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April 4, 2018

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

RE: Senate Bill 187, “Budget Reconciliation and Financing Act of 2018”

Dear Governor Hogan:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 187, “Budget Reconciliation and Financing Act of 2018” (“BRFA”). In reviewing the bill, we have considered whether any of its provisions violate the one subject requirement under the Maryland Constitution. We believe that two provisions that allocate income tax revenues raise serious concerns under the State Constitution’s one subject requirement, though it is our view that the provisions are not clearly unconstitutional.¹ If these provisions were challenged, and a court were to find them unconstitutional, it is our view that the provisions would be severable from the remainder of the bill. We also recommend that a provision that appears to mandate funding for the Maryland Historical Society be construed as a non-binding expression of legislative intent. Finally, we have identified three provisions, none of which are clearly unconstitutional, that we believe merit discussion.

¹ We apply a “not clearly unconstitutional” standard of review for the bill review process. *71 Opinions of the Attorney General* 266, 272 n.11 (1986).

The One Subject Requirement

Article III, § 29 of the Maryland Constitution provides, in relevant part, that “every Law enacted by the General Assembly shall embrace but one subject.” This provision traditionally has been given a “liberal” reading so as not to interfere with or impede legislative action. *MCEA v. State*, 346 Md. 1, 13 (1997). At the same time, the Court’s liberal approach to the one subject requirement was “never intended to render the Constitutional requirement meaningless” *Delmarva Power v. PSC*, 371 Md. 356, 369 (2002).

An act meets the one subject requirement if its provisions are “germane” to the same subject matter. *Migdal v. State*, 358 Md. 308, 317 (2000); *Porten Sullivan Corp. v. State*, 318 Md. 387, 407 (1990). “Germanc” means “in close relationship, appropriate, relative, [or] pertinent.” *Id.* Two matters can be regarded as a single subject because of a direct connection between them or because they each have a direct connection to a broader common subject. For purposes of assessing how closely connected and interdependent the provisions of a bill may be, the “notions of connection and interdependence may vary with the scope of the legislation involved.” *MCEA*, 346 Md. at 14 (quoting *Porten Sullivan*, 318 Md. at 407).

When reviewing the BRFA for constitutionality and legal sufficiency, this Office generally has considered whether the various provisions of the bill deal with the single subject of balancing the budget and adjusting the finances of State and local government. See Bill Review Letter on Senate Bill 172 of 2014 (the purpose of the BRFA is “to balance the State operating budget and provide for the financing of State and local government”); Bill Review Letter on Senate Bill 34 of 1991 (“the one subject of the fiscal affairs of State and local government government”); and Letter to William S. Ratchford, II from AAG Richard E. Israel, dated April 1, 1993 (“one-subject of adjusting the finances of State and local government”). The BRFA typically includes provisions that enhance revenues and reduce current and future year expenditures. These provisions often take the form of fund transfers, the elimination, reduction, or suspension of mandated spending, and revenue raising measures. Provisions that reduce revenues or increase State expenditures arguably run counter to the primary purpose of the BRFA, and the inclusion of such provisions in the BRFA raises constitutional concerns.

2018 BRFA Provisions

In reviewing this year’s BRFA, we have identified provisions that raise questions under the Constitution’s one subject requirement. There are two provisions that we believe

raise serious constitutional concerns: Tax-General Article (“TG”) § 2-605.1, which directs the Comptroller to distribute a portion of income tax revenues into a new special fund, and an amendment to TG § 2-606(h), which directs the Comptroller to distribute \$10 million annually to the Local Reserve Account beginning in fiscal year 2025.

Distribution to a New Innovation and Excellence Fund

The BRFA establishes a new special fund, the Commission on Innovation and Excellence in Education Fund (“Fund”) (Education Article (“ED”) § 5-219) and directs the Comptroller to distribute \$200 million of State income tax revenues to the Fund by the end of fiscal year 2019 (TG § 2-605.1). Money in the Fund may be used only to “assist in providing adequate funding for early childhood education and primary and secondary education through revised education funding formulas based on the final recommendations of the Commission on Innovation and Excellence in Education.” The Commission has not yet made final recommendations on how the State’s education funding formulas should be updated.

