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April 21, 2016

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: Senate Bill 145 and House Bill 1352, "Wicomico County Board of Education – Election and Appointment of Members"

Dear Governor Hogan:

We have reviewed Senate Bill 145 and House Bill 1352, identical bills entitled "Wicomico County Board of Education - Election and Appointment of Members," for constitutionality and legal sufficiency. While these bills may be signed into law, there are provisions that raise constitutional issues. One of these, a provision for de novo judicial review of removals of members of the Board, can be resolved by the manner in which the law is administered. The other provision requires that Board members have resided in the County for two years prior to election. It is our view that the residency requirement raises constitutional issues, but is not clearly unconstitutional. In any event, the requirement is severable from the remainder of the legislation and thus would not render the bill as a whole invalid even if it were found to be unconstitutional.

The bills provide that a member of the Board who is removed from office has a right to de novo review of the removal by the Circuit Court for Wicomico County. If this provision were read literally, it would violate the Separation of Powers requirement of Article 8 of the Maryland Declaration of Rights by requiring a court to perform an executive and nonjudicial function. *See, Department of Natural Resources v. Linchester*, 274 Md. 211 (1975). However, General Provisions Article, § 1-108 provides:

[I]n a statute providing for de novo judicial review or appeal of a quasi-judicial administrative agency action, “de novo” means judicial review based on an administrative record and any additional evidence that would be authorized by § 10–222(f) and (g) of the State Government Article.

So long as the de novo review provision is implemented in accordance with this section, it will not raise constitutional problems.

The bills further provide that a candidate elected to the County Board shall have been a resident of Wicomico County for at least 2 years. A number of courts have analyzed durational residency requirements to determine whether they violate the Equal Protection Clause. Some of these courts have applied heightened scrutiny as a result of the impact on the right to travel, the right to vote, or a supposed right to be a candidate. Others have applied rational basis. The only reported Maryland case of which we are aware addressed a durational voter registration requirement and found it to be unconstitutional. *Board of Supervisors of Elections of Prince George’s Co. v. Goodsell*, 284 Md. 279 (1979) (declaring the 5-year voter registration requirement to run for county executive to violate the Equal Protection clause). In that case, the Court quoted extensively the Supreme Court’s decision in *Bullock v. Carter*, 405 U.S. 134, (1972), where the Court announced that a barrier to candidate ballot access “does not of itself compel close scrutiny. . . . In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.”

In *Bullock*, the Supreme Court determined that high filing fees at issue “substantially limited” voter choice and thus were subject to strict scrutiny. 405 U.S. at 144. Applying the analysis outlined in *Bullock*, the Court of Appeals in *Goodsell* discussed the number of residents who move in and out of the county and concluded that the “potential impact upon choice” of candidates imposed by the 5-year voter registration requirement “is clearly substantial.” 284 Md. at 289. At the same time, the Court also noted the case at issue involved a durational voter registration requirement for county-wide office as opposed to a residency requirement. The plaintiff met the residency requirement, thus the Court “assum[ed] without deciding” that there would be “a sufficient government interest to justify a substantial Residency requirement.” *Id.* at 290. *See also* 16B C.J.S. Constitutional Law § 1422 (April 2016 Update) (“A durational residency requirement for candidates that has an impact on certain fundamental rights is subject to the strict scrutiny test to determine whether it contravenes equal protection but, if it does not have a major impact on fundamental rights, may be justified on a rational basis that candidates should reside among the citizens they represent.”). Accordingly, because the case law is not clear enough to

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predict how a Maryland court would rule, we cannot say that the residency requirement in Senate Bill 145 and House Bill 1352 is clearly unconstitutional.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian E. Frosh". The signature is fluid and cursive, with the first name "Brian" being the most prominent.

Brian E. Frosh
Attorney General

BEF/KMR/kk

cc: The Honorable John C. Wobensmith
Joseph M. Getty
Warren Deschenaux