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April 28, 2014

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

RE: *House Bill 831 and Senate Bill 846, "Baltimore City – Alcoholic Beverages Act of 2014"*

Dear Governor O'Malley:

We have reviewed House Bill 831 and Senate Bill 846, identical bills entitled "Baltimore City – Alcoholic Beverages Act of 2014," for constitutionality and legal sufficiency.¹ We have evaluated the constitutionality of the bills under the Establishment Clause of the First Amendment to the United States Constitution and under two provisions of the Maryland Constitution, the prohibition on "special laws" and the separation of powers and preservation of the Governor's removal powers. While we find a portion of the bills to be unconstitutional under the First Amendment and recommend that it not be given effect, it is our view that the unconstitutional provision is severable and that the bills may be signed. We conclude by pointing out several provisions that, in our view, ought to be fixed in future legislation and by making comment about the proper interpretation of some provisions.

Constitutional Analysis

Establishment Clause

The bills allow waiver of certain food service requirements in a six block area of East Baltimore for a restaurant owned and operated by a not-for-profit organization.

¹ While the provisions of the bills are identical, the pages and line numbers are not. For convenience, the page and line number cites in this letter refer to the Senate Bill only.

The Honorable Martin O'Malley
April 28, 2014
Page 2

Page 4, lines 9-15. To qualify for the waiver described in the last paragraph, the waiver must be "approved by . . . the pastor and church board of directors or pastoral council for each church within 300 feet of the proposed location for the establishment for which the license transfer is sought." Page 6, lines 4 and 8-11. It is our view that this requirement violates the Establishment Clause of the First Amendment of the United States Constitution.

In *Larkin v. Grendel's Den*, 459 U.S. 116 (1982), the Supreme Court considered the validity of a statute that required that an application for an alcoholic beverages license be denied if the governing body of a church or school within five hundred feet of the proposed legislation filed an objection to the issuance of a license. The Court found that the statute gave religious institutions a veto power over the issuance of a license, that the law provided no standards governing the exercise of that veto, thus allowing the power to be exercised for explicitly religious goals. The Supreme Court observed that "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Id.* at 125-126. As a result, the Court found that the statute had the primary effect of advancing religion. Moreover, because the statute "substitut[e]d the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards," *id.* at 127, it led to entanglement of the church and the processes of government and thus violated the First Amendment.

Under the statute in question in the *Grendel's Den* case, the license could be granted unless there was an objection, while under House Bill 831 and Senate Bill 846, no license may be granted unless the applicant is able to get the approval of any church within the 300 feet. If anything, this gives greater power to the churches than was the case in the *Grendel's Den* case. For that reason, it is our view that the portion of the statute that requires the approval of the pastor and church board of directors or pastoral council of a church within 300 feet before a license can be granted is invalid and cannot be given effect.

Once we have determined that the provision is unconstitutional, the next question is whether the effect of that invalidity is to leave the waiver in place, but subject only to the requirement of approval of each community association representing the area and the execution of a memorandum of understanding with each community association, or whether the waiver provision as a whole could not be given effect. This answer to this question rests on the intent of the General Assembly – that is, on a determination of what the General Assembly would have wanted if it had known that the provision could not be given effect as a whole. *Davis v. State*, 294 Md. 370, 383 (1982). There is a presumption that the General Assembly intend that its enactments be severed if possible. *Id.*; Article 1,

§ 23, Annotated Code of Maryland. Thus, “if the dominant purpose of a statute may largely be carried out notwithstanding the invalid provision” it should be severed. *Id.* at 384. It is our view that the invalidity of the minister approval requirement does not prevent the achievement of the dominant purpose of the waiver provision in light of the requirement that neighborhood associations approve, and the ability of churches to work with the neighborhood groups. Therefore, it is our view that the remainder of the waiver provision may be given effect.

Special Laws

We have also investigated whether the waiver described above was intended for the benefit of a single, favored person or business and, as such, might implicate the prohibition on special laws found in Article III, § 33 of the Maryland Constitution. Testimony before the Education, Health and Environmental Affairs Committee indicated that the waiver is intended to apply to a specific restaurant run by a not-for-profit organization, but it is our judgment that the affected area is large enough so that it cannot be considered to create a closed class. *See, e.g. Reyes v. Prince George's County*, 281 Md. 279, 305-06 (1977). For that reason, it is our view that this provision does not violate the constitutional prohibition.

