Bill Review Letters - 2017

An Analysis of Selected Bill Review Letters of the Attorney General of Maryland on Legislation Passed at the 2017 Session of the General Assembly



DEPARTMENT OF LEGISLATIVE SERVICES 2017

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of the
Attorney General of Maryland
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Legislation Passed at the 2017 Session of the General Assembly

Department of Legislative Services
Office of Policy Analysis
Annapolis, Maryland

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Foreword

At the conclusion of each session of the General Assembly, the Attorney General's office undertakes a thorough review of all legislation passed during the session and advises the Governor as to the legislation's legality and constitutionality. While most of the bills that are scrutinized pass constitutional muster without comment, the Attorney General's office frequently prepares letters that raise constitutional, legal, and technical issues that it believes warrant attention or action. In extreme cases, the Attorney General may suggest a gubernatorial veto of a bill or recommend that a provision of a bill that is constitutionally impermissible be severed from the bill. More typically, the Attorney General's concerns relate to technical matters that can be addressed in the annual curative and corrective bills prepared by the Department of Legislative Services for introduction in the next session.

The purpose of this document, *Bill Review Letters – 2017*, is two-fold. First, it is to acknowledge the Attorney General's bill review process as a valuable source of information for the department's use in preparing the annual curative and corrective bills and fulfilling its ongoing responsibility to maintain the accuracy and integrity of the Annotated Code and the laws of Maryland. Second, the document is intended to assist those directly engaged in legislative drafting for the General Assembly. The letters selected for inclusion in this publication discuss various issues relating to constitutional law, statutory construction, and other legal matters to consider in the drafting, review, and analysis of bills and amendments. Finally, the analysis of each letter includes a segment on drafting tips that should be considered carefully by legislative drafters. For purposes of summarization, citations to the cases relied on by the Attorney General are generally omitted.

Bill Review Letters – 2017 contains selected bill review letters that cover a wide range of topics including equal protection, delegation of legislative authority, separation of powers, and a variety of other federal and State legislative issues. Note that several of these topics and other important constitutional and legal considerations related to legislation and legislative drafting are discussed in more depth in the department's *Maryland Legislative Desk Reference*.

This document was prepared by the Department of Legislative Services, Office of Policy Analysis. The analyses included in this document were written by April M. Morton, Jennifer L. Young, Kelsey-Anne Fung, Jameson D. Lancaster, Patrick D. Carlson, and Alistair M. Johnston. Nichol A. Conley and Kacey Smith prepared the document for publication. John J. Joyce edited the analyses and supervised production of the document. The Office of Policy Analysis is grateful to Kelly Desautels of the Office of the Attorney General, Counsel to the General Assembly, for her assistance in providing the letters discussed in this document.

U.S. Constitutional and Federal Legislative Issues

EQUAL PROTECTION, PRIVILEGES AND IMMUNITIES, AND TAKING CLAUSES – TAX SALES – LIMITED AUCTION AND FORECLOSURE FOR ABANDONED PROPERTY

Bill/ Chapter:	House Bill 1573/Chapter 819 of 2017
Title:	Prince George's County – Tax Sales – Limited Auction and Foreclosure for Abandoned Property
Attorney General's Letter:	April 28, 2017
Issue:	Whether a bill that requires a county to conduct an auction of property subject to tax liens, in which participation in the auction is limited to individuals who live in or work for the county or who are honorably discharged veterans, violates the equal protection, privileges and immunities, and takings clauses of the U.S. Constitution and due process, equal protection, and governmental takings provisions of the Maryland Declaration of Rights and Constitution.
Synopsis:	House Bill 1573/Chapter 819 of 2017 requires the tax collector in Prince George's County to conduct a limited auction for any property to be sold for the collection of past due taxes. The limited auction must be held in addition to and before the public auction, and must be open only to bids from an individual who is an honorably discharged veteran, an employee of the federal government, a county resident, or is employed by a municipality in the county or the county government, police department, fire department, sheriff's office, corrections department, or public school system. The holder of a certificate of sale from the limited auction may file a complaint to foreclose at any time after the sale if the property is abandoned and is either a vacant lot or a building cited as vacant and unfit for habitation on a housing or building violation notice.
Discussion:	The Attorney General observed that the bill raises a concern under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and Article 24 of the Maryland Declaration of Rights. The Equal Protection Clause prohibits a state from denying "any person within its jurisdiction the equal protection of the laws" and directs that all persons similarly situated be treated alike. Article 24, which states that "no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but . . . by the Law of the land[,]" has been held to also guarantee equal protection and is applied in a like manner and to the same extent as the Equal Protection Clause.

The Attorney General explained that the bill, by differentiating among properties in Prince George's County, and between those allowed to participate in the limited auction and those who cannot, risks being viewed negatively by a reviewing court as creating an improper preference. The Constitution permits states a wide scope of discretion in enacting laws that affect some groups of citizens differently than others and a statutory discrimination will not be set aside if the varying treatment is rationally related to a legitimate governmental interest. The Attorney General noted that a rational basis for the bill could be to improve neighborhoods, promote homeownership, and reduce blight caused by vacant and abandoned properties, but cautioned that it is unclear how the bill relates to these interests, given that the percentage of properties sold at tax sales in the county is already high and that there is no requirement that purchasers of property at the limited auction actually live in the homes purchased.

The Attorney General then observed that the bill presents a potential Privileges and Immunities Clause violation. Article IV, § 2, of the U.S. Constitution provides that "[t]he Citizens of each State shall be entitled to the Privileges and Immunities of the Citizens in the several States." Citing Supreme Court precedent, the Attorney General explained that the purpose of this clause is to "constitute the citizens of the United States as one people" by "plac[ing] the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." Discrimination against nonresidents may be allowable if there is a substantial reason for the difference in treatment and the discrimination bears a substantial relationship to the State's objective. Applying this test, the Attorney General reasoned that the bidding opportunity granted to county employees, residents, and others authorized to participate in the closed auction, with the potential to pay a lower price on property being auctioned by the county, may be a constitutional violation if there is no substantial reason for the different treatment that has a substantial relationship to a valid governmental interest.

Finally, the Attorney General raised the concern that the bill's requirement of a limited auction, as applied to individuals who may possess a residual interest in the value of the property in excess of the owed taxes and expenses, may constitute an unconstitutional governmental taking of property or abrogation of vested rights. Under the Fifth Amendment of the U.S. Constitution, private property may not "be taken for public use, without just compensation." In addition, Article 24 of the Maryland Declaration of Rights, guaranteeing due process of law, and Article III, § 40 of the Maryland Constitution, prohibiting governmental taking without just compensation, prohibit the retrospective reach of statutes that would have the effect of abrogating vested rights.

Citing federal and State court precedent, the Attorney General explained that to establish a successful Takings Clause claim, a person must establish a constitutionally protected property interest and show that that they had reasonable investment-backed expectations that they would be able to sell the property at a reasonable price. A claim concerning a retroactive abrogation of vested rights considers as factors fair notice, reasonable reliance, and settled expectations to determine the nature and extent of the change in law and the degree of connection between the operation of the new rule and a relevant past event.

Analyzing these elements, the Attorney General reasoned that, by limiting the participants of an auction in a tax sale, the State may be creating a mechanism that results in a significantly lower tax sale price than would have been achieved at an open auction. If the bids at the limited auction are substantially lower than those at the public auction, the mechanism could constitute a governmental taking of a residual interest in the value of the property. The Attorney General noted, however, that the owners of property subject to a tax sale and others who have a valid interest in such property may have no reasonable expectation of a large return on their investment on their property due to the delinquency of owners on their taxes owed and the statutory right of redemption that makes available a procedure to protect their interests.

Despite the serious concerns raised, the Attorney General concluded that, because a reviewing court would be obliged to give the State a great deal of discretion to determine whether the classifications were rationally related to a legitimate governmental interest, the bill was not clearly unconstitutional on its face.

Drafting Tips: **If asked to draft a bill that establishes a preference for individuals who fit an express classification, the drafter should advise the sponsor that there must be a substantial reason for the preference that has a substantial relationship to a valid governmental interest to meet the equal protection requirements of the U.S. Constitution and Maryland Declaration of Rights and the requirements of the Privileges and Immunities Clause of the U.S. Constitution.**

In addition, when drafting a bill that would change procedures for the government sale of property sold for the collection of past due taxes, the drafter should consider whether the change would result in a significantly lower tax sale price for the property than would have been achieved under existing procedures. Such a change could constitute an unconstitutional governmental taking of property or abrogation of vested rights if the owners of the property or others who have an interest in the property are able to establish that the change interferes with a reasonable expectation of obtaining a reasonable return on their investment in the property.

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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 1573 - Prince George's County - Tax Sales - Limited Auction and Foreclosure for Abandoned Property PG 411-17

Dear Governor Hogan:

We have reviewed House Bill 1573 – "Prince George's County - Tax Sales - Limited Auction and Foreclosure for Abandoned Property PG 411-17." We write to raise concerns about the bill's constitutionality. We believe that there is a significant risk that a court would find the bill violates the Equal Protection Clause and the Privileges and Immunities Clause. Additionally, there is a slight risk that a court could find the bill constitutes an unconstitutional taking or retroactively impairs vested rights. Nevertheless, we cannot say it is clearly unconstitutional on its face.[1]

State law generally requires tax collectors to conduct a tax sale at a public auction, not later than two years from the date the tax is in arrears, of all property in the county on which the tax is in arrears. *See* Tax – Property Article ("TP"), Title 14, Subtitle 8. House Bill 1573 requires the tax collector for Prince George's County to conduct a "limited auction" prior to conducting the public auction for property in the county subject to tax liens. The limited auction is open only to bids from an individual who is an honorably-discharged veteran, an employee of the federal government, a County resident, or is employed by the County government, the County police department, the County fire department, the County sheriff's department, a municipality in the County, or the County corrections department, or in a public school in the County. *See* new TP § 14-817(d)(3).

Under State law, a certificate of sale from a tax sale may be assigned. House Bill 1573 provides, however, that "a certificate of sale issued to a purchaser at a limited auction under § 14-817 may not be assigned to another person." *See* new TP § 14-821(b). In addition, the holder of a certificate of sale has two years to foreclose the owner's right of redemption, but in most cases

[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).

must wait 6 months after the sale to file a complaint to foreclose. *See* TP § 14-833. Under House Bill 1573, the holder of a certificate of sale from the limited auction may file a complaint to foreclose at any time after the sale if the property is abandoned and "either a vacant lot or improved property cited as vacant and unfit for habitation on a housing or building violation notice…" *See* new TP § 14-833(h).

According to the Fiscal & Policy Note for House Bill 1573, over the past 5-year period, more than 91% of the property accounts offered for tax sale in Prince George's County have been purchased. Moreover, "Prince George's County advises that revenues may decrease as a result of potentially lower bids on properties subject to an earlier, limited auction compared to the higher bids that may have occurred had the properties been included in the general auction where there would be more competition. As a result, bid prices, and thus bid premiums, may be significantly lower." (Fiscal & Policy Note at 4.) In sum, House Bill 1573 mandates that Prince George's County conduct an auction of property subject to tax liens primarily for individuals who live in or work for the County, or who are honorably discharged from the military and not open to other members of the public or business entities, at which the bids in the closed auction are likely to be lower than the bids would be at a public auction.

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws," and directs that all persons similarly situated be treated alike. Further, Article 24 of the Maryland Declaration of Rights states "[t]hat no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." The Court of Appeals has stated that "we generally apply [Article 24 and the Equal Protection Clause of the Fourteenth Amendment] in a like manner and to the same extent." *Ehrlich v. Perez*, 393 Md. 691, 715 (2006). *See also Kirsch v. Prince George's Co.*, 331 Md. 89, 96 (1993) ("Although the Maryland Constitution does not contain an express equal protection clause, we have long held that equal protection is implicitly guaranteed by the due process provision found in Article 24.").

The Supreme Court has announced that the Constitution "permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others." *McGowan v. Maryland*, 366 U.S. 420, 425 (1961). The Court further explained that "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Id.* at 426.

> Under this "rational basis" level of scrutiny, the classification will pass constitutional muster so long as it is "rationally related to a legitimate governmental interest." In other words, we will uphold the statute under rational basis review "unless the varying treatment of different groups or persons is so unrelated to the

> achievement of any combination of legitimate purposes that [the court] can only conclude that the [governmental] actions were irrational." Statutes reviewed pursuant to this level of scrutiny are presumed constitutional, "and will be invalidated only if the classification is clearly arbitrary."

Conaway v. Deane, 401 Md. 219, 272-77 (2007) (citations omitted).

Nevertheless, the Court of Appeals has invalidated governmental classifications that present no rational basis for the distinction between the classes or which present no fair and substantial relation to the objective of the legislation. *See Frankel v. Board of Regents of University of Maryland System*, 361 Md. 298, 316 (2000). "[I]n the area of economic regulation," the Court of Appeals "has been particularly distrustful of classifications which are based solely on geography, *i.e.*, treating residents of one county or city differently from residents of the remainder of the State." *Verzi v. Baltimore County*, 333 Md. 411, 423 (1994) (invalidating a Baltimore County regulation that required county police officers who responded to disabled vehicle calls to exclusively call tow vehicle operators who worked in Baltimore County). "Such classifications generally do not advance a legitimate government interest, but are intended instead to 'confer the monopoly of a profitable business upon residents' of one geographical area to the exclusion of the residents of other areas." *Id.* at 427 (quoting *Mayor of Havre de Grace v. Johnson*, 143 Md. 601, 608 (1923)).

In *Frankel*, the Court of Appeals invalidated a Board of Regents policy that a student is not entitled to in-state tuition status if more than one-half of the student's financial support came from a person or persons who lived out-of-state. 361 Md. at 314. "[A] government regulation placing a greater burden on some Marylanders than on others based on geographical factors must rest upon some ground of difference having a fair and substantial relation to the object of the regulation." *Id.* at 317. The Court found that even if the Board had a legitimate basis for charging a lower in-state tuition to State residents, the Board's tuition distinction based on out-of-state financial support had no fair and substantial relation to the Board's legitimate objective. *Id. See also Kirsch*, 331 Md. at 106-08 (declaring as violating equal protection an ordinance limiting the number of college students who could live in a home as tenants because the court determined that the distinction between students and other tenants was arbitrary and did not advance the county's stated objective).

