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May 7, 2024

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

RE: Senate Bill 360, "Budget Bill (Fiscal Year 2025)"

Dear Governor Moore:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 360, "Budget Bill (Fiscal Year 2025)." Our review of the annual budget bill generally is confined to those provisions that are subject to veto.¹ Nonetheless, we write to highlight one item (not subject to veto) for the purpose of offering our view as to how that item should be construed, notwithstanding a drafting error. We also note that an item

¹ See Bill Review Letter on House Bill 200, "Budget Bill (Fiscal Year 2024)," dated April 21, 2023. Per Art. II, § 17 of the Maryland Constitution, the Governor may only veto items in the budget bill relating to the Executive Department that have been increased or added by the General Assembly. All of the other provisions in the budget bill become law immediately upon the bill's passage, without further action by the Governor. Md. Const., Art. II, § 17(f) and Art. III, § 52(6a) and (6b).

added by the General Assembly raises some constitutional concerns, but it is not, in our view, clearly unconstitutional.²

As introduced, the budget bill included a special fund appropriation for Program K00A05.10 (Outdoor Recreation Land Loan – Capital Appropriation) in the amount of \$86,470,887. It further stated that, of the special fund appropriation, “\$54,324,298 represents that share of Program Open Space revenues available for State projects and \$54,324,298 represents that share of Program Open Space revenues available for local programs.” Senate Bill 360, Enrolled, p. 75, lines 30-35. As the sum of the State and local shares exceeds \$86,470,887 (the total special fund appropriation for the Program), there clearly is a drafting error. That drafting error apparently was not identified before the General Assembly took final action on the bill.

There is, however, an additional breakdown of the special fund appropriation that appears in the budget bill, following the drafting error, that makes it clear that the intended State share of the special fund appropriation is \$54,324,298, while the intended local share is \$32,146,589. *See* Senate Bill 360, Enrolled, p. 76, line 43 through p. 77, line 10. That State and local share breakdown properly sums to \$86,470,887. Accordingly, it is our view that Item K00A05.10 should be understood as appropriating \$86,470,887 in special funds, of which \$54,324,298 represents the share of Program Open Space revenues available for State projects and \$32,146,589 represents the share of Program Open Space revenues available for local programs.

Section 21 of the budget bill includes a number of items added by the General Assembly, including the following:

(19) \$1,000,000 in general funds is added to the appropriation for program J00D00.01 Port Operations within the Maryland Port Administration within the Maryland Department of Transportation (MDOT) for the purpose of drone-based security provided by a Maryland-based Small Unmanned Aircraft System company that has a drone that has received a Federal Aviation Administration Type Certification/Airworthiness R00033LA with integrated control station/hangar, ability to autonomously change batteries and payloads and received a Beyond Visual Line of Sight waiver to ensure the highest level of safety and support. Funds not expended for this added purpose may not be transferred by

² 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).

budget amendment or otherwise to any other purpose and shall revert to the General Fund.

The initial version of this item, which was added in the Senate, stated that the appropriation was for the purpose of drone-based security to be provided by a specific entity. However, conference committee amendments struck the reference to the named entity and inserted the requirement that the drone-based security services be provided by a “Maryland-based Small Unmanned Aircraft System company” with a drone that meets specified standards. Although this provision raises issues under separation of powers principles and the constitutional prohibition on special laws, it is our view that the provision is not clearly unconstitutional.

Article III, § 33 of the Maryland Constitution provides, in part, that “the General Assembly shall pass no special law, for any case, *for which provision has been made, by an existing General Law.*” (Emphasis added). A prohibited “special law” has been described as a “private Act, for the relief of particular named parties, or providing for individual cases,” *Montague v. State*, 54 Md. 481, 490 (1880); a “special law for a special case,” *Jones v. House of Reformation*, 176 Md. 43, 55 (1939); or a law that “relates to particular persons or things of a class, as distinguished from a general law which applies to all persons or things of a class.” *Prince George’s County v. B. & O. R. Co.*, 113 Md. 179, 183 (1910).

It is not clear that the Constitution’s prohibition on special laws even applies to appropriation measures. If it does, an appropriation that effectively limits a State procurement to a single entity³ could amount to an unconstitutional special law if the procurement would otherwise be subject to a competitive bidding process under State procurement laws. In our view, those constitutional concerns are minimized if the appropriation merely incorporates legitimate terms, conditions, or specifications that are reasonably related to the procurement, even if the effect is to limit a procurement to a single entity (though including detailed terms, conditions, or specifications for a procurement could raise a separation of powers issue, as noted below). On the other hand, if the parameters of the appropriation are not related to legitimate procurement objectives, but appear to be designed primarily to limit a procurement to a specific entity, the constitutional concerns are much greater. Although it is our view that this specific item of appropriation is not clearly an unconstitutional special law, we urge the General Assembly to exercise caution in the future when appropriating funds for State procurements.

³ To be clear, we do not know how many entities could meet the standards specified in Section 21(19), but it is our understanding that there likely is only one entity (or very few entities) that presently could do so.

We also note that attaching comprehensive procurement terms, conditions, or specifications to an item of appropriation could raise a separation of powers issue if the Legislature is effectively establishing the detailed solicitation terms for a procurement by a unit of the Executive Branch.⁴ In our view, Section 21(19) of the budget bill does not cross that line and, for that reason, does not violate separation of powers principles.

Sincerely,

A handwritten signature in black ink, appearing to read "AG 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

⁴ Article 8 of the Maryland Declaration of Rights establishes the requirement of the separation of powers among the branches of government. It provides:

That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.