These BRFA provisions essentially set aside State funds, which otherwise would be deposited in the State General Fund, to meet anticipated increased expenditures due to revised education funding formulas. We have long recognized that the General Assembly may dedicate a portion of State revenues to a special fund to be used only for specified purposes. 20 *Opinions of the Attorney General* 201, 203-04 (1935) and 81 *Opinions of the Attorney General* 225-26 (1996). However, when such a provision is included in the BRFA, we also must consider whether it is consistent with the subject of the BRFA.²

Although TG § 2-605.1 does not reduce revenues to the State Treasury – because reduced General Fund revenues are offset by an equal increase in special fund revenues – the diversion of revenues into a special fund restricts how those funds may be used in future fiscal years to meet the demands of the State budget. Thus, such actions typically would not aid in the balancing of the budget. We have considered whether this BRFA provision

² We also have considered whether the provision allocating tax revenues into the new Fund is consistent with constitutional provisions governing the expenditure of State money (Md. Const., Art. III, §§ 32 and 52), which prohibit the withdrawal of funds from the Treasury except in accordance with an appropriation by law. TG § 2-605.1 does not authorize the expenditure of funds from the Treasury. Rather, it directs projected surplus tax revenues into a special fund within the Treasury and limits the purposes for which those funds may be spent. Because expenditure of the funds remains subject to the State budget process, it is our view this provision is not clearly unconstitutional as being inconsistent with constitutional provisions governing the State budget process. See 75 *Opinions of the Attorney General* 124 (1990).

nonetheless is germane to the subject of financing State government and balancing the State budget to the extent it would place the State in a better position to meet new financial demands stemming from future modifications of the State's education funding formulas. We recognize the argument that setting aside these funds may better position the State to meet the specific financial obligations associated with new education funding requirements enacted in the future. This argument carries particular weight given the State's recent experience in meeting the financial demands of the school funding formulas implemented on the recommendation of the Commission on Education, Finance, and Equity (the Thornton Commission). On the other hand, when one considers the budget in its entirety, with all of the State's funding obligations and priorities, diverting \$200 million of State income tax revenues to fund future enhancements of public education funding formulas necessarily reduces the amount of money available for other purposes, which a court could find to be contrary to the primary purpose of the BRFA.

Nonetheless, given the specific purpose of this provision – to assist in funding future enhancements to education funding, and given the State's recent experience with the fiscal challenges caused by enhancements in public education funding – we cannot say this BRFA provision is wholly unrelated to the subject of balancing the State budget and financing State and local government, and thus it is our view that it is not "clearly unconstitutional" We recognize there is a significant risk that a court may find the provision unconstitutional if challenged, though, if that were the case, it is our view that the provision is severable from the remainder of the bill. Because of the serious concerns regarding the constitutionality of this provision under the one subject rule, we recommend that the General Assembly re-enact it through standalone legislation.

Distributions to the Local Reserve Account

Another provision in the BRFA would make permanent the annual distribution of \$10 million of State income tax revenues to the Local Reserve Account ("Account"), as required by TG § 2-606(h).³ Under current law, the Comptroller is required to distribute \$10 million to the Account each year through fiscal year 2025.

³ Because this provision diverts tax revenues that would otherwise be deposited into the General Fund, we also have considered whether it is consistent with constitutional provisions governing the expenditure of State money (Md. Const., Art. III, §§ 32 and 52). This Office has recognized the distinction between the allocation of State money, which must be done through the State budget process, and the allocation of revenues that are local in nature and never lose their local status, which may be done by statute wholly outside the budget process. *See 75 Opinions of the Attorney General* 124 (1990). It is our view that the allocation of tax revenues to the Local Reserve Account done wholly outside the budget process, for the purpose of reimbursing the

The Account is used to manage the cash flow of local income tax revenues collected by the State and distributed to local jurisdictions pursuant to TG § 2-606. As of fiscal year 2018, the Account is underfunded by \$716.8 million, based on generally accepted accounting principles, which the State must report as an unfunded liability in its Comprehensive Annual Financial Report (“CAFR”). *Dept. of Legislative Services, Analysis of the FY 2019 Maryland Executive Budget, State Reserve Fund*, p. 13-14.

