitutional”). Based on the foregoing authorities, we have consistently advised that legislation authorizing municipal corporations in a particular county to confer tax benefits would violate Article XI-E. *See, e.g.*, Letter from Asst. Att’y Gen. Richard I. Israel to Delegate Tyras S. Athey, dated Dec. 17, 1990; Letter from Asst. Att’y Gen. Bonnie A. Kirkland to Senator John C. Astle, dated Jan. 6, 2004.

Even if a court were to find the bill’s application to municipalities unconstitutional, our view is that the provision would most likely be found to be severable. Maryland law expressly provides for severability. General Provisions Article, § 1-210. Moreover, where a provision of a bill is found to be unconstitutional, it is generally presumed, “even in the absence of an express clause or declaration, that a legislative body generally intends its enactments to be severed if possible.” *Davis v. State*, 294 Md. 370, 383 (1982). Thus, “when the dominant purpose of a statute may largely be carried out notwithstanding the invalid provision, courts will ordinarily sever the statute and enforce the valid portion.” *Id.* at 384. It is clear that the purpose of the legislation can be accomplished without the offending language. As a result, it is our view that, if the application to municipalities were to be found unconstitutional, it would be severable from the remainder of the legislation. As a result, we believe House Bill 386 is not clearly unconstitutional and that if the

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bill is enacted, Montgomery County would be able to legally establish business improvement districts as authorized by the legislation.¹

Sincerely,

A handwritten signature in black ink, appearing to read "Brian E. Frosh". The signature is fluid and cursive, with a large initial "B" and a long, sweeping underline.

Brian E. Frosh
Attorney General

BEF/SBB/kd

cc: The Honorable John C. Wobensmith
Chris Shank
Warren Deschenaux

¹ The Office of Attorney General ordinarily uses a “not clearly unconstitutional” standard when reviewing legislation. 71 *Opinions of the Attorney General* 266, 272 n.12 (1986).