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May 4, 2007

The Honorable Martin J. O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: Senate Bill 733 and House Bill 420

Dear Governor O'Malley:

We have reviewed and hereby approve the constitutionality and legal sufficiency of Senate Bill 733 and House Bill 420, which are identical and concern exceptional milk hauling permits. In our view, the bills do not violate due process or result in an unconstitutional taking of property.

Senate Bill 733 and House Bill 420, among other things, authorize the State Highway Administration (SHA) to issue an exceptional milk hauling permit that is valid in certain counties. The bills outline the requirements for the issuance of such a permit and list activities which the operator of a vehicle is prohibited from doing. The bills also provide sanctions for violations of the terms and conditions of the permit, including the "immediate confiscation" of the permit if the vehicle exceeds the weight restriction by 5,000 pounds.

Because the bills allow for confiscation of the permit before a hearing takes place, we considered whether the bills would violate the due process rights of the permit holder under the Fourteenth Amendment of the United States Constitution or Article 24 of the Maryland Constitution. In our opinion, the bills do not. The Supreme Court has recognized that due process does not always require a hearing before deprivation of property where there are adequate post-deprivation procedures that require the government to act quickly. "[A]n important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify

postponing the opportunity to be heard until after the initial deprivation.” *Gilbert v. Homar*, 520 U.S. 924, 930-931 (1988). *See also Matthews v. Eldridge*, 424 U.S. 319, 334-335 (1976)(setting forth the appropriate due process factors, namely the consideration of the private interest affected, the risk of erroneous deprivation, and any additional procedural safeguards available); *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972)(holding that due process is not “fixed in form” and there may be “extraordinary situations where some valid governmental interest that justifies postponing the hearing until after the event”); *Dept. of Transportation v. Armacost*, 299 Md. 392 (1984).

The permit in question is a property interest within the realm of constitutional protection. *See Goss v. Lopez*, 419 U.S. 565, 576 (1975)(as long “as a property deprivation is not *de minimus*, its gravity is irrelevant to the question [of] whether account must be taken of the *Due Process Clause*”). Nonetheless, the bills serve important governmental interests in ensuring highway safety and protecting travelers from overloaded trucks. In addition, the weight limitations are clear, thus government officials are not granted wide discretion in determining whether a violation has occurred.

Moreover, once a confiscation is made, the bills require that SHA be “immediately” notified and that SHA verify that the violation occurred. If so, SHA is instructed to revoke the permit. *See Mackey v. Montrym*, 443 U.S. 1, 19 (1979)(holding that due process does not mandate “perfect, error-free determinations”; so long as there is “a reasonably reliable basis” to conclude that the facts are correct, the agency may suspend a license pending a prompt, post-deprivation hearing). The bills further provide that the permit holder may appeal a revocation. SHA regulations already have procedures in place for appeal of a suspension and revocation of blanket hauling permits. COMAR § 11.04.10. While the bills explicitly provide exceptional milk hauler permit holders an opportunity to be heard, we recommend that the regulations be amended to further spell the procedures to be used when a confiscation occurs pursuant to the authority granted by Senate Bill 733 and House Bill 420.

It is also our opinion that there is no takings issue because the permit is confiscated, not the cargo. If an authority, such as the Commercial Vehicle Enforcement Division of the Maryland State Police, determines that the vehicle has exceeded its weight limit, the vehicle is put out of service, but the cargo is not seized. The owner may bring another vehicle to transport the cargo.

In sum, it is our view that Senate Bill 733 and House Bill 420 are constitutional and legally sufficient.

The Honorable Martin J. O'Malley

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Very truly yours,

/S/

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Attorney General

DFG/RAZ/as

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cc: Joseph Bryce
Secretary of State
Karl Aro