

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINDRER
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



DAN FRIEDMAN
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

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

May 16, 2008

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

RE: House Bill 628

Dear Governor O'Malley:

We have reviewed House Bill 628, "Department of the Environment - Grants and Loans - Small, Minority, and Women's Business Enterprises," for constitutionality and legal sufficiency. While we approve the bill there are severable parts of the bill that cannot be given effect because they are not properly disclosed in the title. We also write to discuss the implementation of the small business enterprise, minority business enterprise, and women's business enterprise requirements of the bill.

House Bill 628 amends provisions relating to the Water Pollution Control Fund, the Water Supply Facilities Financial Assistance Program, and the Bay Restoration Fund to add provisions designed to require the recipients of the grants or loans under the programs to take steps to include small business enterprises, minority business enterprises, and women's business enterprises in the projects funded.

House Bill 628 also contains provisions relating to the Bay Restoration Fund:
(1) providing that the Bay Restoration Fee may not be reduced while bonds issued to fund

the program are outstanding;¹ (2) prohibiting reversion or transfer of money in the Bay Restoration Fund to a special fund of the State; and (3) specifying that expenditure of funds in the Bay Restoration Fund for projects to remove nitrogen from onsite sewage disposal systems and for cover crop activities is subject to the "allocation of funds."² None of these additional provisions is described in the title, which describes exclusively the new small, minority, and women's business enterprise program.³

Article III, § 29 of the Maryland Constitution provides in part that "every Law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title." House Bill 628 raises questions under both clauses of this provision.

¹ A related change limits the Bay Restoration Fund Advisory Committee recommendations concerning the fees to recommending increases in the fees. Section 9-1605.2(j)(6).

² The meaning of the amendment to § 9-1605.2(i)(2)(ix) of the Environment Article is not completely clear. It may be that the amendment is intended to ensure that all the funds expended for nitrogen removal and cover crop activities be expended pursuant to the same 60%/40% allocation provided in § 9-1605.2(h)(2)(i) and (ii), or that only the funds allocated in § 9-1605.2(h)(2)(i) and (ii) may be used for these activities, or that the expenditure of funds for these purposes is subject to the allocation determined by the Governor in the budget. Any of these three interpretations reflects a substantive change that must be disclosed in the title to be constitutional. It is also possible to read the amendment as having no substantive effect because expenditures under § 9-1605.2(i)(2)(ix) were already subject to the "conditions under subsection (h)" and the amendment, which adds "allocation of funds" refers to the only condition in subsection (h). Such a construction is disfavored, because it is ordinarily presumed that an amendment has substantive effect. Ironically, only if the amendment has no substantive effect would the failure to describe it in the title not pose a constitutional impediment.

³ The title provides that the bill is "FOR the purpose of requiring applicants for certain financial assistance from certain funds to demonstrate that certain steps were taken to include certain small, minority, and women's business enterprises; authorizing the Department of the Environment to withhold certain financial assistance under certain circumstances; requiring certain agreements for grants from a certain fund to require grantees to demonstrate that certain steps were taken to include certain small business enterprises, minority business enterprises, and women's business enterprises; and generally relating to the small business enterprise, minority business enterprise, and women's business enterprise participation in environmental financial assistance programs."

"Section 29 requires that the title to a bill inform members of the legislature and the public about the bill's nature." *Ogrinz v. James*, 309 Md. 381, 398 (1987). While the title requirement is given a liberal construction, so that a provision "will not be declared invalid unless it plainly contravenes the Constitution," *Baltimore Transit Co. v. MTA*, 232 Md. 509 (1963), it is our view that a provision cannot be given effect if there is absolutely no suggestion of its existence in the title. The title of House Bill 628 is focused entirely on small, minority, and women's business enterprises, with no suggestion that any other provision governing the funds might be affected.

It is our view that the failure of the purpose paragraph of the title of House Bill 628 cannot be solved by reference to the function paragraph, which lists the articles and sections that are amended by the bill.⁴ It is true that older cases suggest that a title that lists the sections amended is sufficient. See, e.g., *Mayor of Baltimore v. Perrin*, 178 Md. 101 (1940); *Campbell v. Campbell*, 174 Md. 229 (1938); *Mayor of Baltimore City v. Fuget*, 164 Md. 335 (1933); *Todd v. Mayor of Frostburg*, 141 Md. 693 (1922); *Lankford v. County Commissioners*, 73 Md. 105 (1890). With the exception of the *Lankford* case, however, the titles challenged in these cases contained additional information ranging from the name of the subtitle being amended to short descriptive paragraphs that would assist a reader or legislator to discover the true nature of the legislation. More importantly, the modern practice is to include the description of the bill in the purpose paragraph, and that it is the purpose paragraph that is to meet the constitutional requirement. *Legislative Drafting Manual* at 35 ("The purpose paragraph "is the part of the title to which the constitutional test of Article III, § 29 of the Maryland Constitution is applied."). In the absence of any modern case adopting the *Lankford* rule, we would be reluctant to recommend adoption of the view that a function paragraph containing only the articles and sections amended would be constitutionally sufficient. We cannot do so in this instance, because there is nothing in the title to give notice to the reader that the listed sections are amended for any purpose other than to give effect to the small, minority, and women's business enterprises programs that are the sole matter discussed in the purpose paragraph. In short,

⁴ Modern legislative titles in Maryland consist of three parts: the short title, the purpose paragraph, and the function paragraphs. *Legislative Drafting Manual* at 33 (2008). The function paragraph to House Bill 628 provides, in its entirety, as follows:

BY repealing and reenacting with amendments,
Article - Environment
Section 9-345, 9-421, and 9-1605.2
Annotated Code of Maryland
(2007 Replacement Volume and 2007 Supplement)

it is our view that even under *Lankford*, a correctly drafted function paragraph cannot save an affirmatively misleading purpose paragraph.

