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April 17, 2014

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

RE: House Bill 172 and Senate Bill 547

Dear Governor O'Malley:

We have reviewed House Bill 172 and Senate Bill 547, identical bills entitled "Economic Development - Baltimore Region - Baltimore Metropolitan Council and Advisory Board and Baltimore Regional Transportation Board." In approving the bill, we have concluded that the service of legislators on the Baltimore Metropolitan Council does not violate the separation of powers requirement of Article 8 of the Declaration of Rights Article 8, the prohibitions on dual office holding in Maryland Constitution in Article III, § 11 and Declaration of Rights Article 35, or the prohibition against a legislator serving in an office created during his or her term found in Article III, § 17.

Under current law, the Baltimore Metropolitan Council ("the Council") consists of one member appointed by the County Executive of Anne Arundel County, one member appointed by the Mayor of Baltimore City, one member appointed by the County Executive of Baltimore County, one member appointed by the County Commissioners of Carroll County, one member appointed by the County Executive of Harford County, one member appointed by the County Executive of Howard County, and "other members as the Council Charter provides." House Bill 172 and Senate Bill 547 delete the provision for the appointment of other members as provided by the Council Charter, and add two legislative members, one from each House who represents a district within Anne Arundel County, Baltimore City, Baltimore County, Carroll County, Harford County, or Howard County, appointed by the presiding officer of their respective houses, and "one representative of the private sector appointed by the Governor."¹

¹ The law provides that the members appointed by chief executives of the City and various counties serve at the pleasure of the appointing authority. No provision is made by the bills for a term or duration of service of the member appointed by the Governor. It may be advisable to add a similar provision for those appointments in future legislation.

Article 8 of the Maryland 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 35 of the Maryland Declaration of Rights provides that “no person shall hold, at the same time, more than one office of profit, created by the Constitution or Laws of this State.” This provision could not be violated by service on the Council because the position is not compensated. Article III, § 11 of the Maryland Constitution, however, provides that “[n]o person holding any civil office of profit, or trust, under this State shall be eligible as Senator or Delegate,” thus barring uncompensated office holding as well. Finally, Article III, § 17 of the Maryland Constitution provides that;

[n]o Senator or Delegate, after qualifying as such, notwithstanding he may thereafter resign, shall during the whole period of time, for which he was elected, be eligible to any office, which shall have been created, or the salary of profits of which shall have been increased, during such term.

Whether the above provisions are violated depends on whether the Council is a governmental entity. If it is not, service on the Council does not amount to the assumption or discharge of duties in the executive branch or to the holding of an office of profit or trust. Among the factors ordinarily considered in determining whether an entity is a governmental entity are whether it serves a public purpose, *Napata v. University of Maryland Medical Corporation*, 417 Md. 724, 736-737 (2011), whether State or local government created the entity or has the power to modify or dissolve it, *id*, whether the entity’s governing body is self-perpetuating, or appointed by State officials, *id*, whether, upon dissolution of the entity, its assets would revert to the State, *Baltimore Development Corporation v. Carmel Realty Associates*, 395 Md. 299, 335 (2006), whether the entity enjoys a special tax status, *A.S. Abell Publishing Company v. Mezzanote*, 297 Md. 26, 38 (1983); *Carmel*, 395 Md. at 335, whether the entity is required to report to the State, *Mezzanote*, 297 Md. at 38, whether it receives a substantial portion of its budget from the State, must return excess funds to the State, or must receive State approval of its budget, *Carmel*, 335 Md. at 335, whether the Attorney General was designated as legal advisor, *University of Maryland v. Murray*, 169 Md. 478, 481 (1936), and the extent to which the State controls the entity’s operations, *Andy’s Ice Cream v. Salisbury*, 125 Md. App. 125, 142 (1999), *Mezzanote*, 297 Md. at 38.

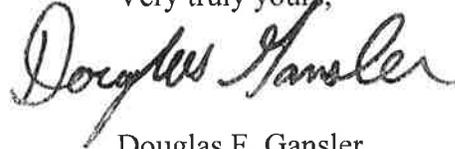
In the case of the Council, many of these factors would appear to support the conclusion that it is a governmental entity. It serves the public purposes of assisting with regional planning and obtaining transportation funding. It is created by State law, and the State has the authority to modify or dissolve it. With the amendments in effect, the Council will be in no part self-perpetuating, but instead appointed entirely by governmental entities, though the appointments are made by many separate governmental entities rather than one. The amendments in House Bill 172 and Senate Bill 547 also require the Council to report to the General Assembly. On the other hand, while the Council receives some money from the Maryland Department of Transportation and from local

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governments, the vast majority of its funding comes from the federal government.² As a result, its assets would not revert to the State on its dissolution, its excess funds are not returned to the State, and its budget is not subject to State approval. Moreover, it does not appear to have any special tax status beyond that ordinarily available to non-profit entities, and the Attorney General is not designated as its counsel. Moreover, it is not subject to the control of any State or local department, though both State and local governments clearly have input through their positions on the Board. To these factors can be added the fact that Economic Development Article, § 13-301(b)(2) provides that the Council "is not a unit of State government" and the comparable entity for the Washington metropolitan area, the Washington Metropolitan Council of Governments, is clearly an independent entity.

Taken together, it is our view that these factors support the conclusion that the Council is not a governmental entity and that service of legislators on the Council would not violate the State Constitution.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/KMR/kmr
HB172_SB547.wpd

² See *Baltimore Region FY 2014 Unified Planning Work Program for Transportation Planning* (April 23, 2013) at 151. <http://www.baltometro.org/downloadables/UPWP/FY2014.pdf>