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May 13, 2021

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

***RE: House Bill 589, "Budget Reconciliation and Financing Act of 2021"***

Dear Governor Hogan:

We have reviewed House Bill 589, "Budget Reconciliation and Financing Act of 2021" ("BRFA"), for constitutionality and legal sufficiency. While we approve the bill, there are two provisions that raise a concern under the "one subject" requirement of Article III, § 29 of the State Constitution. The first purports to mandate funding in the fiscal year 2023 budget for a cost-of-living ("COLA") adjustment for specified State employees. Because we ultimately conclude the provision does not meet the standards for establishing a funding mandate, it is our view it does not violate the one subject requirement. We also offer some guidance as to how the provision should be implemented. The second provision, which re-allocates future transfer tax repayments, and which does so by creating new funding mandates, raises some concern under the one subject requirement. Nonetheless, because those new mandates are fully offset by reductions to existing mandates, and there is a nexus between the new mandates and those that have been reduced, it is our view that these new mandates are not "clearly unconstitutional."<sup>1</sup> Finally, we offer some clarification on Section 9 of the BRFA in light of a drafting error in that section.

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<sup>1</sup> 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). “Germane” 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. When 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).

For purposes of the BRFA, we have looked at “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.” Bill Review Letter on Senate Bill 187 of 2018; *see also* 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”); Letter to William S. Ratchford, II from Assistant Attorney General Richard E. Israel, April 1, 1993 (“one-subject of adjusting the finances of State and local government”).

As we have noted in past bill review letters, the BRFA typically includes provisions that enhance revenues and reduce current and future year expenditures, which “often take the form of fund transfers, the elimination, reduction, or suspension of mandated spending, and revenue raising measures.” Bill Review Letter on Senate Bill 187 of 2017. Provisions that reduce revenues or increase State expenditures, on the other hand, “arguably run counter to the primary purpose of the BRFA, and the inclusion of such provisions in the BRFA raises constitutional concerns.” *Id.*

Given the historical purpose of the BRFA, we have consistently advised that funding mandates typically are not an appropriate subject for the BRFA. . . . A BRFA provision that creates a new funding mandate or increases the amount of an existing mandate is the most difficult to defend, as the effect of the provision is counter to the primary purpose of the BRFA – to balance the State budget. Nonetheless, we have recognized that funding mandates are “more defensible” when they are legislative reactions to a budget action taken by the Executive, either in the Budget Bill or the BRFA.

Bill Review Letter on House Bill 1407 of 2019 (citations omitted). We also have suggested that a new funding mandate enacted through the BRFA may be easier to defend if it is offset by reductions to other funding mandates, at least where there is a nexus between the two. *See* Bill Review Letter on Senate Bill 187 of 2018 (new mandated funding for the Next Generation Farmland Acquisition Program offset by reductions to the mandated repayments to the transfer tax special fund).

*Funding for a State Employee Cost-of-Living Adjustment*

Under current law, a portion of projected and unappropriated “nonwithholding income tax revenues” is to be deposited in the Fiscal Responsibility Fund (“FRF”) at the end of each fiscal year to the extent those revenues are not needed to support General Fund appropriations or to maintain a balance in the Revenue Stabilization Account (“RSA”) at or above six percent of estimated General Fund revenues. State Finance and Procurement Article (“SFP”) § 7-329.<sup>2</sup> The Governor must then include in the budget bill for the second following fiscal year an appropriation for public school capital projects, including projects at public institutions of higher education, equal to the amount in the FRF. SFP § 7-330.

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<sup>2</sup> The RSA is one of four accounts that make up the State Reserve Fund, SFP § 7-309, and its purpose is to retain State revenues for future needs and reduce the need for future tax increases by moderating revenue growth, SFP § 7-311. Certain unappropriated nonwithholding income tax revenues not needed to support General Fund appropriations are to be deposited into the RSA until the balance of the RSA equals six percent of the estimated General Fund revenues for the fiscal year, after which any remaining nonwithholding income tax revenues are to be allocated between the RSA and the FRF. SFP § 7-329(b) though (d). “Nonwithholding income tax revenues” represent the State share of income tax quarterly estimated and final payments with returns made by individuals. SFP § 6-104(a)(1).