The result of this omission from the title is not, however, that the entire bill is invalid, but only that the portion that is not included in the title cannot be given effect. *State's Attorney v. Triplett*, 255 Md. 270, 281-282 (1969).⁵ The provisions relating to small business enterprises, minority business enterprises, and women's business enterprises are not dependent upon the provisions related to the Bay Restoration Fund, and can be given effect without them. Moreover, there is no indication in the legislative history that the General Assembly would not have enacted the remaining provisions of the bill if it had known that the Bay Restoration Fund provisions could not be given effect. Because of the significant confusion about the substantive impact of these amendments, and because there is reason to doubt that the General Assembly was aware of these provisions in enacting the bill, we do not recommend inclusion of this matter in next year's curative bill, but instead suggest separate legislation to accomplish the purpose.

The second question that arises under Article III, § 29 is whether the substantive provisions relating to the Bay Restoration Fund constitute a second subject of the bill. While the matter is not free from doubt, it is our view that they do not. It is well-established that the single subject requirement, like the title requirement, is given "a liberal construction so as not to interfere with or impede legislative action." *MCEA v. State*, 346 Md. 1, 13 (1997). "Two matters can be regarded as a single subject, for purposes of §29, either because of a direct connection between them, horizontally, or because they each have a direct connection to a broader common subject to which the Act relates." *Id.* at 15-16. While the additional Bay Restoration Fund provisions are not directly related to the small, minority, and women's business enterprise provisions, all of the provisions are related to the administration of funds within the Department of the Environment. Moreover, the provisions in question, while substantive, are relatively minor, were not added at the last minute, as was the case in *Delmarva Power v. PSC*, 371 Md. 356 (2002), and do not contain provisions that did not pass as a separate bill, as was the case in *Migdal v. State*, 358 Md. 308 (2000). For these reasons, it is our view that House Bill 628 does not violate the single subject requirement of Article III, § 29 of the Maryland Constitution. In any event, adoption of separate legislation to cure the title problem would also cure any possible one subject violation.

⁵Thus, the status quo ante with respect to the Bay Restoration Fund is unchanged and current law and contractual obligations remain in place.

The small, minority, and women's business enterprise portion of House Bill 628 requires applicants for financial assistance above a certain amount to "demonstrate, to the satisfaction of the Department, that steps were taken to include small business enterprises, minority business enterprises, and women's business enterprises." Specifically:

- (1) Placing qualified small business enterprises, minority business enterprises, and women's business enterprises on solicitation lists;
- (2) Assuring that small business enterprises, minority business enterprises, and women's business enterprises are solicited whenever they are potential sources;
- (3) Dividing total requirements, when economically feasible, into small tasks or quantities to permit maximum participation of small business enterprises, minority business enterprises, and women's business enterprises;
- (4) Establishing delivery schedules, where the requirement permits, that encourage participation by small business enterprises, minority business enterprises, and women's business enterprises; and
- (5) Using the services and assistance of the Maryland Department of Transportation and the Governor's Office of Minority Affairs in identifying and soliciting small business enterprises, minority business enterprises, and women's business enterprises.


If these steps are not demonstrated to the satisfaction of the Department, the Department may withhold financial assistance for the project.

It is our view that the program created by these provisions meets constitutional standards. The actions that it calls for are race-neutral. The division of requirements and the establishment of delivery schedules apply equally to all contractors, without respect to size, race or gender. The remainder of the requirements are aimed at providing equivalent opportunities to small, minority and women's business enterprises, but do not prevent the solicitation of other firms, or grant any other advantage to the small, minority, or women's business enterprises. Race and gender conscious recruiting is deemed neutral, especially where, as here it is in addition to existing recruiting and efforts to recruit small businesses. *Ensley Branch, NAACP v. Seibeis* 731 F.3d 1548 (11th Cir. 1994); *Duffy v. Wolle*, 123 F3d. 1026 (8th Cir. 1997). No goals or requirements are set with respect to the participation of

minority or women's business enterprises. Moreover, the vast majority of the recipients of assistance under these programs are State and local governmental entities, many of which are subject to goals under existing law, and under a requirement of using race-neutral means to achieve those goals.⁶ *See, e.g.*, State Finance and Procurement Article § 14-302(a)(4).

For the above reasons, it is our view that the provisions of House Bill 628 relating to small business enterprises, minority business enterprises, and women's business enterprises are constitutional. However, we caution that the Department must judge compliance based on whether the required steps were taken, not on whether some specific level of small business enterprise, minority business enterprise, and women's business enterprise participation was achieved.

Very truly yours,


Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable Maggie McIntosh
The Honorable Dennis C. Schnepfe
Joseph Bryce
Karl Aro

⁶ Water Pollution Control Fund grants and loans may be awarded to industrial users for some purposes, Environment Article § 9-349(a)(1), but are primarily awarded to State and local governmental agencies, Environment Article §§ 9-347, 9-348 and 9-350. The Water Supply Facilities Financial Assistance Program makes grants and loans only to State and local governmental entities, Environment Article § 9-421(a). The Bay Restoration Fund is for grants for the planning, design, construction and upgrade of wastewater facilities, which are ordinarily owned and operated by governmental agencies. Environment Article § 9-1605.2 (i)(2).