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April 28, 2017

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

**RE: *House Bill 1573 - Prince George's County - Tax Sales - Limited Auction and Foreclosure for Abandoned Property PG 411-17***

Dear Governor Hogan:

We have reviewed House Bill 1573 – “Prince George’s County - Tax Sales - Limited Auction and Foreclosure for Abandoned Property PG 411-17.” We write to raise concerns about the bill’s constitutionality. We believe that there is a significant risk that a court would find the bill violates the Equal Protection Clause and the Privileges and Immunities Clause. Additionally, there is a slight risk that a court could find the bill constitutes an unconstitutional taking or retroactively impairs vested rights. Nevertheless, we cannot say it is clearly unconstitutional on its face.<sup>1</sup>

State law generally requires tax collectors to conduct a tax sale at a public auction, not later than two years from the date the tax is in arrears, of all property in the county on which the tax is in arrears. *See* Tax – Property Article (“TP”), Title 14, Subtitle 8. House Bill 1573 requires the tax collector for Prince George’s County to conduct a “limited auction” prior to conducting the public auction for property in the county subject to tax liens. The limited auction is open only to bids from an individual who is an honorably-discharged veteran, an employee of the federal government, a County resident, or is employed by the County government, the County police department, the County fire department, the County sheriff’s department, a municipality in the County, or the County corrections department, or in a public school in the County. *See* new TP § 14-817(d)(3).

Under State law, a certificate of sale from a tax sale may be assigned. House Bill 1573 provides, however, that “a certificate of sale issued to a purchaser at a limited auction under § 14-817 may not be assigned to another person.” *See* new TP § 14-821(b). In addition, the holder of a certificate of sale has two years to foreclose the owner’s right of redemption, but in most cases

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<sup>1</sup> The Office of Attorney General ordinarily uses a “not clearly unconstitutional” standard when reviewing legislation. 71 *Opinions of the Attorney General* 266, 272 n.12 (1986).

must wait 6 months after the sale to file a complaint to foreclose. *See* TP § 14-833. Under House Bill 1573, the holder of a certificate of sale from the limited auction may file a complaint to foreclose at any time after the sale if the property is abandoned and “either a vacant lot or improved property cited as vacant and unfit for habitation on a housing or building violation notice...” *See* new TP § 14-833(h).

According to the Fiscal & Policy Note for House Bill 1573, over the past 5-year period, more than 91% of the property accounts offered for tax sale in Prince George’s County have been purchased. Moreover, “Prince George’s County advises that revenues may decrease as a result of potentially lower bids on properties subject to an earlier, limited auction compared to the higher bids that may have occurred had the properties been included in the general auction where there would be more competition. As a result, bid prices, and thus bid premiums, may be significantly lower.” (Fiscal & Policy Note at 4.) In sum, House Bill 1573 mandates that Prince George’s County conduct an auction of property subject to tax liens primarily for individuals who live in or work for the County, or who are honorably discharged from the military and not open to other members of the public or business entities, at which the bids in the closed auction are likely to be lower than the bids would be at a public auction.

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws,” and directs that all persons similarly situated be treated alike. Further, Article 24 of the Maryland Declaration of Rights states “[t]hat no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.” The Court of Appeals has stated that “we generally apply [Article 24 and the Equal Protection Clause of the Fourteenth Amendment] in a like manner and to the same extent.” *Ehrlich v. Perez*, 393 Md. 691, 715 (2006). *See also Kirsch v. Prince George’s Co.*, 331 Md. 89, 96 (1993) (“Although the Maryland Constitution does not contain an express equal protection clause, we have long held that equal protection is implicitly guaranteed by the due process provision found in Article 24.”).

The Supreme Court has announced that the Constitution “permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others.” *McGowan v. Maryland*, 366 U.S. 420, 425 (1961). The Court further explained that “[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.” *Id.* at 426.

Under this “rational basis” level of scrutiny, the classification will pass constitutional muster so long as it is “rationally related to a legitimate governmental interest.” In other words, we will uphold the statute under rational basis review “unless the varying treatment of different groups or persons is so unrelated to the

achievement of any combination of legitimate purposes that [the court] can only conclude that the [governmental] actions were irrational.” Statutes reviewed pursuant to this level of scrutiny are presumed constitutional, “and will be invalidated only if the classification is clearly arbitrary.”

