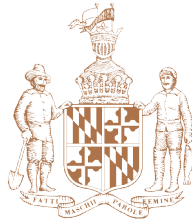


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April 21, 2023

The Honorable Wes Moore
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401
Delivered via email

RE: House Bill 202, “Budget Reconciliation and Financing Act of 2023”

Dear Governor Moore:

We have reviewed for constitutionality and legal sufficiency House Bill 202, “Budget Reconciliation and Financing Act of 2023” (“BRFA”). Although provisions in the bill raise a significant concern under the Constitution’s “one subject” requirement, it is our view the bill is not clearly unconstitutional.¹ In the event a court were to find that a provision in the bill violates the one subject requirement, it is our view that any unconstitutional provision would be severable from the remainder of the bill.²

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). This deferential approach has been taken in recognition of the nature of the legislative process, the political compromises that are part of this process, and the need to address increasingly complex issues through multifaceted legislation. *Delmarva Power v. PSC*, 371 Md. 356, 368-69 (2002); *MCEA*,

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).

² See General Provisions Article, § 1-210 (a finding by a court that part of a statute is unconstitutional or void does not affect the validity of the remaining provisions of a statute unless those remaining provisions are incomplete and incapable of being executed consistent with legislative intent).

346 Md. at 14. At the same time, the Court’s deferential approach to the one subject requirement was “never intended to render the Constitutional requirement meaningless ...” *Delmarva Power*, 371 Md. at 369.

The reasons for the one subject rule are:

1. To avoid the necessity for a legislator to acquiesce in a bill he or she opposes in order to secure useful and necessary legislation; to prevent the engrafting of foreign matter on a bill, which foreign matter might not be supported if offered independently.
2. To protect, on similar ground, a governor’s veto power.

Porten Sullivan Corp. v. State, 318 Md. 387, 408 (1990) (internal citations omitted).

The Supreme Court of Maryland has said that an act satisfies the Constitution’s one subject requirement if its provisions are “germane” to the same subject matter. *Migdal v. State*, 358 Md. 308, 317 (2000); *Porten Sullivan*, 318 Md. at 407. “Germane” means “in close relationship, appropriate, relative, pertinent.” *Porten Sullivan*, 318 Md. at 402. For purposes of § 29, two matters can be regarded as a single subject either horizontally, because of a direct connection between them, or vertically, because they each have a direct connection to a broader common subject to which the bill relates. *MCEA*, 346 Md. at 15-16.

While the concept of vertical connectivity (having a direct connection to a broader common subject) affords the Legislature a certain degree of flexibility to combine provisions in a single bill, the Supreme Court of Maryland has made clear that there still are limits. For example, in *Migdal* the Court concluded that a bill violated the one subject requirement where it contained (1) a narrow provision that protected directors of mutual funds from shareholders’ derivative suits and (2) a separate provision that required persons to provide written consent before being designated as a resident agent of a corporation or association. The Court found the two provisions to be “completely separate and unrelated provisions,” and it rejected the State’s argument that the two provisions each related to the broader subject of “regulating corporations,” which the Court characterized as being “too broad and tenuous of a relationship to satisfy the one-subject requirement.” *Migdal*, 358 Md. at 319.

For purposes of past BRFA’s, this Office 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.” Bill Review Letter on House Bill 589 of 2021 (quoting Bill Review Letter on Senate Bill 187 of 2018). BRFA’s traditionally have

included provisions designed to enhance revenues and reduce current and future year expenditures. Such provisions “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.

We recognize that the General Assembly’s expanded budget powers under Art. III, § 52 of the State Constitution³ may, in some cases, provide a legal basis for including provisions in the BRFA other than traditional measures to increase revenues or reduce spending. For example, this year’s BRFA was amended to include a provision that authorizes the Maryland Energy Administration to use \$9.25 million in funding from the Maryland Gas Expansion Fund for the repair of certain existing gas infrastructure. That BRFA provision implements an amendment made to the budget bill (HB 200) that would increase the appropriation from the Gas Expansion Fund, contingent on legislation authorizing that new use, and for that reason its inclusion in the BRFA arguably is defensible. But there are provisions in this year’s BRFA that are neither the traditional BRFA measures that increase revenues or reduce expenditures nor defensible for inclusion in the BRFA because they implement actions taken on the budget bill by the General Assembly using its new budgetary powers.

The most questionable provision is an amendment to § 12-120 of the Education Article that gives the University of Maryland School of Medicine greater discretion in assigning faculty to the University of Maryland Capital Regional Center. That provision is not germane to the subject of balancing the budget and financing government, and it does not appear to be related in any way to legislative action on the budget bill. Another provision that appears questionable for the BRFA is an amendment to Chapter 39 *Laws of Maryland 2022*, the purpose of which is to delay by two years a requirement that the Bainbridge Development Corporation transfer certain property to the Department of Natural Resources. We note, however, that another bill passed by the General Assembly during the 2023 legislative session (Senate Bill 517) provides for the same two-year delay. Accordingly, if SB 517 should become law, that would moot any questions under the Constitution’s single subject requirement about the validity of the BRFA provision that amends Chapter 39.

³ Article III, § 52(6b) of the Maryland Constitution authorizes the General Assembly, beginning with the fiscal year 2024 budget, to amend the budget bill by increasing, diminishing, or adding items relating to the General Assembly, the judiciary, and the Executive Department, “provided that the total of the appropriation for the Executive Department approved by the General Assembly does not exceed the total proposed appropriation for the Executive Department submitted by the Governor.” In prior years, the General Assembly could amend the budget bill to “increase or diminish” items relating to the General Assembly or judiciary, but it otherwise could only “strike out or reduce” items.

The Honorable Wes Moore

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Notwithstanding these questionable provisions, the BRFA may be signed into law. If a court were to determine that a provision of the BRFA violates the one subject requirement, it is our view that the offending provision would be severable from the remainder of the bill.

Sincerely,

A handwritten signature in black ink, appearing to read "A.G. Brown". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Anthony G. Brown

AGB/DWS/kd

cc: The Honorable Susan C. Lee
Eric G. Luedtke
Victoria L. Gruber