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April 14, 2020

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

RE: House Bill 761 and Senate Bill 352

Dear Governor Hogan:

We have reviewed House Bill 761 and Senate Bill 352, which are identical. These bills expressly exempt a single qualifying private employer in Somerset County (“County”), Eastern Shore Forest Products, Inc. (“ESFP”), from existing durational limits for a County property tax exemption for certain employers with 10 or more employees. Although we believe that there is a risk that a court may find each of the bills to constitute a “special law” in violation of Article III, § 33 of the Maryland Constitution, in light of the unique circumstances of these provisions, we cannot conclude that the bills are clearly unconstitutional. Nonetheless, if the bills are signed, in light of the risk that the bills create a special law, it is recommended that the General Assembly consider amending the law during the next legislative session to carry out the intent of the bills without applying the durational exemption to a specifically named individual qualified employer.

Under § 11-101(a) of Article 20 (Somerset County) of the Public Local Laws of Maryland (“PLL”), the County Commissioners are authorized to exempt from County taxation, “factories, manufacturing industries, fabricating or assembling facilities, industrial plants, and the like, and the land, machinery, and tools which those facilities use, and stock in trade or products of the facilities that are located in the County[.]” The exemption from County taxation may be granted only when “10 or more wage earners are regularly employed” by an employer applying to the County Commissioners for the exemption. § 11-101(c). The exemption may be granted for up to 1 year at a time, and may be annually renewed, but an exemption may not continue beyond 5 years. § 11-101(e). The bills provide that the time limits under § 11-101(e) “DO NOT APPLY TO A TAX

EXEMPTION GRANTED UNDER THIS SECTION TO EASTERN SHORE FOREST PRODUCTS, INC.”

In our view, there is risk that a court could find this express exemption of an individual County employer from the durational limits under these bills to be a “special law” in violation of Article III, § 33 of the State Constitution. That section provides, in pertinent part, that “the General Assembly shall pass no special Law, for any case, for which provision has been made, by an existing General Law.” Section 33 is violated only if a law: (1) is a “special” law; and (2) there is a provision for the matter in an existing general law. *Cities Service Co. v. Governor*, 290 Md. 553, 567 (1981). A special law “is one that relates to particular persons or things of a class, as distinguished from a general law which applies to all persons or things of a class.” *Id.* (quoting *Prince George’s Co. v. B. & O. Rwy. Co.*, 113 Md. 179, 183 (1910)). In *Cities Service*, the Court of Appeals conducted a two-part inquiry to determine if the law was an impermissible special law. First, the Court asked whether invalidating the legislation will effectuate the historical purpose of preventing influential persons from gaining an undue advantage through the enactment of private acts. Second, the Court undertook a close analysis of the bill and its legislative history, including the bill’s actual purpose; whether the beneficiaries are identified by name; whether the beneficiaries sought and persuaded the legislature to pass the bill; whether the public need and public good are served by the bill; and whether the classification contained in the bill are reasonable or arbitrary. *Id.* at 568-70.

Section 11-101 was original enacted in 1963, as new § 396B of Art. 20 of the PLL, in substantially the same form as existing § 11-101. *See* Ch. 534 of the 1963 Laws of Maryland. Under the 1963 enactment, as in existing § 11-101, the purpose of the property tax exemption is for “encouraging the location of new industries in Somerset County and for the purpose of encouraging the growth and development of factories, manufacturing industries, fabricating or assembling facilities, industrial plants, and the like in the County.” § 11-101(a). The property tax exemption applies generally to any such qualifying entities in the County. The Fiscal Note to HB 1458 (Ch. 576) of 2002, which reduced the maximum length of a property tax exemption under § 11-101 from 10 years to 5 years, indicated that it was the practice of the County not to renew an existing tax credit after a period of 3 years, as the credits “were designed to encourage new business developments[,]” while acknowledging that at the time of the 2002 bill hearing, no manufacturing companies had been granted the property tax exemption. Fiscal Note to HB 1458 of 2002.