Arguably, the extension of the annual \$10 million distribution to the Account reflects prudent fiscal policy by codifying in law a commitment by the State to reimburse the Account for funds transferred out of the Account in prior years, thereby replenishing the Account at a level consistent with generally accepted accounting principles. Furthermore, it is our understanding that extending the repayment plan beyond fiscal year 2025 will reduce the State’s unfunded liability that must be reported in the CAFR, which is one of many measures rating agencies consider when evaluating the creditworthiness of the State. Accordingly, the statutory commitment to make reimbursement payments to the Account beyond fiscal year 2025 could be further defended as a fiscal measure that protects the State’s Triple-A credit rating and preserves the State’s ability to issue bonds on more favorable terms. For these reasons, it is our view that the BRFA provision that amends TG § 2-606(h) to require ongoing annual distributions of income tax revenues to reimburse the Local Reserve Account is not clearly unconstitutional.

Nonetheless, if this provision were challenged, we believe there is a significant risk that a court may find that it violates the Constitution’s one subject requirement, given that it reduces by \$10 million each year the revenues flowing into the Treasury. Like the prior provision, however, it is our view that this provision, if ruled unconstitutional by a court, would be severable from the rest of the bill. We recommend that this provision also be reenacted in standalone legislation so as to remove any concerns about a possible violation of the one subject requirement. We also recommend that the reenactment provide for the termination of the allocations upon the full reimbursement of the Account, or earlier, to address our concerns raised in footnote 3, *supra*.

Account, is constitutional. However, given the permanency of the reimbursement requirement, at some point the allocation no longer will represent the reimbursement of local funds, at which time it will become much more difficult to defend. Accordingly, we suggest that the General Assembly amend TG § 2-606(h) in a future session to provide for the termination of the annual allocation when the Account is fully reimbursed.

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Distribution to the Maryland Historical Society

This Office frequently has advised that funding mandates typically are not an appropriate subject for the BRFA. *See, e.g.*, Bill Review Letter on Senate Bill 172 of 2014 at 4-5 (amendments to the BRFA mandating funding for Park Service operations and State Police “likely violate[] the one-subject rule”); Letter to the Honorable Thomas V. Mike Miller, Jr. from Asst. Att’y Gen. Bonnie A. Kirkland, dated April 1, 2009 (advising that a change to the disparity grant formula that would increase State expenditures “would be inconsistent with the primary purpose of the BRFA and should be addressed in separate legislation”). However, we have recognized that funding mandates in the BRFA are “more defensible” if they are legislative reactions to budget action taken by the Executive, in either the Budget Bill or BRFA. Bill Review Letter on House Bill 152 of 2017, at 3, and Bill Review Letter on House Bill 147 of 2005 at 6.

An amendment to TG § 2-202(c) requires that the Comptroller distribute \$250,000 of admissions and amusement tax revenue each year to the Maryland Historical Society. To the extent this provision attempts to mandate that the Governor include an appropriation in the budget, it is our view the provision likely violates the one subject rule. Consistent with earlier bill review letters addressing funding mandates in the BRFA, we recommend that TG § 2-202(c)(2), which is neither related to another provision in the BRFA nor added in response to a budget action by the Governor, be construed as a non-binding expression of legislative intent. The Governor may appropriate \$250,000 each year to be distributed to the Maryland Historical Society pursuant to TG § 2-202(c)(2), but he is not required to do so.

Mandated Funding for Next Generation Farmland Acquisition Program and Program Open Space

Tax Property Article (“TP”) § 13-209 directs a portion of State transfer tax revenues to a special fund that supports Program Open Space, the Agricultural Land Preservation Fund, the Rural Legacy Program, and the Heritage Conservation Fund. Section 13-209(g)(1) through (3) mandate that the Governor include in the budget bill a certain amount of funding in specified fiscal years to repay distributions made from the transfer tax special fund to the General Fund in 2006. Subsection (g)(1) requires that the Governor include General Fund appropriations of \$2.5 million in each of fiscal years 2018 and 2019 for the Next Generation Farmland Acquisition Program (“Next-Gen Program”), which represents reimbursement of 5.6 percent of the funds distributed to the General Fund in 2006, and subsection (g)(2) requires that the Governor include General Fund appropriations of \$15 million in each of fiscal years 2019 through 2021 to the transfer tax

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special fund, which represents reimbursement of 50 percent of the funds distributed to the General Fund in 2006.

The Governor's fiscal year 2019 budget proposed to delay by one year the \$15 million annual repayment to the transfer tax special fund, which was reflected in the BRFA provision amending TP § 13-209(g)(2). The General Assembly accepted the one-year delay but amended the BRFA to reduce by \$7.5 million the cumulative annual repayments to the special fund and to add the same \$7.5 million of mandated funding for the Next-Gen Program, a farmland conservation easement program, by requiring annual appropriations of \$2.5 million to that program in fiscal years 2020 through 2022.