A rational basis for House Bill 1573 could be to improve neighborhoods, promote homeownership, and reduce blight caused by vacant and abandoned properties. Yet it is unclear how the bill relates to these interests, given that the percentage of properties sold at tax sales in the County is already quite high. Moreover, there is no requirement that purchasers of property at the limited auction actually live in the homes purchased.[2] Thus, differentiating between properties in

[2] A bill provision that required that the purchaser to occupy the property was deleted from the bill.

Prince George's County, and between those allowed to participate in the limited auction and those who cannot, risks be viewed negatively by a reviewing court as creating an improper preference. *Verzi* , 333 Md. at 423. As a result, there is a risk a court would find that such distinctions violate equal protection.

Similarly, creating a closed auction available primarily for County employees and residents in a County tax sale that discriminates against other potential bidders in a tax sale also presents a potential Privileges and Immunities Clause violation. The Privileges and Immunities Clause, U.S. Const., Art. IV, § 2, provides that "[t]he Citizens of each State shall be entitled to the Privileges and Immunities of the Citizens in the several States." The purpose of the Privileges and Immunities Clause is to "strongly ... constitute the citizens of the United States as one people," by "plac[ing] the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 296 (1998) (*quoting Paul v. Virginia*, 75 U.S. 168, 180 (1868)). See also *United Bldg. and Constr. Trades Council of Camden County and Vicinity v Mayor and Council of City of Camden*, 465 U.S. 208, 215-16 (1984). Discrimination against non-residents may be allowable if "(i) there is a substantial reason for the difference in treatment and (ii) the discrimination practiced against non-residents bears a substantial relationship to the State's objective." *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985). Thus, the bidding opportunity granted to County employees, residents and others authorized to participate in the closed auction and possibly pay a lower price on property being auctioned by the County may be a constitutional violation if there is no substantial reason for the different treatment that has a substantial relationship to a valid governmental interest.

Another concern, albeit to a lesser extent, is that a court would find that the bill's requirement of a limited auction, as applied to individuals who may possess a residual interest in the value of the property in a tax sale that is in excess of the owed taxes and expenses, is an unconstitutional governmental taking of property or abrogation of vested rights.[3]

> Together, Maryland's Declaration of Rights and Constitution prohibit the retrospective reach of statutes that would have the effect of abrogating vested rights. Article 24 of the Maryland Declaration of Rights, guaranteeing due process of law, and Article III, § 40 of the Maryland Constitution, prohibiting governmental taking

[3] When the court enters a judgment foreclosing a right of redemption, the tax-sale purchaser must pay the unpaid balance of the purchase price to the collector, who must, in turn, execute a deed transferring title to the property to the plaintiff. TP § 14-818(a)(3). "Any balance over the amount required for payment of taxes, interest, penalties, and costs of sale shall be paid by the collector to ... the person entitled to the balance[.]" TP § 14-818(a)(4)(i). *See Kona Properties, LLC v. W.D.B. Corp., Inc.,* 224 Md. App. 517, 543 (2015) ("to receive the bid surplus, the former property owner requests the surplus funds from the collector").

> of property without just compensation, have been shown, through a long line of Maryland cases, to prohibit the retrospective reach of statutes that would result in the taking of vested property rights.

Muskin v. State Dept. of Assessments and Taxation, 422 Md. 544, 555-56 (2011) (citations omitted). "The Maryland Declaration of Rights and the Maryland Constitution are generally read in concert with their federal constitutional counterparts, and cases interpreting federal constitutional provisions are treated as 'persuasive authority by a Maryland court interpreting the Maryland Declaration of Rights and Constitution.'" *Harvey v. Sines*, 228 Md. App. 283, 293 (2016) (quoting *Muskin*, 422 Md. at 555-56).

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. 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. To establish a successful Takings Clause claim, a person must establish possession of a constitutionally protected property interest. *Neifert v. Dept. of the Environment*, 395 Md. 486, 517 (2006) (relying on *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-01 (1984)). Another requirement is that the property owners must show that they had reasonable investment-backed expectations that they would be able to sell the property at a reasonable price. "[T]he inquiry must acknowledge that not every investment deserves protection and ... some investors will inevitably be disappointed." *The Maine Educ. Ass'n Benefits Trust v. Cioppa*, 695 F.3d 145 (1st Cir. 2012). As for a claim about the retroactive abrogation of vested rights, the Court of Appeals considers three factors: "fair notice, reasonable reliance, and settled expectations," to determine "the nature and extent of the change in law and the degree of connection between the operation of the new rule and a relevant past event." *John Deere Construction & Forestry Co. v. Reliable Tractor, Inc.*, 406 Md. 139, 147 (2008).

Owners of the properties subject to a tax sale are delinquent on their taxes owed. Moreover, property owners and others who have a valid interest in the property have a statutory right of redemption that makes available to them a procedure to protect their interests. Consequently, there is a strong argument that they could have no reasonable expectation of a large return on their investment on their property. Additionally, simply because the property owner may have received more revenue at a more competitive auction than received in the limited auction is unlikely to be sufficient to establish an unconstitutional taking. *See Harvey*, 228 Md. at 295 (holding that dormant mineral interest owners did not have "reasonable reliable and settled expectations" that they could make use of their interest as they had not done so for more than 20 years and also had never paid taxes on those interests).

At the same time, by limiting the participants of an auction in a tax sale, the State may be creating a mechanism that results in a significantly lower tax sale price than would have been achieved at an open auction. Such a result, as applied to an individual owner of an interest in the

property, could arguably constitute a governmental taking of the property if the bids at the closed auctions prove to be substantially lower than those at the public auction.

Despite the foregoing concerns, because a reviewing court would give the State a great deal of discretion to determine whether classifications are rationally related to a legitimate governmental interest, we cannot conclude that House Bill 1573 is clearly unconstitutional on its face.

Sincerely,

Brian E. Frosh
Attorney General

BEF/SBB/kd

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

SUPREMACY CLAUSE – FEDERAL REGULATIONS ON RETIREMENT AGE

Bill/Chapter: Senate Bill 664/Chapter 690 of 2017

Title: Correctional Officers' Retirement System – Membership

Attorney General's Letter: April 17, 2017

Issue: Whether a bill that alters the membership of the Correctional Officers Retirement System to include certain job classifications would violate the Supremacy Clause of the U.S. Constitution if proposed federal regulations are adopted.

Synopsis: Senate Bill 664/Chapter 690 of 2017 adds alcohol and drug counselors, certain mental health professionals, social workers, and recreation officers of the Department of Public Safety and Correctional Services as members of the Correctional Officers Retirement System and allows these individuals to retire with 20 years of service in the Correctional Officers Retirement System.

Discussion: The Attorney General advised that if proposed Internal Revenue Service (IRS) regulations on the definition of normal retirement age are adopted, the employees holding job classifications named in the bill will not be eligible for the safe harbor for public safety officers established by the IRS. An eligible individual must be an employee "who provides police protection, firefighting services, or emergency medical services for any area within the jurisdiction."

Article VI, cl. 2 of the U.S. Constitution, the Supremacy Clause, provides that the Constitution and "the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land" and that "the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The Attorney General concluded that while Senate Bill 664 is constitutional, if the proposed federal regulations are adopted, the job classifications added by the bill will no longer meet the IRS definition of qualified public safety employees, and the retirement age set for employees in these job classifications will not comply under the new federal regulations.

Drafting Tips: **When preparing to draft a bill, the drafter should conduct background research into any federal laws or regulations that may impact the bill's application. State legislation that interferes with or is contrary to federal law is unenforceable under the Supremacy Clause of the U.S. Constitution.**

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April 17, 2017

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

RE: Senate Bill 664 – Correctional Officers' Retirement System – Membership

Dear Governor Hogan:

We have reviewed for constitutionality and legal sufficiency Senate Bill 664 – "Correctional Officers' Retirement System – Membership." We can hereby approve Senate Bill 664 for constitutionality and legal sufficiency. We write to advise you of pending federal regulations that could impact the bill's application.

Senate Bill 664 makes individuals in the following job classifications members of Correctional Officers Retirement System ("CORS") as a condition of employment on or after 7/1/17: alcohol and drug counselors, certain mental health professionals, social workers, and recreation officers. Also, the bill allows these individuals to retire with a combined 20 years of service in the Employees' Pension System ("EPS") and CORS.

The Internal Revenue Service has issued proposed regulations on the definition of normal retirement age. 81 Fed. Reg. 4599 (January 27, 2016) (to be codified at 26 C.F.R. § 1-401(a)-1). CORS permits retirement after 20 years of service without regard to age. If the IRS proposed regulations are adopted, employees holding the job classifications named in Senate Bill 664 will not be eligible for the governmental safe harbors established by IRS for public safety officer. Moreover, the use of EPS service to determine retirement eligibility in CORS could render the safe harbor unavailable.

The proposed federal regulations provide guidance regarding whether the normal retirement age under a governmental plan satisfies the requirements of section 401(a) of the IRS Code, and set forth safe harbors by which a governmental plan can use to comply with the normal retirement age requirements. The correctional officers in the CORS most likely qualify for the public safety safe harbors in accordance with the proposed

regulations. Therefore, a normal retirement age of 55 and 10 years of service or any age with at least 20 years of service is likely acceptable for correctional officers in CORS. *See* §1.401(a)-1(b)(2)(v)(H).

The job classifications added to CORS by Senate Bill 664, however, do not satisfy the definition of qualified public safety employees under IRS Code § 72(t)(10). Therefore, unless the proposed federal regulations are substantially changed, employees holding these job classifications will not be eligible for the public safety safe harbor. This means that, as to these employees, the normal retirement age for CORS will not comply with the federal regulations. An additional issue presented by this bill is that it permits these employees to become eligible to retire from CORS based upon a combination of service credit earned in the EPS and CORS. The public safety safe harbor will not be available for service credit earned in the EPS that was not earned while employed as a qualified public safety employee.

The proposed federal regulations state that the final regulations will be effective for employees hired during plan years beginning on or after the later of (1) January 1, 2017, or (2) the close of the first regular legislative session of the legislative body with the authority to amend the plan that begins on or after 3 months after the final regulations are published in the Federal Register. Therefore, if the proposed federal regulations are finally adopted, consideration will need to be given to possible plan amendments to CORS. However, based on the language in the proposed federal regulations, any such amendments can be prospective as to new hires after the effective date.

Sincerely,

Brian E. Frosh
Attorney General

BEF/SBB/kd

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

SUPREMACY CLAUSE – FEDERAL REGULATIONS ON TRAFFIC CONTROL DEVICES

Bill/Chapter: House Bill 1334/Chapter 761 of 2017

Title: State Highway Administration – Traffic Control Devices – Decorative Treatments

Attorney General's Letter: General Approval letter dated April 26, 2017, footnote 4.

Issue: Whether a bill that requires the State Highway Administration to establish a policy that allows for the installation of decorative treatments on traffic control devices marred by graffiti or vandalism is enforceable in light of federal regulations and the Supremacy Clause of the U.S. Constitution.

Synopsis: House Bill 1334/Chapter 761 of 2017 requires the State Highway Administration to establish a policy that allows for the installation of decorative treatments on "traffic control devices" marred by graffiti or vandalism, establishes provisions governing the issuance of permits to install decorative treatments on traffic control devices, and requires the State Highway Administration to adopt specified regulations. The preamble to the bill references "traffic signal cabinets" as a magnet for graffiti.

Discussion: The Attorney General noted that federal regulations require a state to adopt a Manual of Uniform Traffic Control Devices (MUTCD) that complies with the national MUTCD. The national MUTCD and Maryland's MUTCD both prohibit traffic control devices and their supports from "bearing any advertising message or any other message that is not related to traffic control."

Article VI, cl. 2 of the U.S. Constitution, the Supremacy Clause, provides that the U. S. Constitution and federal law and regulations are "the supreme Law of the Land." The Attorney General concluded that, although decorative treatments of "traffic signal cabinets" may be allowed under the regulation, because the bill references "traffic control devices" it conflicts with the national MUTCD and the Maryland MUTCD. The State Highway Administration would not be able to place decorative treatments on traffic control devices or on their supports as the bill describes.

Drafting Tips: **Although cross-referencing to an already-established term from the Maryland Code is often useful in drafting, care must be taken that the term used is in fact appropriate to addressing the subject matter of the bill.**

A drafter should try to make sure that a federal statute or regulation does not impact a bill's application. The Supremacy Clause of the U.S. Constitution precludes State legislation that interferes with or is contrary to federal law.

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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 26, 2017

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

Dear Governor Hogan:

We have reviewed the following bills and hereby approve them for constitutionality and legal sufficiency:

HOUSE	SENATE
HB 185[1]	SB 396[2]
HB 459	SB 517[3]
HB 477[2]	
HB 628[3]	
HB 1334[4]	
HB 1345	

Sincerely,

Brian E. Frosh

Brian E. Frosh
Attorney General

BEF/SB/eb

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

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[1] HB 185 contains a drafting error. The bill authorizes county health officers to issue a civil citation to a person who distributes tobacco products, paraphernalia, or coupons to a minor. The Senate Finance Committee amendments, which according to the Committee's Floor Report on the bill, "[p]rohibit[] an assessment of a criminal fine if a civil penalty is imposed, and vice versa." The amendments to the bill, however, on page 4, in lines 13 through 15, and on page 6, in lines 5 through 7, respectively, appear to be mistakenly reversed and are currently illogical and inconsistent with the Committee's intent. As a result, we recommend that in next year's corrective bill, the amended language on page 4, in lines 13 through 15, should be amended to replace page 6, lines 5 through 7 of the bill, which should replace the improper language on page 4, in lines 13 through 15. Additionally, the description of the amendments in the purpose paragraph, on page 1, in lines 14 and 15, which, while accurately describing the amendments as they appear in the bill, does not reflect the intent of the Finance Committee in adopting the amendments and is similarly currently illogical.