This year's BRFA amends SFP § 7-329(b-1) to direct the Comptroller to distribute to the FRF, "[a]t the end of fiscal year 2022," all of the nonwithholding income tax revenues not needed to support General Fund appropriations (rather than allocate the revenues between the RSA and the FRF) for the purpose of providing certain State employees a COLA of up to 4.5% beginning July 1, 2022. The BRFA then amends SFP § 7-330(j)(3) to require that the Governor include in the budget bill submitted at the 2022 session an appropriation "equal to the amount distributed to the [FRF] in accordance with § 7-329(b-1)" to provide the COLA beginning July 1, 2022.<sup>3</sup>

To the extent these provisions would result in a net increase of mandated funding, we believe they would be highly questionable under the Constitution's one subject requirement.<sup>4</sup> Our concerns about a violation of the one subject requirement, however, are alleviated because, in our view, § 7-330(j)(3) is not "a level of funding prescribed by law" within the meaning of Art. III, § 52(11) and (12), and thus the statutory directive to include funding in the budget bill for a COLA is not binding on the Governor. In other words, it is our view that § 7-330(j)(3) does not establish a constitutional funding mandate.

This Office has consistently advised that a law requiring the Governor to fund a program at a particular level is binding on the Governor only if it "clearly prescribe[s] a dollar amount or an objective basis from which a level of funding can easily be computed." 65 *Opinions of the Attorney General* 108, 110 (1980); see also *Judy v. Schaefer*, 331 Md. 239, 269 n.20 (1993) (relying on 65 *Opinions of the Attorney General* 108 to conclude that

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<sup>3</sup> A similar provision was included in the BRFA of 2019 (Ch. 16 Laws of Maryland 2019) and subsequently amended by the BRFA of 2020 (Ch. 538 Laws of Maryland 2020). In our 2019 bill review letter we noted "a legitimate question" as to whether the provision was consistent with the purpose of the BRFA, given that it established a new funding mandate. Nonetheless, we concluded it was not clearly unconstitutional under the one subject requirement of Article III, § 29, because the ultimate effect of the bill's provisions in that case was to replace an existing funding mandate (for public school projects) with a new funding mandate of a slightly lesser amount (for State employee COLAs).

<sup>4</sup> We note that the current BRFA provisions appear to differ from those in the 2019 BRFA. The provisions at issue in 2019 had the effect of slightly *reducing* the revenues allocated to the FRF. Although we raised concern about those provisions as well, we concluded they were not "clearly unconstitutional" under the Constitution's one subject requirement. In reaching that conclusion, we largely relied on the fact that the ultimate effect of the various BRFA provisions was "that the General Assembly has, for one year, replaced an existing funding mandate (for public school projects) with a new funding mandate of a slightly lesser amount (for State employee COLAs)."

the General Assembly had not mandated funding for a particular program). It is our view that these provisions of the BRFA do not satisfy that requirement.

Section 7-330(j)(3) directs the Governor to include in the budget bill submitted at the 2022 session (the fiscal year 2023 budget bill), an appropriation that is “equal to the amount distributed to the [FRF] in accordance with § 7-329(b-1)” to fund a COLA. The fiscal year 2023 budget bill is to be delivered to the presiding officers of the House and Senate on the third Wednesday of January, 2022. Md. Const., Art. III, § 52(5). However, the amount to be included in the budget bill for a COLA – i.e., “the amount distributed to the [FRF] in accordance with § 7-329(b-1)” – will not be known until the end of fiscal year 2022, which will not close until several months later, on June 30, 2022. Accordingly, it is our view that SFP § 7-330(j)(3), as amended by the BRFA, neither prescribes a dollar amount or provides an objective basis from which a level of funding can easily be computed, and, therefore, the directive to appropriate funds for a COLA of up to 4.5% is not binding on the Governor.

