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May 1, 2020

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

RE: Senate Bill 987

Dear Governor Hogan:

We have reviewed and hereby approve Senate Bill 987, “Racing and Community Development Act of 2020,” for constitutionality and legal sufficiency. While we approve the bill, we write this letter to note that various provisions that call for the disbursement of funds from the State Treasury in fiscal year 2021 must be supported by a valid appropriation. We also write to comment on a provision of the bill that requires the conveyance of certain property to the City of Bowie.

State Government Article (“SG”) §§ 9-1A-29(d)(2)(ii) and 9-1A-31(a)(4)(i) require that specified funds be transferred to certain private non-profit entities, beginning in fiscal year 2021. To the extent these provisions otherwise establish funding mandates, they cannot do so for fiscal year 2021.¹ Moreover, because Senate Bill 987 does not levy a tax, and thus does not satisfy the requirements of a supplementary appropriation bill under Md. Const., Art. III, § 52(8), these provisions cannot be construed as appropriating State money.

Although these provisions cannot appropriate funds, to the extent they reallocate funds that are otherwise appropriated in the fiscal year 2021 Budget Bill (Senate Bill 190), it is our view they may be construed as valid budget restrictions. This Office has advised

¹ A funding mandate – i.e., a law requiring the Governor to include funding for a program in the annual Budget Bill – must have been enacted at least one year before the fiscal year to which it applies. Md. Const. Art. III, § 52(11) and (12).

that the General Assembly may, by ordinary legislation, effectively amend an enacted Budget Bill and thereby authorize the Governor to transfer funds to a purpose for which they were not originally appropriated. *See* Letter to the Hon. Barbara A. Hoffman from Jack Schwartz, Chief Counsel, Opinions and Advice, April 1, 1994. However, in order to comply with the constitutional principle that only the Governor can initiate an appropriation in the Budget Bill, it is our view that the reallocation of the funds to these new purposes must be left to the Governor’s discretion.

The bill also alters the allocation of funds from the Purse Dedication Account, SG § 9-1A-28, and the Racetrack Facility Renewal Account (“RFRA”), SG § 9-1A-29, to require, in fiscal year 2021, that a portion of those funds be allocated to a new Racing and Community Development Facilities Fund (“Facilities Fund”), one of two funds established under the bill that are to be administered by the Maryland Stadium Authority (“MSA”), apparently as non-budgeted accounts.² It further requires that a portion of the unencumbered fund balance in RFRA, as of the end of fiscal year 2020, be transferred to the new Facilities Fund. Of the fund balance transferred to the Facilities Fund, at least \$1 million but not more than \$1.5 million is to be transferred to the City of Bowie for remediation costs relating to the Bowie Race Course Training Center (Section 8), and \$2 million is to be used only for reimbursing racing licensees’ for specified costs (Section 9).

If the Facilities Fund is to be operated as a non-budgeted account outside of the State Treasury, which appears to be the case, it is our view that these distributions to the Facilities Fund from RFRA and the Purse Dedication Account require an appropriation. As noted above, SB 987 cannot appropriate money, nor can it mandate funding for fiscal year 2021. To the extent these provisions reallocate funds that are otherwise appropriated in the fiscal year 2021 Budget Bill, it is our view the provisions may be construed as valid budget restrictions; however, as noted above, the disbursement of the funds for these new purposes in fiscal year 2021 must be left to the Governor’s discretion.

We also note that there is a provision in the bill requiring that the owner of the Bowie Race Course Training Center convey the training center property to the City of Bowie by December 31, 2023.³ Under the Fifth Amendment of the federal constitution, private property shall not “be taken for public use, without just compensation.” U.S. Const.. Amend. V. Maryland’s constitution also prohibits the taking of property without just

² The other is the Racing and Community Development Financing Fund. To the extent considered appropriate by MSA, money in these accounts is to be pledged to and used for debt service on MSA bonds.

³ Page 11, lines 6-11.

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compensation. Md. Const., Art. III, § 40. The analysis of the takings claim under Maryland's constitution is similar to the analysis under the Fifth Amendment of the U.S. Constitution. *Dept. of Transportation v. Armacost*, 299 Md. 392, 420 (1984). A per se taking occurs when the state's action results either in a permanent physical invasion of the property or a deprivation of all economically beneficial use for the owner.

Current law authorizes the State "in accordance with the sovereign power of the State and the provisions of Article III, §§ 40 and 40A of the Maryland Constitution" to "acquire by purchase or condemnation for public use with just compensation...Bowie Race Course Training Center..." Business Regulation Article, § 11-521(a)(3). That provision was repealed and reenacted without amendment in Senate Bill 987. While the bill provides funding for the owner for expenses relating to the Bowie Race Course Training Center during construction at Pimlico, and also a variety of tax incentives for the conveyance of the Bowie Race Course Training Center, if this is not considered just compensation for the required conveyance, the State may be obligated to pay the owner further compensation.

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/DWS/kd

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