[2] HB 477 is identical to SB 396.

[3] HB 628 is identical to SB 517.

[4] The preamble to HB 1334 states that traffic signal cabinets are a magnet for graffiti and that decorative treatments can beautify public spaces, build community, and mitigate and prevent graffiti. The body of the bill, however, does not relate to decorative treatments on traffic signal cabinets but on "traffic control devices." Transportation Article, § 11-167 defines the term traffic control device as "any sign, signal, marking, or device" that is not inconsistent with the Maryland Vehicle Law and is "placed by authority of an authorized public body or official to regulate, warn, or guide traffic." The national Manual of Uniform Traffic Control Devices (MUTCD) (2009 Edition) has a similar definition. *Id.* at 1A.13.01 (238). Each focuses on the portion of whatever signs or devices are expected to convey a message to the public. The MUTCD specifically states that these devices and their supports "shall not bear any advertising message or any other message that is not related to traffic control." *Id.* at 1A.01.03. Maryland has an MUTCD that complies with the national MUTCD, Transportation Article, § 25-104 as federal regulations require. 23 C.F.R. § 655.603(b). Thus, the State Highway Administration would not be able to place decorative treatments on traffic control devices as stated in the body of House Bill 1334 or on their supports. It could, however, place decorative treatments on traffic signal cabinets as discussed in the preamble if it is within its authority to do so.

Maryland Constitutional Issues

APPROPRIATIONS – "SUBJECT TO BUDGET LIMITATIONS" LANGUAGE – LEGISLATIVE INTENT

Bill/Chapter: House Bill 1513/Chapter 513; Senate Bill 531/Chapter 638 and House Bill 269/Chapter 637; and Senate Bill 278/Chapter 396 and House Bill 586/Chapter 395 of 2017

Title: Maryland Historic Trust Grant Improvement Act; Housing Navigator and Aftercare Program; and Maryland Farms and Families Act

Attorney General's Letters: General Approval Letter dated April 27, 2017, footnote 4; General Approval Letter dated April 28, 2017, footnote 1; and Attorney General's Letter date April 26, 2017

Issue: Whether under the Maryland Constitution the Governor is required to include an appropriation in the budget when a bill expresses the General Assembly's intent that a purported appropriation is "subject to the limitations of the State budget."

Synopsis: House Bill 1513/Chapter 513, Senate Bill 531/Chapter 638 and House Bill 269/Chapter 637, and Senate Bill 278/Chapter 396 and House Bill 278/Chapter 395 each purportedly require the Governor to include a specific appropriation for the respective bill's purpose in the annual budget (requiring an annual appropriation in the Maryland Historic Trust Grant Fund, establishing a Housing Navigator and Aftercare Program, and establishing a Maryland Farms and Families Program, and Maryland farms and Families Fund, respectively). Each bill was subsequently amended to make the funding '[s]ubject to the limitations of the State budget."

Discussion: Under Article III, § 52 of the Maryland Constitution the General Assembly may, by legislation, require the Governor to include funding for a particular program in future budgets. In order to constitute a valid funding mandate, however, the statute must clearly prescribe a dollar amount for future appropriations or provide an objective basis or formula for calculating the appropriations. Although all the bills included a specific dollar amount, the Attorney General advised that because the bills were amended to state that the appropriations were "[s]ubject to the limitations of the State budget" the Governor was not obliged to include the appropriated funds. The Attorney General also reasoned, based on the legislative history – including committee reports, fiscal notes, floor statements, and interviews with committee staff – that the intended purpose of the added language was to make the funding discretionary. The Attorney General concluded that the bills did not represent constitutional funding mandates.

Drafting Tips: **When drafting legislation that seeks to include a specific appropriation for a particular program, the drafter should ensure that in order to constitutionally bind the Governor to a specific funding level, the legislation list a specific dollar amount or an objective basis from which a level of funding can easily be computed. Modifying the appropriation with the phrase "subject to the limitations of the State budget," will be interpreted as only expressing a legislative intent, rather than making the funding mandatory.**

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April 27, 2017

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

Dear Governor Hogan:

We have reviewed the following bills and hereby approve them for constitutionality and legal sufficiency:

HOUSE	SENATE
HB 941[1]	SB 631[1]
HB 1375[2]	SB 714[5]
HB 1382[3]	SB 781[2]
HB 1513[4]	SB 1121[3]

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Sincerely,

Brian E. Frosh

Brian E. Frosh
Attorney General

BEF/SB/eb

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

---

[1] HB 941 and SB 631 are identical. The bills add to the Criminal Law Article a new § 10-626, which establishes an Animal Abuse Emergency Compensation Fund, to be administered by the Executive Director of the Governor's Office of Crime Control and Prevention ("GOCCP") and used to defray the costs of the removal and care of animals impounded under the State's animal abuse and neglect laws. The bills provide that the Executive Director of GOCCP "shall receive from the Fund each fiscal year the amount, not exceeding $50,000 in a fiscal year, necessary to offset its costs in administering" Title 10, Subtitle 6, of the Criminal Law Article. We note that expenditures from the Fund may be made only pursuant to a valid appropriation. Md. Const., Art. III, § 32 ("No money shall be drawn from the Treasury of the State ... except in accordance with an appropriation by Law ...."). Moreover, it is within the Governor's discretion as to whether to include funding for this purpose in the budget bill, as this provision does not establish an enforceable funding mandate. 65 *Opinion of the Attorney General* 108, 110 (1980) (law requiring the Governor to fund a program at a particular level must "clearly prescribe a dollar amount or an objective basis from which a level of funding can easily be computed.").

[2] HB 1375 is the cross-filed bill to SB 781, but they are not identical. On page 4, lines 11-12 of HB 1375, a reference is made correctly to "an oral swab." In SB 781, the reference on page 4, line 4, is made incorrectly to "a oral swap." Both bills, however, contain the same grammatical error in another place. In HB 1375, page 5, line 1, the "a" should be "an"; and in SB 781, the error appears on page 4, line 26. These errors are not legally significant and changes can be made in next year's corrective bill. In addition, both bills state that "The Court of Appeals shall adopt rules to carry out the requirements of this subsection." This language should be interpreted as directory, not mandatory.

[3] HB 1382 and SB 1121 are nearly identical. The difference appears in HB 1382 on page 1, in line 6, where the purpose paragraph includes the phrase "making a conforming change;" which is not included in SB 1121. The difference is not legally significant, and either bill or both bills may be signed.

[4] HB 1513 allows money in the Maryland Historic Trust Grant Fund to be used for administrative costs, not to exceed 5% of the annual general fund appropriation to the Fund, and limits grants to historic properties owned by the Maryland Historic Trust to 10% of all grants awarded from the Fund. Although the bill purports to require that the Governor include in the budget bill an annual appropriation of $1.5 million to the Fund (§ 5A-328(i), page 4, lines 19 through 22), it is our view that this provision should be viewed as a non-binding expression of legislative intent, not a constitutional funding mandate. The House amended the bill to make the Governor's obligation to include the annual $1.5 million appropriation in the budget bill "[s]ubject to the limitations of the State budget." As we noted in our bill review letter on HB 586 and SB 278, dated April 26, 2017, identical language was added to those bills, and we concluded that the intended purpose of the language was to make the funding discretionary. We reach the same conclusion as to the funding provision in HB 1513. The House Floor Report on HB 1513 describes the funding provision of the bill, as amended, as follows: "the Governor is *authorized* to include in the annual State budget bill an appropriation of $1.5 million to the Maryland Historic Trust Grant Fund." (Emphasis added). Also, when the Fiscal Note on the bill was revised to reflect the amendments, the description of the bill as "establish[ing] a mandated appropriation" was deleted.

[5] SB 714 amends the State's Public Defender Act to require District Court commissioners to determine whether an individual is indigent for purposes of representation by the Office of Public Defender ("OPD"). We write to discuss two instances in which the legislative intent is not clear, thus the General Assembly may wish to clarify those issues in the future. The first involves Criminal Procedure Article, § 16-210(c)(5), which was not amended and states that "[i]f the Office subsequently determines that an applicant is ineligible: (i) the Office shall inform the applicant; and (ii) the applicant shall be required to engage the applicant's own attorney and reimburse the Office for the cost of the representation provided." It is unclear whether the legislature intended that the OPD retain discretion to make such determinations, given that the office will no longer be making initial determinations. In addition, it is possible that a defendant may have an initial appearance before a Circuit Court. *See* Rule 4-213(c). It is unclear whether that person must appear before a District Court commissioner to determine indigency.

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April 28, 2017

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

Dear Governor Hogan:

We have reviewed the following bills and hereby approve them for constitutionality and legal sufficiency:

HOUSE	SENATE
HB 269[1]	SB 178
HB 1002[2]	SB 531[1]
HB 1381[3]	SB 581[4]
	SB 866[3]
	SB 966[2]

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Sincerely,

Brian E. Frosh

Brian E. Frosh
Attorney General

BEF/SB/eb

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

---

[1] HB 269 and SB 531 are identical. The bills establish a Housing Navigator and Aftercare Program to assist certain families and individuals in securing and maintaining permanent housing. As introduced, the bills stated that "[b]eginning in fiscal year 2019 and for each fiscal year thereafter, the Governor shall include in the annual budget an appropriation for the Program of $516,828." Each bill was amended in its house of origin to make the Governor's obligation to include the annual $516,828 appropriation in the budget bill "[s]ubject to the limitations of the State budget ...." It is our view that this provision, as amended, should be viewed as a non-binding expression of legislative intent, not a constitutional funding mandate. In our bill review letter on HB 586 and SB 278, dated April 26, 2017, we concluded that identical language added to those bills was intended to make the funding discretionary. We reach the same conclusion as to the funding provisions in HB 269 and SB 531. Committee staff indicated that the purpose of the amendment was to eliminate the funding mandate and make the funding for the Program subject to the Governor's discretion. The Fiscal Notes appear to reflect that purpose. The Fiscal Notes described the bills, as introduced, as "establish[ing] a mandated appropriation," however, that description was deleted when the Fiscal Notes were revised after the bills were amended.

[2] HB 1002 and SB 966 are nearly identical. In HB 1002, on page 1, in line 6, the purpose paragraph refers to the "Program," whereas SB 966 uses the lowercase "program," page 1, line 6. Also, the purpose paragraph of SB 966 repeats the phrase "stating the intent of the General Assembly regarding the timing for expending certain unexpended bill assistance and arrearage funds" (page 1, lines12-13 and page 1, line 14 through page 2, line 1). Both bills are legally sufficient, but if you decide to sign both, we recommend that you sign HB 1002 last.

[3] HB 1381 and SB 866 are nearly identical. In HB 1381, on page 6, in line 28, the word "SHALL" is superfluous. The word does not appear in SB 866. Although it is not legally significant, if you decide to sign both bills, we recommend that you sign SB 866 last.

[4] SB 581 is the identical cross-filed bill to HB 516, which was enacted on April 6, 2017 under Article II, Section 17(b) of the Maryland Constitution and is Chapter 25.

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April 26, 2017

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

RE: House Bill 586 and Senate Bill 278, "Maryland Farms and Families Act"

Dear Governor Hogan:

We have reviewed House Bill 586 and SB 278, "Maryland Farms and Families Act" and approve them for constitutionality and legal sufficiency. We write to advise about the proper construction of a provision in the bill.

The bills establish a Maryland Farms and Families Program in the Department of Agriculture and a Maryland Farms and Families Fund. The purpose of the Fund is to provide grants to nonprofit organizations that use the funds to increase the purchasing power of certain food-insecure residents at participating farmers markets. As introduced, the bills required that the Governor include in the budget bill each year an appropriation of $500,000 to the Fund. Each bill was amended in its house of origin to make the Governor's obligation to include the annual $500,000 appropriation in the budget bill "[s]ubject to the limitations of the State budget." House Bill 586, page 3, lines 20-22; Senate Bill 278, page 3, lines 20-22.

The purpose of the amendment, based on the bill language alone, is unclear, as we question what it means to make the Governor's obligation to include funds in the budget subject to the limitations of the budget. The legislative history, however, indicates that the purpose of the amendment was to effectively strike the funding mandate and make the funding of the program subject to the Governor's discretion. The House Committee Floor Report on the bill described the effect of the amendment as follows: "... this removes the mandate and makes funding discretionary." Describing the amendments on the House floor, the floor leader also characterized them as making the funding discretionary. Finally, when the Fiscal Notes on the bills were revised

to reflect these amendments, the description of the bills as "establish[ing] a mandated appropriation" was deleted.

In light of this legislative history, we believe the funding provision in the bills should be construed as a non-binding expression of legislative intent, not a funding mandate.

Sincerely,

Brian E. Frosh
Attorney General

BEF/DWS/kd

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

APPROPRIATIONS – REQUIREMENTS FOR CONSTITUTIONAL FUNDING MANDATES – DOLLAR AMOUNT OR OBJECTIVE BASIS OR FORMULA

Bill/Chapter: House Bill 1240/Chapter 715, House Bill 601/Chapter 673, and House Bill 941/Chapter 410 of 2017

Title: Individualized Education Programs – Studies; Senior Call-Check Service and Notification Program – Establishment; and Criminal Law – Animal Abuse Emergency Compensation Fund – Establishment

Attorney General's Letters: General Approval Letter dated April 17, 2017, footnote 3; General Approval Letter dated April 25, 2017, footnote 3; and General Approval Letter dated April 27, 2017, footnote 1

Issue: Whether, under the Maryland Constitution, bills with an appropriation that does not include a dollar amount or an objective basis or formula for calculating an appropriation create a funding mandate that is binding on the Governor.

