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April 8, 2024

The Honorable Wes Moore
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401
Delivered via email

RE: House Bill 1487, "Maryland Entertainment Council – Alterations"

Dear Governor Moore:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 1487, "Maryland Entertainment Council – Alterations." We write to discuss potential constitutional issues with the bill and to provide advice for implementation to avoid those issues. Specifically, given the responsibilities of the Council, having members of the General Assembly serve as members raises a separation of powers issue under Article 8 of the Maryland Declaration of Rights and a dual office issue under Article III, § 11 of the State Constitution. It is our view, however, that by limiting the legislator members' role to purely advisory, the problems can be avoided.

This bill reestablishes the Maryland Entertainment Industry Council as the successor to the uncodified Maryland Entertainment Council, which was created by Chapter 434 in 2023. Two members of the Council are to be members of the General Assembly. As originally created, the Council has legislative members. The current duties of the Council, however, are purely advisory. House Bill 1487 proposes to expand the powers of the Council by authorizing it to adopt regulations, enter into contracts and

agreements, obtain services, ask other units of the State for assistance and data, accept federal money, and accept gifts, donations, or bequests.

It is our concern that having legislative members of an entity that is empowered to manage State funds and initiate projects, among other actions, could implicate the separation of powers of Article 8 of the Maryland Declaration of Rights or cause a violation of the prohibition against dual office holding found in Article III, § 11 of the State Constitution. Article 8 of the Declaration of Rights provides: “That 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 said Departments shall assume or discharge the duties of any other.” Article III, Section 11 of the Constitution states: “No person holding any civil office of profit, or trust, under this State shall be eligible as Senator or Delegate.”

In 1976, Attorney General Burch opined that these two constitutional provisions would be infringed by the service of members of the General Assembly on the Washington Suburban Transit Commission. 61 *Opinions of the Attorney General* 152, 159-62 (Jan. 22, 1976). In 2009, we advised the Governor about legislation reestablishing the Commission on the Establishment of a Maryland Women in Military Service Monument. Because the legislation empowered the Commission, the membership of which included members of the General Assembly, to enter contracts regarding “the funding, design, construction, or placement of an appropriate monument,” and not merely to give advice regarding a monument, we advised that the exercise by the Commission of those executive powers could infringe these two provisions. Bill Review Letter on House Bill 944 and Senate Bill 367 (May 15, 2009).¹

Similarly, it is our concern that if the Council reestablished by this bill exercises the powers granted, it is performing a core executive branch function. For legislators to be members of a State entity exercising such powers could risk a court finding a separation of powers violation because it is a core executive function that cannot be exercised by legislative branch officials either individually or as members of another State instrumentality. Moreover, because we believe that the power to manage funds, accept gifts, and initiate projects on behalf of the Council is an exercise of the sovereign power of the State, we believe that membership on the Council could be found to be an “office of trust” that is incompatible with simultaneous service in the State legislature.

¹ We have raised these issues in other letters. *See, e.g.*, Bill Review Letter on House Bill 548/Senate Bill 299, House Bill 831/Senate Bill 723, House Bill 1364/Senate Bill 946, dated May 13, 2021; Bill Review Letter on Senate Bill 910, dated May 16, 2016.

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It is also our view, however, that the foregoing constitutional concerns would be addressed if the legislators who are members of the Council abstained from participating on votes managing funds, initiating projects, or adopting regulations and that legislators have no role in supervising staff or consultants. Thus, if the legislators on the Council limited their role to an advisory role, we believe that there are no constitutional problems with having two members of the General Assembly on the Council. Accordingly, it is our view that House Bill 1487 is constitutional and legally sufficient.

Sincerely,

A handwritten signature in black ink, appearing to read "A.G. Brown". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Anthony G. Brown

AGB/SBB/kd

cc: The Honorable Susan C. Lee
Eric G. Luedtke
Victoria L. Gruber