

BRIAN E. FROSH  
ATTORNEY GENERAL



SANDRA BENSON BRANTLEY  
COUNSEL TO THE GENERAL ASSEMBLY

ELIZABETH F. HARRIS  
CHIEF DEPUTY ATTORNEY GENERAL

KATHRYN M. ROWE  
DEPUTY COUNSEL

CAROLYN A. QUATTROCKI  
DEPUTY ATTORNEY GENERAL

JEREMY M. MCCOY  
ASSISTANT ATTORNEY GENERAL

THE ATTORNEY GENERAL OF MARYLAND  
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

DAVID W. STAMPER  
ASSISTANT ATTORNEY GENERAL

May 10, 2018

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

***RE: House Bill 1295 and Senate Bill 989, "One Maryland Economic Development Tax Credits - Simplification and Alteration"***

Dear Governor Hogan:

We have reviewed and hereby approve Senate Bill 989 for constitutionality and legal sufficiency. We write to discuss issues raised by the cross-filed bill, House Bill 1295.

House Bill 1295 and Senate Bill 989 are designated as cross-filed bills but are not identical as passed. Both bills amend Economic Development Article ("EC"), § 6-401, which relates to the One Maryland Economic Development Tax Credit to substitute the term "Tier I county" for the term "qualified distressed county." Both bills also define the newly added term, "Tier I county" in EC § 6-401, in a manner that is based on the definition of "qualified distressed county" in current law, in EC § 1-101, but the definition has been amended in a way that likely makes more counties eligible.<sup>1</sup> As introduced, both bills would have eliminated the definition of qualified distressed county in the Article-wide definitions provision in EC § 1-101 and added the new definition of Tier I county that appears in EC § 6-401 in both bills as passed. This change to EC § 1-101 was amended out of Senate Bill 989 but ultimately left in House Bill 1295, with the result that House Bill 1295 eliminates the definition of qualified distressed county but only explicitly substitutes the term "Tier county" in § 6-401.

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<sup>1</sup> This is because the definition includes a county with "a median household income for the most recent 24-month period for which data are available that is equal to or less than 75% of the median household income for the State during that period." Current law uses 67% rather than 75% of the median household income for the State during that period.

Eliminating the definition of “qualified distressed county,” as House Bill 1295 does, would create significant ambiguities in a number of other provisions in the Economic Development Article, because the term is still used in Title 5, Subtitle 3 (Maryland Economic Development Assistance Authority and Fund); Title 5, Subtitle 4 (Maryland Industrial Development Financing Authority); and Title 6, Subtitle 8 (More Jobs for Marylanders Program). Even if the bill is read to apply the new definition of “Tier I county” to these other provisions, the deletion of the definition of “qualified distressed county” and the extension of the new definition of “Tier I county” is especially problematic in reference to Title 6, Subtitle 8 because that provision under current law has a different definition of “Tier I county.” Section 6-801(j) defines “Tier I county” as: “(1) a qualified distressed county as defined in § 1-101 of this article; or (2) a county designated by the Department that is not a county described in paragraph (1) of this subsection, not to exceed 3 counties.” In general, a more specific provision, such as a definition of a term applicable to a single subtitle, would prevail over a general one applicable to the entire article. *Clarksville Residents Against Mortuary Defense Fund v. Donaldson Properties*, 453 Md. 516, 538-539 (2017). In this case, however, the existing definition is rendered virtually meaningless in House Bill 1295 by the repeal of the definition of “qualified distressed county.” Applying the new definition of “Tier I county” would also be problematic, however, because it raises questions about whether the Department retains the ability to designate additional counties, as is allowed in current law.

In addition and more concerning, application of the new “Tier I county” definition would likely expand the eligibility criteria programs that use that term in a manner that is not mentioned in the title of the bill. The changes discussed in that title relate only to the One Maryland Economic Development Tax Credit, and the generally relating clause refers only to the One Maryland Economic Development Tax Credit Program. Article III, § 29 of the Maryland Constitution states, in relevant part, that “every Law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title. . .” The purpose of this constitutional provision “is to assist the members of the Legislature in finding out the nature of the bills, usually read to them by their titles only, and in watching their course intelligently, and also to inform the citizens of the State generally about the proposed legislation, and to give them an opportunity to appear before the committees of the Legislature.” *Bell v. Board of County Comm’rs of Prince George’s County*, 195 Md. 21 (1950).

The first clause of the purpose paragraph says “altering the definition of ‘qualified distressed county’ by altering certain income levels in the definition and renaming it to be ‘Tier I county.’” Arguably this clause is broad enough to encompass a change to the definitions throughout the provisions of the Economic Development Article in Division I to which that definition applies. The only existing definition of “qualified distressed county” that could have been “altered” in the Article is in the definitions provision at the beginning of the Article that applies to Division I.

On the other hand, although a title does not necessarily need to explain every change to existing law with specificity, *see Mayor & City Council of Baltimore v. Perrin*, 178 Md. 101 (1940), it does need to provide fair notice of the subject matter of the bill such that someone reading the title will know essentially what the bill is about and will not be misled about the scope of the bill. *Bell*, 195 Md. at 28-29. House Bill 1295’s title seems to focus exclusively on the One Maryland program and does not mention any other programs, let alone any changes to the scope of any other programs. A fair reading of the title, and the better read in our view, would lead one to believe that the subject of the bill is the One Maryland program alone. Therefore, even though the first clause of the title arguably encompasses changes to other programs, there is a strong risk that a court would find the title to be misleading if the change were applied more broadly. *See Bell*, 195 Md. at 28-29 (explaining the difference between an insufficiently descriptive title and a misleading one).

Nonetheless, despite our concerns the Office of Attorney General uses a “not clearly unconstitutional” standard when reviewing legislation. 71 *Opinions of the Attorney General* 266, 272 n.12 (1986). Moreover, Maryland courts have said that titles should be liberally construed to avoid constitutional problems. *See Eubanks v. First Mount Vernon Indus. Loan Ass’n, Inc.*, 125 Md. App. 642, 669 (1999) (“Statutes are presumed valid, and a statute will not be invalidated for defective titling unless it plainly contravenes a provision of the constitution, and a reasonable doubt in its favor is enough to sustain it.”) (internal quotes and citations omitted). Given this high bar, together with a plausible argument that the title provides sufficient notice that the definition of “qualified distressed county” is being changed throughout the Article, we cannot say that this bill is clearly unconstitutional, even if read to change the scope of other tax credit programs.

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Accordingly, should you sign House Bill 1295, either together with Senate Bill 989 or alone, we recommend that legislation be enacted next year to clarify which programs are subject to the changed and expanded definition and to make those changes clear in the title.

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  
Victoria L. Gruber