Synopses: House Bill 1240/Chapter 715 requires the State Department of Education, in consultation with the Department of Budget and Management and the Department of Legislative Services, to contract with a public or private entity to conduct an independent study of the individualized education program process in the State. The bill requires that the Governor "shall include sufficient funds in the State budget for the appropriate fiscal years for the State Department of Education to cover the costs of conducting the study."

House Bill 601/Chapter 673 requires the Department of Aging to establish and administer the Senior Call-Check Service and Notification Program. Additionally, the bill provides that the program "shall be funded at an amount that is equal to the cost that the Department… is expected to incur for the upcoming fiscal years for the State Department of Education to cover the costs of conducting the study."

House Bill 941/Chapter 410 requires the Animal Abuse Emergency Compensation Fund to be administered by the Governor's Office of Crime Control and Prevention to assist in paying costs associated with the removal and care of animals impounded under the State's animal abuse and neglect law. The bill states that the Executive Director of the Office "shall receive from the Fund each fiscal year the amount, not exceeding $50,000 in a fiscal year, necessary to offset its costs in administering" the provisions in the Criminal Law Article covering crimes related to animals.

Discussion: Under Article III, § 52 of the Maryland Constitution the General Assembly may, by legislation, require the Governor to include funding for a particular program in future budgets. It is the long held opinion of the Attorney General that in order to constitute a valid funding mandate, a statute must clearly prescribe a dollar amount for future appropriations or provide an objective basis or formula for calculating the appropriations. Although all three bills purported to provide formulas necessary to cover or offset the costs of administering the established programs, none provided a specific dollar amount or an objective formula by which a level of funding could be calculated. In the case of the Animal Abuse and Emergency Compensation Fund, a maximum funding amount was set. This was still, however, insufficient to establish a clear level of funding, according to the Attorney General. As a result, the language used in the bill only declares the General Assembly's intent that the budget include funding for the programs. The Attorney General concluded that it remains within the Governor's discretion as to whether to include the funding in the budget bill for the stated purposes of the bills.

Drafting Tips: **When drafting legislation that seeks to include an appropriation for a particular program, the sponsor should be advised that, in order to bind the Governor to a specific funding level, the legislation must, under the Maryland Constitution, include a specific dollar amount or an objective formula for calculating a level of funding. An appropriation for funds "equal to the cost [the executive branch expects] to incur" or necessary "to offset [administrative] costs" is not sufficient. Without a specific dollar amount or an objective formula, the appropriation will be seen as an expression of legislative intent, rather than as a mandate.**

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April 17, 2017

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

Dear Governor Hogan:

We have reviewed the following bills and hereby approve them for constitutionality and legal sufficiency:

HOUSE	SENATE
HB 248	SB 232[2]
HB 304[1]	SB 353[1]
HB 616[2]	SB 392
HB 786	SB 549[4]
HB 1145	SB 873
HB 1240[3]	
HB 1265[4]	

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Sincerely,

Brian E. Frosh

Brian E. Frosh
Attorney General

BEF/SB/eb

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

---

[1] HB 304 is identical to SB 353.

[2] HB 616 is identical to SB 232.

[3] Section 2 of HB 1240 requires the State Department of Education, in consultation with the Department of Budget and Management and the Department of Legislative Services, to contract with a public or private entity to conduct an independent study of the individualized education program in the State. Section 2(c) provides that the Governor "shall include sufficient funds in the State budget for the appropriate fiscal years for the State Department of Education to cover the costs of conducting the study." A law requiring the Governor to fund a program at a particular level must "clearly prescribe a dollar amount or an objective basis from which a level of funding can easily be computed." 65 *Opinion of the Attorney General* 108, 110 (1980). Because the bill does not identify a specific dollar amount or provide an objective basis by which a level of funding can be calculated, we believe the provision should be interpreted as a nonbinding expression of legislative intent.

[4] HB 1265 is identical to SB 549.

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OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 25, 2017

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

Dear Governor Hogan:

We have reviewed the following bills and hereby approve them for constitutionality and legal sufficiency:

HOUSE	SENATE
HB 305[1]	SB 453[4]
HB 526[2]	SB 736[6]
HB 601[3]	SB 1075[7]
HB 646[4]	SB 1138
HB 738[5]	
HB 892[6]	
HB 1553[7]	

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Sincerely,

Brian E. Frosh

Brian E. Frosh
Attorney General

BEF/SB/eb

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

---

[1] HB 305 was signed by you on April 18, 2017 and is Chapter 304.

[2] HB 526 was signed by you on April 18, 2017 and is Chapter 288.

[3] HB 601 establishes a Senior Call-Check Service and Notification Program and specifies that the Program, which is to be funded from the existing Universal Service Trust Fund, "shall be funded at an amount that is equal to the cost that the Department of Aging is expected to incur for the upcoming fiscal year to provide the service and administer the program," not to exceed a certain amount of money in the Trust Fund. State Finance and Procurement Article, § 3A-506(a)(2). Although this provision purports to require a minimum level of annual funding for the Program, it does not identify a specific dollar amount or provide an objective basis by which a level of funding can be calculated. Accordingly, we believe it should be interpreted as a nonbinding expression of legislative intent. 65 *Opinion of the Attorney General* 108, 110 (1980) (law requiring the Governor to fund a program at a particular level must "clearly prescribe a dollar amount or an objective basis from which a level of funding can easily be computed.").

[4] HB 646 and SB 453 are identical. HB 646 was signed by you on April 11, 2017 and is Chapter 74. SB 453 was also signed by you on April 11, 2017 and is Chapter 73.

[5] HB 738 contains a provision that is in conflict with SB 944, which you have already signed into law as Chapter 161. Both bills amend § 3-313(a) of the Criminal Law Article, but HB 738 restructures the language of paragraph (a) in a manner that conflicts with new language in SB 944 (Chapter 161), which refers to § 3-305 and § 3-306 of the Criminal Law Article "AS THE SECTIONS EXISTED BEFORE OCTOBER 1, 2017[.]" Although HB 738 may be signed, we recommend that the drafting conflict be resolved in next year's corrective bill.

[6] HB 892 is identical to SB 736. Both bills are legally sufficient, but only one of the bills should be signed because the enactment of duplicate bond bills would double the authorized debt.

[7] HB 1553 is identical to SB 1075.

BRIAN E. FROSH
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OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 27, 2017

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

Dear Governor Hogan:

We have reviewed the following bills and hereby approve them for constitutionality and legal sufficiency:

HOUSE	SENATE
HB 941[1]	SB 631[1]
HB 1375[2]	SB 714[5]
HB 1382[3]	SB 781[2]
HB 1513[4]	SB 1121[3]

Sincerely,

Brian E. Frosh

Brian E. Frosh
Attorney General

BEF/SB/eb

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

---

[1] HB 941 and SB 631 are identical. The bills add to the Criminal Law Article a new § 10-626, which establishes an Animal Abuse Emergency Compensation Fund, to be administered by the Executive Director of the Governor's Office of Crime Control and Prevention ("GOCCP") and used to defray the costs of the removal and care of animals impounded under the State's animal abuse and neglect laws. The bills provide that the Executive Director of GOCCP "shall receive from the Fund each fiscal year the amount, not exceeding $50,000 in a fiscal year, necessary to offset its costs in administering" Title 10, Subtitle 6, of the Criminal Law Article. We note that expenditures from the Fund may be made only pursuant to a valid appropriation. Md. Const., Art. III, § 32 ("No money shall be drawn from the Treasury of the State ... except in accordance with an appropriation by Law ...."). Moreover, it is within the Governor's discretion as to whether to include funding for this purpose in the budget bill, as this provision does not establish an enforceable funding mandate. 65 *Opinion of the Attorney General* 108, 110 (1980) (law requiring the Governor to fund a program at a particular level must "clearly prescribe a dollar amount or an objective basis from which a level of funding can easily be computed.").

[2] HB 1375 is the cross-filed bill to SB 781, but they are not identical. On page 4, lines 11-12 of HB 1375, a reference is made correctly to "an oral swab." In SB 781, the reference on page 4, line 4, is made incorrectly to "a oral swap." Both bills, however, contain the same grammatical error in another place. In HB 1375, page 5, line 1, the "a" should be "an"; and in SB 781, the error appears on page 4, line 26. These errors are not legally significant and changes can be made in next year's corrective bill. In addition, both bills state that "The Court of Appeals shall adopt rules to carry out the requirements of this subsection." This language should be interpreted as directory, not mandatory.

[3] HB 1382 and SB 1121 are nearly identical. The difference appears in HB 1382 on page 1, in line 6, where the purpose paragraph includes the phrase "making a conforming change;" which is not included in SB 1121. The difference is not legally significant, and either bill or both bills may be signed.

[4] HB 1513 allows money in the Maryland Historic Trust Grant Fund to be used for administrative costs, not to exceed 5% of the annual general fund appropriation to the Fund, and limits grants to historic properties owned by the Maryland Historic Trust to 10% of all grants awarded from the Fund. Although the bill purports to require that the Governor include in the budget bill an annual appropriation of $1.5 million to the Fund (§ 5A-328(i), page 4, lines 19 through 22), it is our view that this provision should be viewed as a non-binding expression of legislative intent, not a constitutional funding mandate. The House amended the bill to make the Governor's obligation to include the annual $1.5 million appropriation in the budget bill "[s]ubject to the limitations of the State budget." As we noted in our bill review letter on HB 586 and SB 278, dated April 26, 2017, identical language was added to those bills, and we concluded that the intended purpose of the language was to make the funding discretionary. We reach the same conclusion as to the funding provision in HB 1513. The House Floor Report on HB 1513 describes the funding provision of the bill, as amended, as follows: "the Governor is *authorized* to include in the annual State budget bill an appropriation of $1.5 million to the Maryland Historic Trust Grant Fund." (Emphasis added). Also, when the Fiscal Note on the bill was revised to reflect the amendments, the description of the bill as "establish[ing] a mandated appropriation" was deleted.

[5] SB 714 amends the State's Public Defender Act to require District Court commissioners to determine whether an individual is indigent for purposes of representation by the Office of Public Defender ("OPD"). We write to discuss two instances in which the legislative intent is not clear, thus the General Assembly may wish to clarify those issues in the future. The first involves Criminal Procedure Article, § 16-210(c)(5), which was not amended and states that "[i]f the Office subsequently determines that an applicant is ineligible: (i) the Office shall inform the applicant; and (ii) the applicant shall be required to engage the applicant's own attorney and reimburse the Office for the cost of the representation provided." It is unclear whether the legislature intended that the OPD retain discretion to make such determinations, given that the office will no longer be making initial determinations. In addition, it is possible that a defendant may have an initial appearance before a Circuit Court. *See* Rule 4-213(c). It is unclear whether that person must appear before a District Court commissioner to determine indigency.

APPROPRIATIONS – TRANSPORTATION TRUST FUND – USE OF FUNDS

Bill/ Chapter: Senate Bill 1149/Chapter 785 of 2017

Title: Baltimore City – Maryland Transit Administration – Transit Services for Public School Students

Attorney General Letter: General Approval Letter, dated April 26, 2017, footnote 4.

Issue: Whether a bill requiring the Maryland Transit Administration (MTA) to provide free ridership to certain eligible public school students in Baltimore City violates the State constitutional requirements regarding the use of funds from the Transportation Trust Fund (TTF).

Synopsis: Senate Bill 1149/Chapter 785 of 2017 requires MTA to provide free ridership on transit vehicles to eligible Baltimore City Public School (BCPS) students. Under the bill, MTA may not collect fees or reimbursement for these services, and must work with BCPS to adopt regulations that establish the eligibility criteria for students to use the services. Free ridership under the bill is anticipated to decrease TTF revenues by $6 million annually for fiscal 2019 through 2021.

Discussion: Article III, § 53 of the Constitution of Maryland generally requires that TTF funds be used only "(1) [for] the purpose of paying the principal of and interest on transportation bonds as they become due and payable; and (2) [after] meeting debt service requirements for transportation bonds, for any lawful purpose related to the construction and maintenance of an adequate highway system in the State or any other purpose related to transportation." In reviewing the bill, the Attorney General observed that, assuming that MTA established rider eligibility requirements that were similar to those contained in an existing ridership contract under which BCPS pays MTA to provide transportation for BCPS students, the bill would not affect TTF expenditures. Therefore, the bill did not violate the constitutional requirements for TTF fund uses because TTF expenditures remained unaffected.

The Attorney General also noted that even if the anticipated annual decrease in TTF revenues associated with free ridership to BCPS students could be said to constitute an "expenditure," the bill did not violate State constitutional requirements because the operation of MTA's transit vehicles is a purpose related to transportation.

Drafting Tips: **A drafter must be conscious of the constitutional limitations on TTF fund uses. Generally, TTF funds may only be used (1) for the purpose of paying the principal of and interest on transportation bonds as they**

become due and payable; and (2) after meeting debt service requirements for transportation bonds, for any lawful purpose related to the construction and maintenance of an adequate highway system in the State or any other purpose related to transportation.

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April 26, 2017

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

Dear Governor Hogan:

We have reviewed the following bills and hereby approve them for constitutionality and legal sufficiency:

HOUSE	SENATE
HB 82[1]	SB 125[1]
HB 1183[2]	SB 986[2]
HB 1464	SB 1148[3]
HB 1619[3]	SB 1149[4]

Sincerely,

Brian E. Frosh

Brian E. Frosh
Attorney General

BEF/SB/eb

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

---

[1] HB 82 and SB 125 are identical. The bills repeal the Woodrow Wilson Bridge and Tunnel Compact with an effective date of October 1, 2017. However, the termination of the Compact by repealing the legislation conflicts with Transportation Article, § 10-303, Text of Compact, Chapter I, Article VII, which provides as follows: "1. Any signatory may withdraw from the Compact upon one year's written notice to that effect to the other signatories. In the event of a withdrawal of one of the signatories from the Compact, the Compact shall be terminated; provided, however, that no revenue bonds, notes, or other evidence of obligation issued pursuant to Chapter II, Article VI or any other financial obligations of the Authority remain outstanding and that the withdrawing signatory has made a full accounting of its financial obligations, if any, to the other signatories. 2. Upon termination of this Compact, the jurisdiction over the matters and persons covered by this Compact shall revert to the signatories and the federal government, as their interest may appear." Therefore, although HB 82 and SB 125 repeal the Compact from Maryland's statutory provisions, the Compact would not normally terminate until after "one year's notice ... to the other signatories," and any financial obligations of the "Authority" would remain outstanding and the terms of the Compact may continue to govern those obligations. According to the Fiscal & Policy Note, the Authority "was never active because federal funding was used to construct the replacement bridge." We interpret this to mean the Compact was never signed. Moreover, Virginia repealed its Compact statute in 2015.