The new mandated funding for the Next-Gen Program is fully offset by reductions to the mandated funding for the transfer tax special fund. Furthermore, there is a nexus between these funding mandates. Both represent a portion of the reimbursement of the 2006 transfer from the special fund to the General Fund. Also, distributions from the transfer tax special fund support the Maryland Agricultural Land Preservation Fund (TP § 13-209(d)), which funds the Maryland Agricultural Land Foundation's agricultural and woodland conservation easement programs and a portion of which may be used to provide grants for the Next-Gen Program (Agriculture Article § 2-505). Lastly, the General Assembly's decision to shift future mandated funding from the transfer tax special fund to the related Next-Gen Program can be viewed as a legislative response to the Governor's proposal to delay reimbursement of the special fund. Accordingly, it is our view that these new funding mandates for the Next-Gen Program likely are defensible under the one subject rule and are not clearly unconstitutional.

Work Zone Speed Camera Revenues

In light of our bill review letter on the 2014 BRFA, we have considered whether an amendment to Transportation Article ("TR") § 12-118(e) is an appropriate subject for the BRFA. In our 2014 letter, we concluded that an amendment that added TR § 12-118(e)(1)(ii)2. likely violated the one subject rule because it appeared to be an attempt to mandate funding – by requiring the distribution of at least \$7 million a year to State Police for the purchase of replacement vehicles and related equipment.

Unlike the 2014 amendment, the amendment made by this year's BRFA does not mandate funding in the budget. Although it modifies the uses for which work zone speed camera revenues may be spent, the amendment does not require the Governor to appropriate a specific level of funding. Under TR § 12-118(e), the revenue from fines generated by work zone speed cameras are distributed to State Police and the State

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Highway Administration to cover the costs of administering the work zone speed control systems, after which, beginning in fiscal year 2019, any remaining funds are distributed to State Police to fund “roadside enforcement activities.” This year’s BRFA amends TR § 12-118(e) to provide that any remaining funds are to be distributed to State Police “for the purchase of replacement vehicles and related motor vehicle equipment.”

Funding for roadside enforcement activities may be used to purchase replacement vehicles and related equipment if the vehicles are used for that purpose, i.e., for roadside enforcement. *See Letter to the Hon. James E. DeGrange, Sr. from Asst. Att'y Gen. David W. Stamper, August 30, 2016* (purchase of replacement vehicles used for roadside enforcement activities is consistent with the statutory requirement that speed camera revenues be used for “roadside enforcement activities”). It is our view that expanding the uses of dedicated revenues – in this case, for any replacement vehicles, including those not used for roadside enforcement – generally is consistent with the subject of balancing the budget. However, we recognize that this amendment also limits in certain ways how the revenues may be used – by excluding non-vehicle expenditures for roadside enforcement activities. Nonetheless, we believe this provision, which does not raise the same concerns as the 2014 BRFA provision, is not clearly unconstitutional.

Electronic Instant Bingo Machines

Section 23 of the BRFA is meant to clarify a provision of Ch. 603 *Laws of Maryland* 2012. The State Lottery and Gaming Control Commission has construed that provision as requiring that an entity licensed to operate electronic instant bingo machines replace its machines only with those of the specific type that it had in operation under a license on December 31, 2007. Section 23 clarifies that a licensee may operate any type of electronic instant bingo machine that the Commission has approved for any other licensee. This provision preserves a source of State revenues from instant bingo operations. It allows a licensee to replace electronic bingo machines if the specific type of machine the licensee had been using no longer is available in the market. Moreover, because the provision merely clarifies existing law and is not meant to effect a substantive change, we do not believe it raises significant concerns under the Constitution’s one subject requirement.

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Conclusion

SB 187 is constitutional and legally sufficient. Although it contains two provisions that raise serious concerns under the Constitution's one subject requirement, it is our view that these provisions are not "clearly unconstitutional." If the provisions were challenged and deemed unconstitutional by a court, they are severable from the other provisions in the bill. General Provisions Article, § 1-210.

Sincerely,



Brian E. Frosh
Attorney General

BEF/DWS/kd

cc: The Honorable John C. Wobensmith
Chris Shank
Victoria L. Gruber