Though § 7-330(j)(3) is not, in our view, binding on the Governor, using the BRFA as a vehicle for allocating a larger share of nonwithholding income tax revenues to the FRF remains a significant concern under the one subject requirement because State law directs the Governor to include in the budget bill for the second following fiscal year an appropriation for public school capital projects that is equal to the amount in the FRF. Accordingly, it is our view that the nonwithholding income tax revenues should be allocated between the RSA and the FRF at the end of fiscal year 2022 as currently provided in SFP § 7-329, notwithstanding the BRFA’s amendments to SFP § 7-329(b-1). At the same time, the Governor may, at his discretion, rely on the estimated fiscal year nonwithholding income tax revenues to fund a State employee COLA in the fiscal year 2023 budget bill, as specified in the BRFA. This approach is consistent with the general purpose of the BRFA provisions – to provide funding for State employee COLAs – as well as the prior advice of this Office when a purported mandate is determined not to be binding on the Governor, and it avoids the constitutional concerns that would be raised if the BRFA were to increase mandated funding for public school capital projects.

#### *Re-allocation of Transfer Tax Repayments*

As originally introduced, the BRFA would have amended Tax-Property Article (“TP”), § 13-209 to delay the fiscal year 2022 repayments to the transfer tax special fund. The General Assembly struck those provisions from the bill, opting not to delay the payments, and it further amended § 13-209 to alter the purposes for which the 2022 funds

are to be used so as to track amendments to the fiscal year 2022 budget bill.<sup>5</sup> In addition, it modified the repayment schedule for future years by adding new funding mandates. Specifically, the General Assembly added funding for the Maryland Agricultural and Resource-Based Industry Development Corporation's ("MARBIDCO") Next Generation Farmland Acquisition Program for fiscal years 2023 through 2027 and funding for MARBIDCO in fiscal year 2025 to support its rural business loan and small matching grant programs, its Certified Local Farm Enterprise Program, and the development of agricultural product aggregation and storage sites.

Although creating new funding mandates in the BRFA raises an issue under the Constitutions' one subject requirement, these new funding mandates for fiscal years 2023 through 2027 were offset by equal reductions to mandated repayments to the transfer tax special fund. Furthermore, there is at least some nexus between the new funding mandates and the transfer tax repayments, in that the transfer tax repayments currently support MARBIDCO programs. *See* TG § 13-209(g)(1). Lastly, the General Assembly's decision to re-allocate the transfer tax repayments might be viewed as a legislative response to the Governor's proposal to delay those repayments. Accordingly, it is our view that the funding mandates added to TP § 13-209 are not clearly unconstitutional.

## **Section 9 – Erroneous Cross-References**

Finally, we note that Section 9 of the BRFA, which provides that certain one-time education aid grants for counties in fiscal year 2022 are contingent on a county increasing its local funding for the county board of education, incorrectly refers to those grants as being authorized "under § 5-219(f)" of the Education Article ("ED"), as enacted by "Section 1" of the BRFA. As originally introduced, the BRFA authorized the one-time grants under subsection (g), not subsection (f), of ED § 5-219. When the House amended the bill, it replaced ED § 5-219 with ED § 5-206 to reflect the re-numbering of those sections by Ch. 36 of 2021, and the one-time education aid grants for fiscal year 2022 were then authorized under ED § 5-206(g). Subsequent conference committee amendments then placed § 5-206 under Section 2 of the BRFA. The language in Section 9, however, was never amended to reflect those changes. Notwithstanding Section 9's reference to the one-time grants authorized "under § 5-219(f)," as enacted by "Section 1" of the BRFA, we think it is clear, based on the legislative record, that the contingency is to apply to the one-

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<sup>5</sup> *See* House Bill 588 (Item Y01A02.01). The General Assembly amended the general fund appropriation to the Dedicated Purpose Account to provide that, of the amount appropriated for Program Open Space Repayment, \$21.9 million may only be used for the Outdoor Recreation Land Loan, Critical Maintenance Program, and another \$1.2 million may only be used for a pilot dredging project at Deep Creek Lake.

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time education aid grants for fiscal year 2022 that are authorized under ED § 5-206(g), as authorized by Section 2 of the BRFA.

Sincerely,

A handwritten signature in blue ink that reads "Brian E. Frosh". The signature is written in a cursive style with a large initial "B" and a long horizontal stroke at the end.

Brian E. Frosh  
Attorney General

BEF/DWS/kd

cc: The Honorable John C. Wobensmith  
Keiffer J. Mitchell, Jr.  
Victoria L. Gruber