[2] HB 1183 is identical to SB 986.

[3] HB 1619 is identical to SB 1148.

[4] SB 1149 requires the Maryland Transit Administration ("MdTA") to provide free ridership on transit vehicles to eligible Baltimore City Public School ("BCPS") students and prohibits MdTA from collecting reimbursement for these services. It has been suggested that the bill violates the restrictions in Article III, § 53 regarding the use of money in the Transportation Trust Fund ("TTF"). As noted in the Fiscal and Policy Note, assuming MdTA establishes eligibility requirements for ridership that are similar to those under its current contract with BCPS, TTF expenditures are not affected by the bill. The effect of the bill is an estimated decrease of TTF revenues of $6 million annually for fiscal years 2019 through 2021. Even if it could be said that this shifting of the financial burden from BCPS to the State constitutes an expenditure of TTF funds, we do not believe the bill violates Article III, § 53, as the operation of MdTA's transit vehicles is a "purpose related to transportation."

DELEGATION OF LEGISLATIVE AUTHORITY – CONTINGENCY ON RECOMMENDATIONS BY PRIVATE ENTITY

Bill/Chapter: Senate Bill 169/Chapter 721 of 2017

Title: Health – Cost of Emergency Room Visits to Treat Dental Conditions and Coverage of Dental Services Under Medicaid – Study

Attorney General's Letter: April 28, 2017

Issue: Whether making certain provisions of a bill contingent on the recommendations of a nonprofit private entity amounts to an unconstitutional delegation of the General Assembly's legislative authority.

Synopsis: Section 1 of Senate Bill 169/Chapter 721 of 2017 authorizes the Maryland Dental Action Coalition (MDAC), a nonprofit private entity, to study the annual cost of emergency room visits to treat dental conditions of adults and to determine whether it is advisable to provide Medicaid dental services for adults with incomes at or below 133% of the federal poverty level. Section 2 of the bill authorizes the State, beginning January 1, 2019, to expand benefits under its Medicaid program to include dental services for such adults, as permitted under federal law and subject to available funding. Section 3 of the bill, however, contains a contingency clause providing that Section 2 may take effect only if MDAC determines that the proposed expansion is advisable.

Discussion: Citing the Maryland Court of Appeals, the Attorney General expressed concern that the bill violates the doctrine that prohibits a legislative body delegating its law-making function to any other branch of government or entity. The delegation of legislative authority to a private entity is particularly problematic, according to the Attorney General, because private entities are not accountable to the general public.

The Attorney General concluded that Sections 2 and 3 of the bill are likely unconstitutional under this delegation doctrine. These sections essentially delegate to MDAC, a private entity, the authority to determine whether the expansion of benefits under the State's Medicaid program is advisable and, based on that determination, whether the expansion will become law. The Attorney General suggested that Sections 2 and 3 could be severed from the constitutionally valid Section 1, so that MDAC's study could go forward. The Attorney General advised, however, that the outcome of this study should be treated as a recommendation, and that the General Assembly should pursue separate legislation if it chooses to expand the Medicaid program as contemplated in Section 2 of the bill.

Drafting Tips: **When drafting legislation that calls for a private entity to conduct a study or make a report to the General Assembly, a drafter should be mindful of the delegation doctrine. Substantive provisions of law should not be made contingent on the recommendations of a private entity. If a sponsor wants to delay implementation of a particular policy or program pending the outcome of a study by a private entity, the drafter should suggest that the sponsor pursue separate legislation after the study is completed.**

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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: Senate Bill 169 - Health – Cost of Emergency Room Visits to Treat Dental Conditions and Coverage of Dental Services Under Medicaid – Study

Dear Governor Hogan:

We have reviewed Senate Bill 169 ("Health – Cost of Emergency Room Visits to Treat Dental Conditions and Coverage of Dental Services Under Medicaid – Study"). We write to raise a constitutional issue with respect to Section 2 of the bill and the related contingency provision in Section 3. We believe there is a significant risk that a court would find that these provisions amount to an unconstitutional delegation of the General Assembly's legislative authority. Even if a court determines these provisions are unconstitutional, it is our view that the provisions are severable and will not impact the constitutionality of the provisions in Section 1. Thus, we approve Senate Bill 169 for constitutionality and legal sufficiency.

Section 2 of the bill allows the State to provide dental services under its Medicaid program, beginning January 1, 2019, for adults whose household income is at or below 133% of the poverty level, as permitted under federal law and subject to available funding in the budget. Section 3 provides that Section 2 is contingent on the Maryland Dental Action Coalition, a nonprofit private entity, determining after a study that it is "advisable to expand benefits" provided under Medicaid to include dental services for such adults. If the Coalition's study does not include a finding that the expansion of Medicaid is advisable, Section 2 of the bill shall be null and void. The study to be conducted by the Coalition is authorized by Section 1.

Describing the delegation doctrine, the Court of Appeals has explained that it "prohibits a legislative body from delegating its law-making function to any other branch of government or entity and is a corollary of the separation of powers doctrine implicit in the United States Constitution and expressly provided in the Maryland Constitution." *Maryland State Police v. Warwick Supply & Equip. Co.*, 330 Md. 474, 480 (1993).

> Of course, the General Assembly cannot constitutionally delegate to another body its "fundamental decision making authority" in the sense that it cannot delegate a function which the Constitution expressly and unqualifiedly vests in the General Assembly itself. Thus the General Assembly could not delegate to an administrative agency its power to impeach, to propose constitutional amendments, or to enact statutes.

Christ by Christ v. Maryland Dep't of Nat. Res., 335 Md. 427, 444–45 (1994) (citations omitted).

The Court of Appeals has "long sanctioned delegations of legislative power to administrative officials where sufficient safeguards are legislatively provided for the guidance of the agency in its administration of the statute." *State Police v. Warwick Supply & Equipment Co. Inc.*, 330 Md. 474, 480 (1993). Moreover, there are limited instances in which authority is lodged with private persons by a legislative body. *See e.g., Portsmouth Stove and Range Co. v. Mayor and City Council of Baltimore*, 158 Md. 244, 251 (1929) (City ordinance authorizing health commissioner to require tests by unofficial agencies before issuing licenses for gas installation not an unlawful delegation of legislative authority). However, the Court of Appeals has explained that "delegations of legislative authority to private entities are strictly scrutinized because, unlike governmental officials or agencies, private persons will often be wholly unaccountable to the general public." *Bd. of Trustees of Employees' Retirement Syst. of City of Baltimore v. Mayor and City Council of Baltimore,* 317 Md.72, 94 (1989).

In this case, Section 3 of the bill effectively delegates to a private entity the authority to determine whether the expansion of Medicaid under Section 2 is advisable and, based on its finding, whether Section 2 is to become law. We believe it is likely that a court would conclude that giving such authority to a private entity is unconstitutional under the delegation doctrine. *See, e.g., Maryland Co-op. Milk Producers v. Miller,* 170 Md. 81 (1936) ("The delegation with which we are concerned in this instance is not to the voters of a political subdivision or of a described locality, but to an indefinite portion of producer, consumer, and distributor classes in areas having no legislative description," and the "salient provisions [of the Act] are not intended to become operative until invoked by their affirmative request."). Moreover, because the contingency provision in Section 3 is integral to Section 2, we believe a court likely would find Section 2 invalid as well.

Even if a court were to conclude that Sections 2 and 3 are invalid, it is our view that the provisions in Section 1, which authorize the study, would most likely be found to be severable. Maryland law expressly provides for severability. General Provisions Article, § 1-210. 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 Section 1 can be accomplished without Sections 2 and 3. As a result, we believe Senate Bill 169 is not clearly unconstitutional and that if the bill is enacted, the Coalition would be able to conduct the study pursuant to Section 1.[1] However, we believe any findings of the Coalition should be treated as recommendations only, and the General Assembly should pursue separate legislation if it chooses to expand the Medicaid program as contemplated in Section 2 of the bill.

Sincerely,

Brian E. Frosh
Attorney General

BEF/DWS/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).

DELEGATION OF LEGISLATIVE POWER – COUNTY DESIGNATION BY DEPARTMENT OF COMMERCE

Bill/ Chapter:	Senate Bill 317/Chapter 149 of 2017
Title:	More Jobs for Marylanders Act of 2017
Attorney General Letter:	General Approval Letter, dated April 11, 2017, footnote 2.
Issue:	Whether a bill authorizing an Executive Branch agency to independently designate certain counties for the purpose of providing favorable tax treatment and an exemption from certain fees to manufacturing businesses that locate and create jobs within those counties, absent any other express guidance from the General Assembly, violates the delegation doctrine.
Synopsis:	Senate Bill 317/Chapter 149 of 2017 establishes the More Jobs for Marylanders Program, administered by the Department of Commerce. A new manufacturing business that locates and creates jobs within a Tier I county, defined in the Act as a qualified distressed county or a county designated by the department (up to three), may be entitled to a 10-year (1) income tax credit for up to 5.75% of the total wages paid to qualified employees; (2) sales and use tax refund; (3) State property tax credit equal to 100% of the tax imposed on the facility's real property; and (4) exemption from paying corporate filing fees.
Discussion:	Under the delegation doctrine a legislative body is prohibited from delegating its law-making function to any other branch of government or entity. The Attorney General observed that the General Assembly's authorization for the Department of Commerce to designate up to three counties as Tier I counties under the program – without specifying further criteria in selection – presented the risk that a court could find that the General Assembly had failed to provide the department with sufficient guidance regarding selection of these counties, thereby running afoul of the delegation doctrine. The Attorney General, however, also observed that existing law already provides the department with broad discretion regarding economic development, which could be read to provide the necessary discretion to determine which additional counties should be deemed Tier I counties in light of Senate Bill 317's purpose. The Attorney General concluded that the provision was not clearly unconstitutional.
Drafting Tips:	**When drafting a bill that allows an Executive Branch agency to make a determination that could be made legislatively, the drafter should consider whether the bill provides sufficient criteria to guide the agency in making the determination. Failing to provide an agency with sufficient guidance in the exercise of the agency's discretion may result in an unconstitutional delegation of legislative power.**

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April 11, 2017

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

Dear Governor Hogan:

We have reviewed the following bills and hereby approve them for constitutionality and legal sufficiency:

HOUSE	SENATE
HB 522[1]	SB 317[2]
HB 879	SB 427[1]

104 LEGISLATIVE SERVICES BUILDING · 90 STATE CIRCLE · ANNAPOLIS, MARYLAND 21401-1991
410-946-5600 · 301-970-5600 · FAX 410-946-5601 · TTY 410-946-5401 · 301-970-5401

Sincerely,

Brian E. Frosh

Brian E. Frosh
Attorney General

BEF/SB/eb

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

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[1] HB 522 is identical to SB 427.

[2] For Senate Bill 317, we considered the definition on page 8, lines 25-27, in light of the delegation doctrine, which "prohibits a legislative body from delegating its law-making function to any other branch of government or entity." *Maryland State Police v. Warwick Supply & Equip. Co.*, 330 Md. 474, 480 (1993). The definition authorizes the Commerce Department to designate up to three additional counties as Tier I counties. "[D]elegations of legislative power to executive branch agencies or officials ordinarily do not violate the constitutional separation of powers requirement as long as guidelines or safeguards, sufficient under the circumstances, are contained in the pertinent statute or statutes." *Christ v. Md. Dep't of Natural Resources*, 335 Md. 427, 441 (1994) (citation omitted). There is a risk a court would find that the legislature has not provided the Department with sufficient guidance regarding the selection of the three additional counties. Nevertheless, it is possible that the broad discretion granted to the Department regarding economic development can be read to provide the necessary discretion to determine which additional counties should be considered Tier I counties in light of the Senate Bill 317's purpose. *See Pressman v. Barnes*, 209 Md. 544, 555 (1956). Thus, we do not believe the provision is clearly unconstitutional.