*Conaway v. Deane*, 401 Md. 219, 272-77 (2007) (citations omitted).

Nevertheless, the Court of Appeals has invalidated governmental classifications that present no rational basis for the distinction between the classes or which present no fair and substantial relation to the objective of the legislation. See *Frankel v. Board of Regents of University of Maryland System*, 361 Md. 298, 316 (2000). “[I]n the area of economic regulation,” the Court of Appeals “has been particularly distrustful of classifications which are based solely on geography, *i.e.*, treating residents of one county or city differently from residents of the remainder of the State.” *Verzi v. Baltimore County*, 333 Md. 411, 423 (1994) (invalidating a Baltimore County regulation that required county police officers who responded to disabled vehicle calls to exclusively call tow vehicle operators who worked in Baltimore County). “Such classifications generally do not advance a legitimate government interest, but are intended instead to ‘confer the monopoly of a profitable business upon residents’ of one geographical area to the exclusion of the residents of other areas.” *Id.* at 427 (quoting *Mayor of Havre de Grace v. Johnson*, 143 Md. 601, 608 (1923)).

In *Frankel*, the Court of Appeals invalidated a Board of Regents policy that a student is not entitled to in-state tuition status if more than one-half of the student’s financial support came from a person or persons who lived out-of-state. 361 Md. at 314. “[A] government regulation placing a greater burden on some Marylanders than on others based on geographical factors must rest upon some ground of difference having a fair and substantial relation to the object of the regulation.” *Id.* at 317. The Court found that even if the Board had a legitimate basis for charging a lower in-state tuition to State residents, the Board’s tuition distinction based on out-of-state financial support had no fair and substantial relation to the Board’s legitimate objective. *Id.* See also *Kirsch*, 331 Md. at 106-08 (declaring as violating equal protection an ordinance limiting the number of college students who could live in a home as tenants because the court determined that the distinction between students and other tenants was arbitrary and did not advance the county’s stated objective).

A rational basis for House Bill 1573 could be to improve neighborhoods, promote homeownership, and reduce blight caused by vacant and abandoned properties. Yet it is unclear how the bill relates to these interests, given that the percentage of properties sold at tax sales in the County is already quite high. Moreover, there is no requirement that purchasers of property at the limited auction actually live in the homes purchased.<sup>2</sup> Thus, differentiating between properties in

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<sup>2</sup> A bill provision that required that the purchaser to occupy the property was deleted from the bill.

Prince George's County, and between those allowed to participate in the limited auction and those who cannot, risks be viewed negatively by a reviewing court as creating an improper preference. *Verzi*, 333 Md. at 423. As a result, there is a risk a court would find that such distinctions violate equal protection.

Similarly, creating a closed auction available primarily for County employees and residents in a County tax sale that discriminates against other potential bidders in a tax sale also presents a potential Privileges and Immunities Clause violation. The Privileges and Immunities Clause, U.S. Const., Art. IV, § 2, provides that “[t]he Citizens of each State shall be entitled to the Privileges and Immunities of the Citizens in the several States.” The purpose of the Privileges and Immunities Clause is to “strongly ... constitute the citizens of the United States as one people,” by “plac[ing] the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.” *Lunding v. New York Tax Appeals Tribunal*, 522 U.S. 287, 296 (1998) (quoting *Paul v. Virginia*, 75 U.S. 168, 180 (1868)). See also *United Bldg. and Constr. Trades Council of Camden County and Vicinity v Mayor and Council of City of Camden*, 465 U.S. 208, 215-16 (1984). Discrimination against non-residents may be allowable if “(i) there is a substantial reason for the difference in treatment and (ii) the discrimination practiced against non-residents bears a substantial relationship to the State’s objective.” *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985). Thus, the bidding opportunity granted to County employees, residents and others authorized to participate in the closed auction and possibly pay a lower price on property being auctioned by the County may be a constitutional violation if there is no substantial reason for the different treatment that has a substantial relationship to a valid governmental interest.