In this instance and in light of the foregoing, in our view, there is a risk that a court could conclude that the bills constitute a special law in violation of Art. III, § 33. On their face, the bills provide a potential benefit exclusively to one private entity, ESFP. That time

limit exemption is not available to any other entity that meets the criteria for a County property tax exemption under § 11-101. Under the bills, ESFP, to the extent it qualifies for the County tax exemption, is not subject to the same time limits for the tax exemption to which any other entity that qualifies for the tax exemption is subject.

According to the Fiscal Notes for the bills, “[o]nly one business [ESFP] currently receives the property tax exemption.” Revised Fiscal and Policy Note to HB 761 and SB 352. “According to the Somerset County Finance Office, the personal property tax bill for [ESFP] has not been paid since fiscal 2014, which was the fifth year of the tax exemption.” *Id.* The County has entered into an agreement with ESFP to pay a portion of its owed property taxes. *Id.* The sponsors of each bill acknowledged at each bill’s hearing that the bills provide a durational exemption to the tax exemption for ESFP, which they characterized as an important employer in the County. Oral testimony in Ways and Means Committee Bill Hearing for HB 761 (2/18/20) and Budget & Taxation Committee Bill Hearing for SB 352 (2/5/20).

The bills would effectively establish different durations of the tax exemption for members of the same class of manufacturing properties, restricting the duration of the property tax exemption for all but ESFP, providing a special advantage to this individual company. Despite the bill sponsors’ testimony that ESFP is a major employer in the County, no specific public “need” for providing a unique exemption was articulated. Ultimately, even if the goal of continuing to allow the property tax exemption for ESFP may be reasonable, singling out a particular private entity for such a benefit may be viewed by a reviewing court as arbitrary.

The Court of Appeals has long held that statutory property tax exemptions for a particular property by name constitute unconstitutional special laws. In *Mayor and City Council of Baltimore v. Minister and Trustees of Starr Methodist Protestant Church (“Starr Church”)*, 106 Md. 281 (1907), the Court voided a statute that exempted one specific property of a religious organization as a special law because the exemption did not apply to a class of eligible properties, while property of religious bodies were already exempt from property tax under another provision. Similarly, in *Beauchamp v. Somerset County*, 256 Md. 541, 546 (1970), the Court of Appeals examined a statute that provided that “any incorporated American Legion Post is exempted from payment of any taxes, charges or assessments of whatever kind levied against the property of any such Post by the Somerset County Sanitary District, Inc.” Noting the similarities of the tax exemption language with the language at issue in *Starr Church*, the Court held that the exemption constituted an unconstitutional special law.

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Although in our view there is a risk that a court could find HB 761 and SB 352 to be special laws, in light of the unique circumstances surrounding this exemption and this private entity, we cannot conclude that the bills are clearly unconstitutional. First, the exemption at issue applies to an entity that had apparently previously qualified for, and had been granted the property tax exemption. Second, although existing § 11-101 validly creates a general class of entities in the County that may be eligible for the property tax exemption, ESFP appears to be the only entity that currently receives the tax exemption. Consequently, ESFP does not appear to be gaining an unfair advantage over another eligible entity in the County by eliminating the durational limits on its exemption. Third, the continued awarding of a property tax exemption to ESFP appears to be consistent with one of the stated purposes for the property tax exemption in § 11-101, namely “encouraging the growth and development” of such entities in the County.

In closing, we note that the General Assembly could have accomplished its apparent intended outcome of providing an extended property tax exemption to ESFP by repealing the durational limits on the tax exemption for any entity who qualifies for, and as is approved by the County to receive the tax exemption, rather than specifically exempting ESFP from the durational limits. In light of this, the public policy need to prevent a possibly improper special law in this instance arguably is not compelling. However, if either or both bills are signed, it is recommended that the General Assembly consider amending § 11-101 in the next legislative session to repeal the specific benefit to ESFP, and extend or repeal the duration limits on the property tax exemption for any qualifying and approved County employer.

Sincerely,

A handwritten signature in blue ink that reads "Brian E. Frosh". The signature is fluid and cursive, with the first name "Brian" being the most prominent.

Brian E. Frosh
Attorney General

BEF/JMM/kd

cc: The Honorable John C. Wobensmith
Keiffer J. Mitchell, Jr.
Victoria L. Gruber