LEGAL SUFFICIENCY – REPEAL OF INTERSTATE COMPACT

Bill/ Chapter:	Senate Bill 125/Chapter 682 and House Bill 82/Chapter 681 of 2017
Title:	Woodrow Wilson Bridge and Tunnel Compact – Repeal
Attorney General Letter:	General Approval Letter, dated April 26, 2017, footnote 1.
Issue:	Whether bills repealing the Woodrow Wilson Bridge and Tunnel Compact, without providing a notice of withdrawal to the other compact signatories, are sufficient to withdraw the State from the compact.
Synopsis:	Senate Bill 125/Chapter 682 and House Bill 82/Chapter 681 of 2017 repeal the Woodrow Wilson Bridge and Tunnel Compact. The compact was established in 1995 between Maryland, Virginia, and Washington, DC, to create the Woodrow Wilson Bridge and Tunnel Authority in order to fund, build, maintain, and administer a new Woodrow Wilson Bridge. The compact contains a provision requiring a signatory to provide one year's written notice of withdrawal to the other signatories prior to withdrawing from the compact. The compact further provides that the withdrawal of any one of its signatories will terminate the compact.
Discussion:	The Attorney General noted that the text of the compact (Md. Code, Transportation § 10-303) provides that a signatory may withdraw from the compact on one year's written notice to that effect to the other signatories and that in the event of a withdrawal of one of the signatories from the compact, the compact is terminated. The Attorney General explained that while the bills purport to repeal the compact from Maryland's statutory provisions, it would not normally terminate until after the State provided one year's notice of its withdrawal to the other compact signatories. The Attorney General noted, however, that according to the bill's fiscal and policy note, the authority established under the compact was never active because federal funding was used to construct a replacement bridge. The Attorney General interpreted this to mean that the compact was never signed. The Attorney General also observed that Virginia repealed its version of the compact in 2015. The compact provides for its own termination on withdrawal of any one of the signatories, suggesting that Virginia's repeal served to effectively terminate it at that time.
Drafting Tips:	**When drafting legislation that repeals a provision of law, the drafter should be aware of any special requirements affecting the termination and repeal of the provision, especially if the requirements are spelled out within the law being repealed.**

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April 26, 2017

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

Dear Governor Hogan:

We have reviewed the following bills and hereby approve them for constitutionality and legal sufficiency:

HOUSE	SENATE
HB 82[1]	SB 125[1]
HB 1183[2]	SB 986[2]
HB 1464	SB 1148[3]
HB 1619[3]	SB 1149[4]

Sincerely,

Brian E. Frosh
Attorney General

BEF/SB/eb

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

---

[1] HB 82 and SB 125 are identical. The bills repeal the Woodrow Wilson Bridge and Tunnel Compact with an effective date of October 1, 2017. However, the termination of the Compact by repealing the legislation conflicts with Transportation Article, § 10-303, Text of Compact, Chapter I, Article VII, which provides as follows: "1. Any signatory may withdraw from the Compact upon one year's written notice to that effect to the other signatories. In the event of a withdrawal of one of the signatories from the Compact, the Compact shall be terminated; provided, however, that no revenue bonds, notes, or other evidence of obligation issued pursuant to Chapter II, Article VI or any other financial obligations of the Authority remain outstanding and that the withdrawing signatory has made a full accounting of its financial obligations, if any, to the other signatories. 2. Upon termination of this Compact, the jurisdiction over the matters and persons covered by this Compact shall revert to the signatories and the federal government, as their interest may appear." Therefore, although HB 82 and SB 125 repeal the Compact from Maryland's statutory provisions, the Compact would not normally terminate until after "one year's notice ... to the other signatories," and any financial obligations of the "Authority" would remain outstanding and the terms of the Compact may continue to govern those obligations. According to the Fiscal & Policy Note, the Authority "was never active because federal funding was used to construct the replacement bridge." We interpret this to mean the Compact was never signed. Moreover, Virginia repealed its Compact statute in 2015.

[2] HB 1183 is identical to SB 986.

[3] HB 1619 is identical to SB 1148.

[4] SB 1149 requires the Maryland Transit Administration ("MdTA") to provide free ridership on transit vehicles to eligible Baltimore City Public School ("BCPS") students and prohibits MdTA from collecting reimbursement for these services. It has been suggested that the bill violates the restrictions in Article III, § 53 regarding the use of money in the Transportation Trust Fund ("TTF"). As noted in the Fiscal and Policy Note, assuming MdTA establishes eligibility requirements for ridership that are similar to those under its current contract with BCPS, TTF expenditures are not affected by the bill. The effect of the bill is an estimated decrease of TTF revenues of $6 million annually for fiscal years 2019 through 2021. Even if it could be said that this shifting of the financial burden from BCPS to the State constitutes an expenditure of TTF funds, we do not believe the bill violates Article III, § 53, as the operation of MdTA's transit vehicles is a "purpose related to transportation."

LOCAL LAWS – CODE COUNTIES – REFERENDA REQUIRED FOR LOCAL LAWS

Bill/Chapter: Senate Bill 957/Chapter 619 and House Bill 1168/Chapter 618 of 2017

Title: Counties and Municipalities – Land Bank Authorities

Attorney General's Letter: April 28, 2017

Issue: Whether bills that authorize counties and municipalities to establish land bank authorities "by ordinance" and specify that the ordinances are not subject to referendum violate the requirement that any action of a code county in the enactment, amendment, or repeal of a local law is subject to referendum in Article XI-F, § 7 of the Maryland Constitution.

Synopsis: Senate Bill 957/Chapter 619 and House Bill 1168/618 of 2017 authorize counties and municipalities to establish, by ordinance, land bank authorities. The bills specify that an ordinance adopted under the legislation "is not subject to referendum." The bills also direct that when the authority becomes incorporated it becomes an instrumentality of the incorporating local government.

Discussion: The Attorney General noted that Article XI-F, § 7 of the Maryland Constitution provides that "[a]ny action of a code county in the enactment, amendment, or repeal of a public local law is subject to a referendum of the voters in the county.…" The section also provides that the General Assembly may "amplify the provisions of this section…in any manner not inconsistent with this Article . . . ." The General Assembly's authority to exempt a public local law from the referendum power, when the power has been granted by charter is therefore "questionable" according to the Attorney General.

Turning to the issue of whether the ordinance establishing a land bank should be considered a "public local law," the Attorney General, citing the Court of Appeals, noted that the classification of a legislative action as a general or local law is based on the subject matter and substance of the law and not only its form. According to the court, a public local law is a law applicable to the incorporation, organization, or government of a code county and contained in the county's code of public local laws. Because the bills define a land bank authority as a "body politic" and "instrumentality" of the local government, the Attorney General stated that a court could find an ordinance creating an authority to be local law subject to a referendum. The Attorney General, however, also speculated that a court could find an ordinance authorized by the bills as being enacted to a

public general law and not as an exercise of home rule powers and, therefore, not subject to referendum. Where a county's enactment of a "local" ordinance is "pursuant to…affected by, and had an effect on" an entire statewide legislative enactment, it is not a local law, according to the precedent cited by the Attorney General. Because the bills do not mandate land bank authorities, expressly authorize intragovernmental agreement, and because the bills' sponsors testified that they sought this legislation because vacant and abandoned properties are a statewide concern, the Attorney General suggested that a court may rule that an ordinance enacted under the authority of the bills is not a public local law. In any case, the Attorney General concluded that even if the language restricting the ordinances from referenda was found unconstitutional, it would be severable from the rest of the legislation.

Drafting Tips: **Before drafting legislation that authorizes a code county to draft ordinances not subject to referendum, the drafter should consider the applicability of Article XI-F of the Maryland Constitution, which prohibits the General Assembly from enacting legislation that would be local in its terms or in its effect for code counties and not subject to referendum. If the ordinances are, however, arguably related to an entire statewide legislative enactment, a court may hold that they are public general laws that can be precluded from referenda.**

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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 1168 and Senate Bill 957 – Counties and Municipalities – Land Bank Authorities

Dear Governor Hogan:

We have reviewed House Bill 1168 and Senate Bill 957, titled "Counties and Municipalities – Land Bank Authorities." We write to raise a constitutional issue with a particular provision as it relates to code counties. Even if a court determines the provision in question is unconstitutional, it is our view that the provision is severable and will not impact the constitutionality of the remainder of House Bill 1168 and Senate Bill 957. Thus, we approve these bills for constitutionality and legal sufficiency.

The legislation in question authorizes counties and municipalities to establish a land bank authority "by ordinance." The bills further specify:

> An ordinance adopted under this section:
>
> (i) is administrative in nature;
> (ii) is not subject to referendum; and
> (iii) in a charter county that has a publicly elected county executive or in a municipality that has a publicly elected chief executive or mayor, is subject to approval by the county executive, chief executive, or mayor.

(New provision Local Government Article ("LG"), § 1-1403(a)(3)). The bills also direct the local government to file with the State Department of Assessment and Taxation articles of incorporation for the land authority and when accepted, the authority "becomes a body politic and corporation and an instrumentality of the incorporating local government." (Amended LG § 1-1403(c)(2)).

Article XI-F, § 7 of the Maryland Constitution provides in part that "[a]ny action of a code county in the enactment, amendment, or repeal of a public local law is subject to a referendum of the voters in the county...." That section further states that "[t]he General Assembly shall amplify the provisions of this section by general law in any manner not inconsistent with this Article..." In our view, this language does not allow the General Assembly to prohibit a public local law from being subject to a referendum. Accordingly, if an ordinance authorized by House Bill 1168 and Senate Bill 957 is determined to be a public local law, the ordinance is subject to a referendum. *Kent Island Defense League LLC v. Queen Anne's Co. Bd. of Elections*, 145 Md. App. 684, 692 (2002). Moreover, if an ordinance authorized by the bills is determined to be a public local law, a constitutional issue could arise in the bill's application to charter counties that, by charter, entitle the county's voters to petition such laws to referendum. As explained by the Court of Appeals, "referendum by petition is quite clearly a power affecting the form or structure of local government and therefore belongs to that class of powers vested directly in the people of the several counties by Article XI-A, § 1." *Ritchmount Partnership v. Bd. of Sup'rs of Elections for Anne Arundel Cty.*, 283 Md. 48, 61 (1978). The General Assembly's authority to exempt a public local law from the referendum power, when that power is granted by a charter, is thus questionable.

In *Kent Island Defense League,* the court recognized that "[t]he classification of legislative action as general or local is based on 'subject matter and substance and not merely on form.'" *Id.* at 693 (quoting *Cole v. Secretary of State*, 249 Md. 425, 433 (1968)). That case involved Article XI-F, § 1(2), which defines "public local law" as "a law applicable to the incorporation, organization, or government of a code county and contained in the county's code of public local laws..." Because House Bill 1168 and Senate Bill 957 specify that a land bank authority is a "body politic" and "instrumentality" of the local government, it is possible that a court would find that an ordinance creating the authority is a public local law subject to a referendum. *See Boomer v. Waterman Family Limited Partnership*, 2017 WL 823712 (Mar. 2, 2017) (determining that zoning density ordinances were public local laws for purposes of Article XI-F).

On the other hand, a court could consider an ordinance authorized by House Bill 1168 and Senate Bill 957 as being enacted pursuant to a public general law and not as an exercise of home rule powers. In that case, the ordinance would not be considered a "public local law," and as a result, not subject to referendum. "A general law is one that pertains to two or more geographical subdivisions within the State" and "deals with the general public welfare, a subject which is of significant interest not just to any one county, but rather to more than one geographical subdivision, or even to the entire state." *Tyma v. Montgomery County*, 369 Md. 497, 507 (2002). Where a county's enactment of a "local" ordinance is "pursuant to ... affected by, and had an effect on" an entire statewide legislative enactment, it is not a local law. *Kent Island Defense League*, 145 Md. App. at 695.

In *Kent Island Defense League*, the court held that ordinances enacted by Queen Anne's County were not public local laws for purposes of Article XI-F because they were enacted "pursuant to mandatory language in the State Critical Area law, a public general law, binding on

the County." *Id.* at 692. "The ordinances were part of the implementation of a State program in which uniformity is required... The State statutes do not provide for, nor contemplate, local referenda." *Id.* The court went on to conclude that the ordinances in question were not public local laws "because they were enacted pursuant to a public general law, and they are not purely local in origin or effect." *Id.* at 695.

Similarly, while House Bill 1168 and Senate Bill 957 do not mandate that local governments create land bank authorities, the bills outline certain requirements and procedures for the establishment of such. Moreover, arguably the bills are not purely local in concern because they expressly authorize intergovernmental agreements. Further, the bills' sponsors testified that they sought expansion of land bank authority beyond municipalities, as authorized under current law, because vacant and abandoned properties are a larger Statewide concern. Accordingly, a court may very well conclude that an ordinance enacted under the authority of House Bill 1168 and Senate Bill 957 is not a public local law.

Even if a court were to find the provision in question 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 provision were to be found unconstitutional, it would be severable from the remainder of the legislation.

Sincerely,

Brian E. Frosh
Attorney General

BEF/SBB/kd

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

LOCAL LAWS – MUNICIPAL HOME RULE – BUSINESS IMPROVEMENT DISTRICTS

Bill/Chapter: House Bill 386/Chapter 444 of 2017

Title: Montgomery County – Economic Development – Business Improvement Districts MC 12-17

Attorney General's Letter: April 28, 2017

Issue: Whether legislation that authorizes municipal corporations in a particular county to create special taxing districts violates Article XI-E of the Maryland Constitution.

Synopsis: House Bill 386/Chapter 444 of 2017 exempts Montgomery County from the statewide business improvement district law and authorizes the governing board of Montgomery County and its municipalities to create, by law, a business improvement district based on provisions only applicable to Montgomery County.

Discussion: The Attorney General noted that the bill's application to municipal corporations in Montgomery County only and not others in the State is constitutionally problematic. Section 1 of Article XI-E of the Maryland Constitution (Municipal Home Rule Amendment) provides 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." Article XI-E, § 5 further provides that a municipal corporation may not impose any tax, license fee, franchise tax, or fee unless the General Assembly expressly authorizes the tax or fee through general legislation that applies alike to all municipal corporations in the same class.

The Attorney General advised that legislation authorizing municipal corporations in a particular county to confer tax benefits would violate Article XI-E. While House Bill 386 as applied to municipalities in Montgomery County would violate the requirement that general laws apply alike to all municipal corporations in the same class, the bill's application to the governing board of Montgomery County would be constitutional. Since Maryland law expressly provides for severability, and the purpose of the legislation can be accomplished without the offending language, the Attorney General found that House Bill 386 is not clearly unconstitutional and Montgomery County would be able to establish business improvement districts as authorized by the legislation.

Drafting Tips: **In drafting legislation that relates to the incorporation, organization, government, or affairs of any municipal corporation, the drafter should consider the applicability of Article XI-E of the Maryland Constitution (Municipal Home Rule Amendment), which limits the General Assembly's power to enact legislation that would be special or local in its terms or in its effect. The drafter should be mindful that Article XI- E requires that legislation concerning municipal corporations in the State generally be in the form of "general laws which shall in their terms and in their effect apply alike to all municipal corporations."**

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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

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

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

Sincerely,

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).

LEGISLATIVE INTENT – STATEMENT OF LEGISLATIVE INTENT FOR PREVIOUSLY ENACTED LEGISLATION

Bill/Chapter: Senate Bill 584/Chapter 701 and House Bill 1468/Chapter 700 of 2017

Title: Medical Records – Disclosure of Directory Information and Medical Records

Attorney General's Letter: April 17, 2017

Issue: Whether the uncodified section of a bill declaring it to be intent of the General Assembly that previously enacted legislation be interpreted in a certain way is effective in establishing that interpretation.