Governor's Removal Powers

Section 5 of the bill provides for the appointment of new license commissioners by May 30, 2014, thus cutting off the terms of the existing license commissioners. In *Schisler v. State*, 394 Md. 519 (2006), the Court of Appeals found that legislation terminating the terms of members of the Public Service Commission unconstitutionally interfered with the Governor's removal powers. *Id.* at 583, 596. It is our view, however, that unlike *Schisler*, these bills do not unconstitutionally interfere with the Governor's removal power because the mode of appointment is unchanged and nothing in the statute would prevent the Governor from reappointing one or more of the existing commissioners if he wished to do so, subject, of course, to the confirmation of the Senate.

Suggestions for Corrections in Future Legislation

The bills permit the Board to waive distance restrictions for churches and schools in two defined areas. The second area is described as being bounded by West Cross Street on the west, Clifford Street on the north, Scott Street on the east, and Carroll Street on the south. Page 5, lines 30-32. According to Mapquest, however, Clifford Street does not run all the way to West Cross Street but stops at South Amity Street leaving a gap in the

border of the area described. If our understanding is correct, it may be desirable to address this in future legislation.

The "resign to run" provision of the bills are defective and unlikely to achieve their purpose of preventing current employees *and* members of the Board from running for elected office. The bills provide, at Page 11, line 12:

(i) On filing a certificate of candidacy for election to a public office or within 30 days before the filing deadline for the primary election for the public office sought, whichever occurs later, an individual who is a member of the Board or an employee of the Board shall certify to the City Board of Elections under oath that the individual is no longer a member of the Board.

(ii) The certification shall be accompanied by a letter addressed to the Governor containing the resignation of the member of the Board

The effect is that an employee who decides to run for office must certify that he or she is no longer a member of the Board. While this would not be difficult, it would not seem to achieve the aim of the provision, which presumably is that a person not be employed by the Board while running for political office. We would recommend that this be addressed in a future legislative session.

Finally, the bills require that the City Solicitor review regulations proposed by the Board to ensure that the regulations comply with the authority granted to the Board by the State. Page 12, line 29. They further provide that the Board "shall . . . use as needed the advice of the Baltimore City Law Department." Page 13 line 33. This would appear to conflict with current law at State Government ("SG") Article § 6-107(a)(2), which provides that the "Attorney General is the legal adviser of and shall represent and otherwise perform all legal work for . . . the Board of Liquor Commissioners of Baltimore City." To the extent that they are inconsistent, the bills, as the more recent enactment, repeal the earlier enactment by implication. *Farmer & Merchants Bank of Hagerstown v. Schlossberg*, 306 Md. 48, 61 (1986). It is advisable to amend or repeal SG § 6-107(a)(2) to be consistent with these bills.

Additional Comments

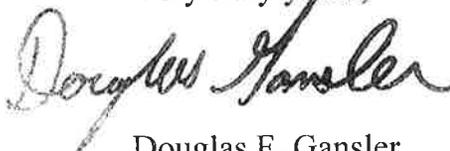
We conclude with a few additional observations. The bills provide that the Governor shall appoint all of the members of the Board, and that the appointments shall be made:

1. If the Senate is in session, with the advice and consent of the Senate;
or
2. If the Senate is not in session, by the Governor alone.

Page 18, lines 3-7. This provision tracks the language of Article 2B, § 15-101(a)(1) in current law, which governs the appointment of Boards of License Commissioners in any county where no other provision has been made. Despite the reference to "the Governor alone," this provision has been interpreted to require the advice and consent of the Senate once they are back in session. 88 *Opinions of the Attorney General* 136 (2003).

Finally, Section 7 of the bills provides that Section 3 of the Act will take effect when House Bill 270 takes effect, or will become abrogated if House Bill 270 does not take effect. House Bill 270 has been signed into law as Chapter 94 and takes effect October 1, 2014. Therefore, if signed, these bills will take effect on that same date.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/KMR/eb

cc: The Honorable Verna Jones-Rodwell
The Honorable Talmadge Branch
The Honorable Curt Anderson
The Honorable John P. McDonough
Jeanne D. Hitchcock
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