Another concern, albeit to a lesser extent, is that a court would find that the bill’s requirement of a limited auction, as applied to individuals who may possess a residual interest in the value of the property in a tax sale that is in excess of the owed taxes and expenses, is an unconstitutional governmental taking of property or abrogation of vested rights.<sup>3</sup>

Together, Maryland’s Declaration of Rights and Constitution prohibit the retrospective reach of statutes that would have the effect of abrogating vested rights. Article 24 of the Maryland Declaration of Rights, guaranteeing due process of law, and Article III, § 40 of the Maryland Constitution, prohibiting governmental taking

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<sup>3</sup> When the court enters a judgment foreclosing a right of redemption, the tax-sale purchaser must pay the unpaid balance of the purchase price to the collector, who must, in turn, execute a deed transferring title to the property to the plaintiff. TP § 14-818(a)(3). “Any balance over the amount required for payment of taxes, interest, penalties, and costs of sale shall be paid by the collector to ... the person entitled to the balance[.]” TP § 14-818(a)(4)(i). See *Kona Properties, LLC v. W.D.B. Corp., Inc.*, 224 Md. App. 517, 543 (2015) (“to receive the bid surplus, the former property owner requests the surplus funds from the collector”).

of property without just compensation, have been shown, through a long line of Maryland cases, to prohibit the retrospective reach of statutes that would result in the taking of vested property rights.

*Muskin v. State Dept. of Assessments and Taxation*, 422 Md. 544, 555-56 (2011) (citations omitted). “The Maryland Declaration of Rights and the Maryland Constitution are generally read in concert with their federal constitutional counterparts, and cases interpreting federal constitutional provisions are treated as ‘persuasive authority by a Maryland court interpreting the Maryland Declaration of Rights and Constitution.’” *Harvey v. Sines*, 228 Md. App. 283, 293 (2016) (quoting *Muskin*, 422 Md. at 555-56).

Under the Fifth Amendment of the federal constitution, private property shall not “be taken for public use, without just compensation.” U.S. Const. amend. V. A per se taking occurs when the state’s action results either in a permanent physical invasion of the property or a deprivation of all economically beneficial use for the owner. To establish a successful Takings Clause claim, a person must establish possession of a constitutionally protected property interest. *Neifert v. Dept. of the Environment*, 395 Md. 486, 517 (2006) (relying on *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-01 (1984)). Another requirement is that the property owners must show that they had reasonable investment-backed expectations that they would be able to sell the property at a reasonable price. “[T]he inquiry must acknowledge that not every investment deserves protection and ... some investors will inevitably be disappointed.” *The Maine Educ. Ass’n Benefits Trust v. Cioppa*, 695 F.3d 145 (1st Cir. 2012). As for a claim about the retroactive abrogation of vested rights, the Court of Appeals considers three factors: “fair notice, reasonable reliance, and settled expectations,” to determine “the nature and extent of the change in law and the degree of connection between the operation of the new rule and a relevant past event.” *John Deere Construction & Forestry Co. v. Reliable Tractor, Inc.*, 406 Md. 139, 147 (2008).

Owners of the properties subject to a tax sale are delinquent on their taxes owed. Moreover, property owners and others who have a valid interest in the property have a statutory right of redemption that makes available to them a procedure to protect their interests. Consequently, there is a strong argument that they could have no reasonable expectation of a large return on their investment on their property. Additionally, simply because the property owner may have received more revenue at a more competitive auction than received in the limited auction is unlikely to be sufficient to establish an unconstitutional taking. *See Harvey*, 228 Md. at 295 (holding that dormant mineral interest owners did not have “reasonable reliable and settled expectations” that they could make use of their interest as they had not done so for more than 20 years and also had never paid taxes on those interests).

At the same time, by limiting the participants of an auction in a tax sale, the State may be creating a mechanism that results in a significantly lower tax sale price than would have been achieved at an open auction. Such a result, as applied to an individual owner of an interest in the

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property, could arguably constitute a governmental taking of the property if the bids at the closed auctions prove to be substantially lower than those at the public auction.

Despite the foregoing concerns, because a reviewing court would give the State a great deal of discretion to determine whether classifications are rationally related to a legitimate governmental interest, we cannot conclude that House Bill 1573 is clearly unconstitutional on its face.

Sincerely,

A handwritten signature in cursive script, reading "Brian E. Frosh".

Brian E. Frosh  
Attorney General

BEF/SBB/kd

cc: The Honorable John C. Wobensmith  
Chris Shank  
Warren Deschenaux