Synopsis: Senate Bill 584/Chapter 701 and House Bill 1468/Chapter 700 of 2017, among other things, alter the circumstances under which a health care provider may disclose directory information and medical records without the authorization of the person in interest, including information that was developed primarily in connection with mental health services. An uncodified section of the bills added by committee amendment also provides that it is the intent of the General Assembly that Title 4, Subtitle 3 of the Health – General Article, the Maryland Confidential Records Act ("the Act"), including provisions not affected by the bills, not be interpreted (1) to be more restrictive than federal privacy regulations under the Health Insurance Portability and Accountability Act (HIPAA); (2) to conflict with HIPAA; or (3) to be inconsistent with HIPAA regulations, policy guidance, or judicial decisions related to HIPAA.

Discussion: The Attorney General began by noting that the bills amend certain provisions of the Act to conform to federal requirements under HIPAA. The Attorney General then focused on the uncodified language of Section 2 of the bills that purportedly declare the legislative intention of the Act – specifically, that the Act should not be interpreted to be more restrictive than federal privacy regulations under HIPAA, to conflict with HIPAA, or interpreted to be inconsistent with HIPAA regulations, policy guidance, or judicial decisions related to HIPAA.

The Attorney General pointed out that there were provisions of the Act, unaffected by the bills, that "clearly are more protective of medical records" than federal requirements under HIPAA. While the Attorney General noted that provisions of state law that offer more protection of privacy rights are generally not preempted by HIPAA, the Attorney General also reviewed jurisprudence regarding a statement of legislative intent by a subsequent

legislative body for previously enacted legislation. In the precedents cited by the Attorney General, an attempt by a subsequent legislature to influence the interpretation of previously enacted legislation were not given "much weight" by the judiciary. If the language of a provision is not clear and the issue of legislative intent is raised, it is the intent of the legislative body that enacted the provision that is operative. An attempt by a subsequent legislature to alter or clarify the interpretation of a provision without altering the statutory language itself is essentially disregarded by the judiciary. The Attorney General advised that it would be unlikely that a court would therefore rely on the language of the bill to construe the Act contrary to its plain meaning.

Drafting Tips: **When a sponsor requests a statement of legislative intent for previously enacted legislation without changing the law itself, advise the sponsor that the judiciary usually considers only the intent of the enacting legislature and disregards attempts by subsequent legislatures to shape interpretation without amending statutory language.**

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April 17, 2017

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

RE: Senate Bill 584 and House Bill 1468 – Medical Records – Disclosure of Directory Information and Medical Records

Dear Governor Hogan:

We have reviewed for constitutionality and legal sufficiency Senate Bill 584 and House Bill 1468, "Medical Records – Disclosure of Directory Information and Medical Records." We hereby approve these bills for constitutionality and legal sufficiency. We write to advise you about an interpretation of a provision that specifies legislative intent.

Senate Bill 584 is identical to its cross-file House Bill 1468. These bills amend provisions of the Maryland Confidentiality of Medical Records Act (the "Act") regarding the disclosure of directory information and medical records to family members. Those provisions currently are more protective of mental health records than federal law; as amended by these bills, the provisions will conform to federal law. The bills also amend disclosure requirements related to directory information to conform to federal law. The bills contain uncodified language in Section 2 that states the intent of the General Assembly that the Act may not be interpreted as more restrictive than federal law, is not intended to be in conflict with federal law, and is to be interpreted as consistent with federal law. Despite this declaration of the General Assembly's intent, there are provisions of the Act that clearly are more protective of medical records than federal law. *See*, *e.g.*, Health-General Article ("HG"), § 4-302(d) (limits on redisclosure), § 4-305(b)(3), (4) (protections for mental health records), § 4-306(b)(2), (6), (7) (protections for mental health records), and § 4-307 (protections for mental health records).

Generally, provisions of State law that provide more protection for an individual's privacy rights than federal law are not pre-empted by the regulations implementing the Health Insurance Portability and Accountability Act ("HIPAA"). *See* 45 C.F.R. §§

160.202, 160.203. The Court of Appeals has held that "'a statement by present members of a legislative body as to what their predecessors intended in a statute enacted several years previously is not entitled to much weight.'" *Green v. Nassif*, 426 Md. 258, 288-89 (2012) (*quoting State v. Coleman*, 423 Md. 666, 683 (2011)). *See also Collier v. Connolley*, 285 Md. 123, 126 (1979) ("We do not place much weight upon what the legislature, in 1977, said was intended in a 1974 statute.") In *Green*, *Coleman*, and *Collier*, the Court went on to apply its usual principles of statutory construction. *See Green*, 426 Md. at 289-91; *Coleman*, 423 Md. at 683; *Collier*, 285 at 126. Thus, it is unlikely that a court would rely on the language in Section 2 of the bill to construe the Act contrary to its plain meaning and find that the Act is no more protective than HIPAA.

Sincerely,

Brian E. Frosh
Attorney General

BEF/SBB/kd

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

SEPARATION OF POWERS DOCTRINE – LEGISLATIVE BRANCH ROLE IN EXECUTIVE BRANCH RULEMAKING

Bill/Chapter: Senate Bill 734/Chapter 659 of 2017

Title: Sexual Assault Victims Resources Act of 2017

Attorney General's Letter: General Approval Letter, dated April 26, 2017, footnote 5.

Issue: Whether a bill requiring the Attorney General to adopt regulations based on recommendations from a committee that includes members of the General Assembly violates the separation of powers doctrine in Article 8 of the Maryland Declaration of Rights.

Synopsis: Senate Bill 734/Chapter 659 of 2017, among other things, establishes the Maryland Sexual Assault and Evidence Policy and Funding Committee to provide for a statewide sexual assault evidence kit policy and funding committee to increase access to justice for sexual assault victims; hold the perpetrators of sexual assault accountable; increase availability of sexual assault evidence collection exams; and create effective statewide policies regarding the collection, testing, and retention of medical forensic evidence in sexual assault cases. Four members of the General Assembly are included in the membership of the committee and the Attorney General, or the Attorney General's designee, serves as the committee chair. The Attorney General is required to adopt regulations based on recommendations from the committee regarding the collection, testing, and retention of sexual assault evidence collection kits.

Discussion: Under the separation of powers provision in Article 8 of the Maryland Declaration of Rights, the "Legislative, Executive, and Judicial powers of Government ought to be forever separate and distinct from each other" and no person exercising the functions of one of the departments may assume or discharge the duties of another. The Attorney General's separate constitutional executive authority is provided under Article V of Constitution of Maryland. Adopting regulations is an executive function delegated to the Attorney General under the bill and, because the committee includes legislative members, the Attorney General suggested that the committee's recommendations should be considered advisory rather than mandatory in order to avoid a potential violation of the separation of powers doctrine.

Drafting Tips: **When drafting legislation that creates a body with both executive and legislative membership charged with making recommendations for**

regulations to an agency of the Executive Branch, the drafter should be mindful that the separation of powers doctrine prohibits the General Assembly from usurping the constitutional power of the Executive Branch. Where legislation delegates rulemaking authority to the Executive Branch the drafter should advise the sponsor that a body with such membership may act only in an advisory capacity to the Executive Branch entity.

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April 26, 2017

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

Dear Governor Hogan:

We have reviewed the following bills and hereby approve them for constitutionality and legal sufficiency:

HOUSE	SENATE
HB 246[1]	SB 734[5]
HB 250[2]	
HB 514[3]	
HB 518[4]	

Sincerely,

Brian E. Frosh

Brian E. Frosh
Attorney General

BEF/SB/eb

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

---

[1] HB 246 was signed by you on April 18, 2017 and is Chapter 254.

[2] HB 250 was signed by you on April 18, 2017 and is Chapter 256.

[3] HB 514 is identical to SB 184, which was enacted on April 6, 2017, under Article II, Section 17(b) of the Maryland Constitution and is Chapter 14.

[4] HB 518 contains a typographical error. On page 5, in line 3, before "1." the bill is missing a designation for item "(i)" which exists in current § 18-338.2(b)(1) of the Health-General Article. No corrective action is necessary as the reference properly exists under current law.

[5] SB 734, among other things, establishes a Maryland Sexual Assault Evidence Kit Policy and Funding Committee and directs the Committee to develop and disseminate best practices information and recommendations regarding sexual assault evidence collection kits. The bill also directs the Attorney General, in consultation with the Committee, to adopt regulations based on the Committee's recommendations. As the Committee includes legislator members, we note that the Committee's recommendations should be considered advisory to avoid any potential violation of the separation of powers provision in Article 8 of the Maryland Declaration of Rights.

We also note that a provision of the bill requiring the Governor to include funds in the State budget each year to implement Criminal Law Article, § 11-927 (page 10, lines 7-14) should be construed as a non-binding expression of legislative intent because it does not identify a specific dollar amount or provide an objective basis by which a level of funding can be calculated. 65 *Opinion of the Attorney General* 108, 110 (1980) (law requiring the Governor to fund a program at a particular level must "clearly prescribe a dollar amount or an objective basis from which a level of funding can easily be computed.").

LEGISLATIVE INTENT – TRANSFER OF AUTHORITY – DETERMINATIONS OF INDIGENCY BY DISTRICT COURT COMMISSIONER

Bill/Chapter: Senate Bill 714/Chapter 606 of 2017

Title: Criminal Procedure – Indigent Individual – Indigency Determination

Attorney General's Letters: General Approval letter dated April 27, 2017, footnote 5.

Issue: Whether a bill requiring District Court commissioners to determine whether an individual is indigent for purposes of representation by the Office of the Public Defender while leaving unchanged other code provisions that discuss related determinations by the office reflects an intent to maintain or change those provisions.

Synopses: Senate Bill 714/Chapter 606 of 2017 amends the State's Public Defender Act to require District Court commissioners to determine whether a person qualifies as indigent for the purposes of eligibility by the Office of the Public Defender.

Discussion: The Attorney General noted that although the bill transfers the authority to determine eligibility for a public defender from the Office of the Public Defender to the District Court commissioner, the office appears to still have a role. In § 16–201(c)(5) of the Criminal Procedure Article, which the bill did not amend, the office retains responsibility to inform the applicant for a public defender "[i]f the office subsequently determines that an applicant is ineligible" because the applicant is not indigent. The bill also only provides for a determination of indigency made by the District Court commissioner, but there exist circumstances under which a defendant might initially appear in circuit court. See Maryland Court Rule 4-213(c).

As a result, the Attorney General advised that it was unclear whether the General Assembly intended that the office would retain the ability to make subsequent indigency determinations or whether the General Assembly intended those with initial appearances before a circuit court to also appear before District Court commissioners for indigency determinations. The Attorney General recommended that the General Assembly clarify these issues in the future.

Drafting Tips: **In drafting legislation that transfers authority exercised by one governmental unit to another, the drafter should also research and note other provisions that may be effected by the change and discuss potential changes to those provisions with the sponsor.**

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ATTORNEY GENERAL

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April 27, 2017

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

Dear Governor Hogan:

We have reviewed the following bills and hereby approve them for constitutionality and legal sufficiency:

HOUSE	SENATE
HB 941[1]	SB 631[1]
HB 1375[2]	SB 714[5]
HB 1382[3]	SB 781[2]
HB 1513[4]	SB 1121[3]

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Sincerely,

Brian E. Frosh

Brian E. Frosh
Attorney General

BEF/SB/eb

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

---

[1] HB 941 and SB 631 are identical. The bills add to the Criminal Law Article a new § 10-626, which establishes an Animal Abuse Emergency Compensation Fund, to be administered by the Executive Director of the Governor's Office of Crime Control and Prevention ("GOCCP") and used to defray the costs of the removal and care of animals impounded under the State's animal abuse and neglect laws. The bills provide that the Executive Director of GOCCP "shall receive from the Fund each fiscal year the amount, not exceeding $50,000 in a fiscal year, necessary to offset its costs in administering" Title 10, Subtitle 6, of the Criminal Law Article. We note that expenditures from the Fund may be made only pursuant to a valid appropriation. Md. Const., Art. III, § 32 ("No money shall be drawn from the Treasury of the State ... except in accordance with an appropriation by Law ...."). Moreover, it is within the Governor's discretion as to whether to include funding for this purpose in the budget bill, as this provision does not establish an enforceable funding mandate. 65 *Opinion of the Attorney General* 108, 110 (1980) (law requiring the Governor to fund a program at a particular level must "clearly prescribe a dollar amount or an objective basis from which a level of funding can easily be computed.").

[2] HB 1375 is the cross-filed bill to SB 781, but they are not identical. On page 4, lines 11-12 of HB 1375, a reference is made correctly to "an oral swab." In SB 781, the reference on page 4, line 4, is made incorrectly to "a oral swap." Both bills, however, contain the same grammatical error in another place. In HB 1375, page 5, line 1, the "a" should be "an"; and in SB 781, the error appears on page 4, line 26. These errors are not legally significant and changes can be made in next year's corrective bill. In addition, both bills state that "The Court of Appeals shall adopt rules to carry out the requirements of this subsection." This language should be interpreted as directory, not mandatory.

[3] HB 1382 and SB 1121 are nearly identical. The difference appears in HB 1382 on page 1, in line 6, where the purpose paragraph includes the phrase "making a conforming change;" which is not included in SB 1121. The difference is not legally significant, and either bill or both bills may be signed.

[4] HB 1513 allows money in the Maryland Historic Trust Grant Fund to be used for administrative costs, not to exceed 5% of the annual general fund appropriation to the Fund, and limits grants to historic properties owned by the Maryland Historic Trust to 10% of all grants awarded from the Fund. Although the bill purports to require that the Governor include in the budget bill an annual appropriation of $1.5 million to the Fund (§ 5A-328(i), page 4, lines 19 through 22), it is our view that this provision should be viewed as a non-binding expression of legislative intent, not a constitutional funding mandate. The House amended the bill to make the Governor's obligation to include the annual $1.5 million appropriation in the budget bill "[s]ubject to the limitations of the State budget." As we noted in our bill review letter on HB 586 and SB 278, dated April 26, 2017, identical language was added to those bills, and we concluded that the intended purpose of the language was to make the funding discretionary. We reach the same conclusion as to the funding provision in HB 1513. The House Floor Report on HB 1513 describes the funding provision of the bill, as amended, as follows: "the Governor is *authorized* to include in the annual State budget bill an appropriation of $1.5 million to the Maryland Historic Trust Grant Fund." (Emphasis added). Also, when the Fiscal Note on the bill was revised to reflect the amendments, the description of the bill as "establish[ing] a mandated appropriation" was deleted.

[5] SB 714 amends the State's Public Defender Act to require District Court commissioners to determine whether an individual is indigent for purposes of representation by the Office of Public Defender ("OPD"). We write to discuss two instances in which the legislative intent is not clear, thus the General Assembly may wish to clarify those issues in the future. The first involves Criminal Procedure Article, § 16-210(c)(5), which was not amended and states that "[i]f the Office subsequently determines that an applicant is ineligible: (i) the Office shall inform the applicant; and (ii) the applicant shall be required to engage the applicant's own attorney and reimburse the Office for the cost of the representation provided." It is unclear whether the legislature intended that the OPD retain discretion to make such determinations, given that the office will no longer be making initial determinations. In addition, it is possible that a defendant may have an initial appearance before a Circuit Court. *See* Rule 4-213(c). It is unclear whether that person must appear before a District Court commissioner to determine indigency.

Miscellaneous Legislative Issues

STATUTORY CONSTRUCTION – CONJUNCTIVE AND DISJUNCTIVE CLAUSES

Bill/ Chapter:	House Bill 979/Chapter 686 of 2017
Title:	Property Tax Credit – Public Safety Officers
Attorney General's Letter:	April 25, 2017
Issue:	Whether a bill that authorizes counties and municipalities to grant a certain property tax credit that may not exceed a specified amount per dwelling and the amount of the property tax imposed on the dwelling should be construed to authorize a credit that may not exceed the lesser of these amounts based on the legislative history of the bill.
Synopsis:	House Bill 979/Chapter 686 of 2017 authorizes county and municipal governments to grant a property tax credit for a dwelling owned by a public safety officer. The bill specifies that the amount of the property tax credit may not exceed $2,500 and the amount of property tax imposed on the dwelling.
Discussion:	The Attorney General noted that testimony offered by the sponsor of the bill at hearings in both the House and Senate made clear that the purpose of the bill was to authorize a maximum tax credit of $2,500. The Attorney General added, however, that the use of the conjunctive "and" raised the question of whether the General Assembly intended a maximum tax credit amount equal to the greater of $2,500 or the amount of property tax imposed on the property. Because of the legislative history, the Attorney General concluded that the provision should be construed as authorizing a credit that may not exceed the lesser of those amounts and recommended the enactment of clarifying legislation to change the "and" to an "or."
Drafting Tips:	**When drafting legislation that includes a list of items, a drafter should determine whether the sponsor intends the items to be additive to each other. If the items are intended to be additive, the drafter must use the conjunctive "and" to connect the items. If the items are not intended to be additive, the drafter must use the disjunctive "or" to connect the items. More specifically, if a bill is intended to prohibit a tax credit or other type of quantitative element from exceeding the lesser of two or more amounts specified in the bill, the drafter must use the disjunctive "or" to connect the amounts.**

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April 25, 2017

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

RE: House Bill 979, "Property Tax Credit – Public Safety Officers"

Dear Governor Hogan:

We have reviewed House Bill 979, "Property Tax Credit – Public Safety Officers" and approve it for constitutionality and legal sufficiency. We write to advise about the proper construction of a provision in the bill.

House Bill 979 authorizes counties and municipalities to grant a credit against the property tax imposed on a dwelling owned by a public safety officer. Section 9-259(c) of the bill states that the credit "may not exceed: (1) $2,500 per dwelling; *and* (2) the amount of the property tax imposed on the dwelling." (Emphasis added). Testimony offered by the bill's sponsor at the bill hearings in both the House and the Senate made clear that the purpose of the bill was to authorize a maximum tax credit of $2,500. However, the use of the conjunctive "and" raises the question of whether the General Assembly intended a maximum tax credit amount equal to the greater of $2,500 or the amount of property tax imposed on the property. In light of the legislative history, we believe the provision should be construed as authorizing a credit that may not exceed *the lesser of* those amounts, and we suggest that the General Assembly enact clarifying legislation next session to change the "and" to an "or."

Article 15 of the Maryland Constitution requires property tax to be assessed uniformly. Although the Court of Appeals has always recognized that the legislature has broad discretion in the creation of property tax exemptions, the creation of credits for a term of years and the granting of partial exemptions has raised uniformity concerns. Nonetheless, the Court has recognized that the property tax system cannot be administered in perfect uniformity. Accordingly, the Court has accepted a five-year reassessment cycle as not being in violation of the uniformity clause. *Rogan v. County Commissioners of Calvert County*, 194 Md. 299, 309 (1949). Additionally, the Office of the Attorney General has opined that the homestead tax credit was not in clear violation of the uniformity clause until it reached its tenth year. 72 *Opinions of the Attorney General* 350 (1987). While the duration of the tax credit is within the discretion of the local governing body, we

recommend and assume that a local governing body will establish the duration for the property tax within the recognized time period.

Sincerely,

Brian E. Frosh

Brian E. Frosh
Attorney General

BEF/DWS/kd

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

STATUTORY INTERPRETATION – "DOMICILE" AND "RESIDENCY"

Bill/Chapter: House Bill 12/Chapter 543 of 2017

Title: Senatorial and Delegate Scholarships – Eligibility, Award Amounts, and Use of Funds

Attorney General's Letter: April 17, 2017

Issue: Whether statutory language extending eligibility for certain senatorial and delegate scholarships to active military members "domiciled" in the State should be interpreted differently in light of the concurrent use of the term "residents" of the State within the same statute.

Synopsis: House Bill 12/Chapter 543 of 2017 extends eligibility for senatorial scholarships to "an individual who is on active duty with the U.S. military who is *domiciled* in the State" and "*domiciled* in the legislative district from which the applicant seeks an award." (italics added) Under current law, an individual may only receive a senatorial scholarship if he or she is a "*resident* of this State" and "a *resident* of the legislative district from which the applicant seeks an award." The bill specifies that a recipient of a senatorial scholarship who is on active duty with the U.S. military and who otherwise meets eligibility criteria "may be domiciled in the State rather than a resident of this State." The bill also allows active military members domiciled in the State to use senatorial and delegate scholarships at out- of- state institutions of higher education.

Discussion: The Attorney General raised the issue on how the term "domiciled" as used in the bill should be interpreted.

Although *Black's Law Dictionary* gives slightly different definitions for "domicile" and "residency," Maryland courts generally interpret the words as having the same meaning. The Maryland Court of Appeals has advised that "the words 'reside' or 'resident' in a constitutional provision or statute delineating rights, duties, obligations, privileges, *etc*." should be "construed to mean 'domicile' unless a contrary intent is shown." Citing the Floor Report of the House Ways and Means Committee as well as testimony by the bill's sponsor, the Attorney General noted that the bill's purpose is to allow Marylanders who are active members of the military and stationed out-of-state to use senatorial and delegate scholarships for institutions outside of Maryland. This suggests that the General Assembly intended that "domicile" mean "residency" for purposes of the bill, since any other interpretation would result in more sweeping changes to the eligibility criteria for senatorial and delegate scholarships.

The Attorney General argued that federal law also supports reading "domicile" as meaning "residency." Federal law specifically provides that service members do not lose their domicile or acquire a new one for purposes of taxation if they are in a state solely because of compliance with military orders. Accordingly, under the bill, Maryland service members who are stationed out-of-state, but who have not established a new residence or domicile, are eligible to receive senatorial and delegate scholarships and to use them at out-of-state institutions. Based on the apparent purpose of the bill and the way the terms are commonly interpreted under State and federal law, the Attorney General concluded that, as used in the bill, the term "domicile" should be interpreted as meaning "residency" − even though both terms appear in the same provisions of law.

The Attorney General concluded by warning that language in the bill stating that an otherwise eligible applicant for a senatorial scholarship who is on active duty with the U.S. military "may be domiciled in the State rather than a resident of this State" is unnecessary and potentially misleading. This language could suggest that other residency requirements can be met for an individual who is not domiciled in Maryland, which does not appear to be the intent of the bill. The Attorney General suggested that the Maryland Higher Education Commission consider clarifying regulations or that the General Assembly consider clarifying language next session to address this issue.

Drafting Tips: **When drafting legislation that is intended to apply only to Maryland residents, the drafter should be consistent with word choice. In general, courts will interpret the terms "domicile" and "residency" (or an individual "domiciled in Maryland" and an individual who "resides in Maryland") as having the same meaning. In order to avoid confusion, however, the terms should not be used interchangeably within the same statute.**

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April 17, 2017

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

RE: House Bill 12 - Senatorial and Delegate Scholarships - Eligibility, Award Amounts, and Use of Funds

Dear Governor Hogan:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 12, "Senatorial and Delegate Scholarships - Eligibility, Award Amounts, and Use of Funds." We write to advise how a certain term should be interpreted.

House Bill 12 expands the eligibility for senatorial and delegate scholarships. Under current State law, in order to be eligible for a senatorial scholarship an individual must be "a resident of this State" and "a resident of the legislative district from which the applicant seeks an award." Education Article ("ED"), § 18-402(b). In addition, senators may award up to 10 percent of the scholarship funds for institutions out-of-state under limited conditions. ED § 18-405(d). Similarly, under current law delegate scholarships may be used at certain defined institutions outside of the State only under limited specified circumstances. ED § 18-501(b).

House Bill 12 expands the eligibility of senatorial scholarships to "an individual who is on active duty with the United States military" who is "domiciled in this State; and [a]t the time of the applicant's initial application, [is] domiciled in the legislative district from which the applicant seeks an award." (House Bill 12, page 3, lines 12-17.) The bill also allows the scholarship to be used at an institution outside of the State if the applicant "is on active duty with the United States military who is domiciled in" Maryland. (House Bill 12, page 4, lines 25-26.) In addition, House Bill 12 also states that "[a] recipient of a senatorial scholarship who is an individual who is on active duty with the United States military and otherwise meets [ED § 18-406(a) or (b)] may be domiciled in this State rather than a resident of this State." (House Bill 12, page 5, lines 10-13.) For a delegate scholarship, House Bill 12 expands eligibility to "an individual who is on active duty with the United States military who is domiciled in this State." (House Bill 12, page 5, lines 29-30.)

Generally, domicile is defined as "[t]he place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere." *Black's Law Dictionary* 558 (9th ed. 2009). On the other hand, residence ordinarily means the place where a person physically lives. *Black's Law Dictionary* 1310 (9th ed. 2009). Under Maryland law, however, "residency" generally means "domicile." *Blount v. Boston,* 351 Md. 360 (1998). Moreover, the Court of Appeals has "held consistently that 'the words 'reside' or 'resident' in a constitutional provision or statute delineating rights, duties, obligations, privileges, etc. would be construed to mean "domicile" unless a contrary intent is shown.'" *Wamsley v. Wamsley,* 333 Md. 454, 458 (1994) (quoting *Bainum v. Kalen*, 272 Md. 490, 497 (1974)). The two words also have the same meaning in the context of state income tax, *Comptroller v. Haskin*, 298 Md. 681, 690 (1984); estate and probate, *Shenton v. Abbott*, 178 Md. 526, 530 (1940); eligibility to file a claim against the former Unsatisfied Claim and Judgment Fund, *Hawks v. Gottschall,* 241 Md. 147, 149 (1966); and determination of venue for filing a divorce, *Harrison v. Harrison,* 117 Md. 607, 612 (1912).

In new provision ED § 18-402(b)(2), the legislative intent appears to be that domicile means residency, despite the use of both terms in the same provision. The Floor Report of the House Ways and Means Committee for House Bill 12 indicates that the provision "authorizes senatorial scholarships to be awarded to an individual who is on active duty with the United States military who is domiciled in the legislative district of the State from which the individual on active duty seeks an award." Second, the sponsor of the bill testified before the relevant House and Senate committees that the purpose of the bill is to allow Marylanders who are active members of the military and stationed out-of-state to be eligible to receive a scholarship for an institution outside of Maryland.

Federal law specifically provides that for the purposes of taxation, servicemembers do not lose their domicile or acquire a new one if they are in a state solely because of compliance with military orders. 50 U.S.C.A. § 4001 ("A servicemember shall neither lose nor acquire a residence or domicile for purposes of taxation with respect to the person, personal property, or income of the servicemember by reason of being absent or present in any tax jurisdiction of the United States solely in compliance with military orders."). Thus, servicemembers and their spouses are entitled to pay only their domicile state's taxes no matter where they are stationed.

Consistent with the foregoing, active military members who are Marylanders but stationed out-of-state would have been considered to have Maryland residency for purposes of the scholarship program under current law. Nevertheless, they would have been unable to use the scholarship at an out-of-state institution in most cases. Under House Bill 12, active military members who are Marylanders but stationed out-of-state and have not established a new residence or domicile are eligible to receive senatorial or delegate scholarships as well as use at an out-of-state institution. Therefore, in our view, the language on page 5, at lines 10-13 of House Bill 12

appears to be unnecessary. Moreover, that language could suggest that other residency requirements in Title 18, Subtitle 4 can be met for an individual who is not domiciled in Maryland. We do not believe that is the legislative intent. As a result, the Maryland Higher Education Commission may wish to issue clarifying regulations or the General Assembly may consider clarifying language next session. Nevertheless, the bill is constitutional, thus there is no legal reason it cannot be signed.

Sincerely,

Brian E. Frosh
Attorney General

BEF/SBB/kd

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