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April 3, 2019

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

RE: House Bill 1407, "Budget Reconciliation and Financing Act of 2019"

Dear Governor Hogan:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 1407, "Budget Reconciliation and Financing Act of 2019" ("BRFA"). While we approve the bill, we write to address three provisions that we believe raise concerns under the State Constitution's one subject requirement. Two of the provisions involve funding mandates, and although they do not result in any increase in State expenditures, we believe their inclusion in the BRFA is questionable. Moreover, to the extent that one of those provisions mandates a deficiency appropriation, we caution that mandating funding through a deficiency appropriation may be inconsistent with Article III, § 52. The third provision, which adds a notice requirement for certain projects to be included in the State's Consolidated Transportation Program ("CTP"), has only a tenuous connection to the State budget.

Though it is our view that these provisions are not clearly unconstitutional, we recommend that the General Assembly reenact the provisions next session to cure any potential constitutional defect.¹ If these provisions were challenged and a court were to find any of them unconstitutional, it is our view that each of the provisions would be severable from the remainder of the bill.

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 constitutional 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 liberal reading of the one subject requirement was “never intended to render the Constitutional requirement meaningless” *Delmarva Power v. PSC*, 371 Md. 356, 369 (2002).

Generally speaking, 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). In this context, “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. 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). Moreover, “a measure that begins life as a comprehensive one, and then has additional details inserted may survive a § 29 attack more readily than an originally narrow bill which becomes a very broad one.” *Porten Sullivan*, 318 Md. at 407.

When analyzing the BRFA for compliance with the one subject requirement, 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.” 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 AAG Richard E. Israel, April 1, 1993 (“one-subject of adjusting the finances of State and local government”).

As we noted in our bill review letter on last year’s BRFA:

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.

Given the historical purpose of the BRFA, we have consistently advised that funding mandates typically are not an appropriate subject for the BRFA. Bill Review Letter on House Bill 152 of 2017; Bill review Letter on Senate Bill 172 of 2014; Bill Review Letter on House Bill 147 of 2005. 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 Senate Bill 187 of 2018; Bill Review letter on House Bill 152 of 2017.

Provisions in the 2019 BRFA

This year’s BRFA was initiated by the General Assembly in reaction to anticipated General Fund revenue write-downs following the submission of the Governor’s budget. The Department of Legislative Services anticipated “a revenue write-down of about \$200 million across fiscal 2019 and 2020.” Fiscal Note on House Bill 1407 of 2019, First Reader. According to the Department of Legislative Services, a write-down of that magnitude would “require about \$200 million of legislative actions, including \$150 million of structural actions, to attain the Spending Affordability Committee goals.” *Id.* The actual revenue write-down reported by the Board of Revenue Estimates amounted to a \$138 million reduction for Fiscal Year 2019 and a \$130.5 million reduction for Fiscal Year 2020.

As introduced, the BRFA included provisions that enhance special fund revenues and authorize certain special fund expenditures for the purpose of offsetting General Fund cuts; reduce mandated General Fund expenditures; reduce Fiscal Year 2019 General Fund appropriations; and enhance Fiscal Year 2020 General Fund revenues with certain projected and unappropriated “nonwithholding income tax revenues” that otherwise would have been deposited into a special fund.

As noted above, we have identified three provisions in the BRFA that raise concerns in light of the one subject requirement of Article III, § 29 of the Maryland Constitution, one of which also raises an issue under Article III, § 52 to the extent the provision mandates a deficiency appropriation.

Mandated Funding for Cost-of-Living Adjustments in the Fiscal Year 2021 Budget

Under current law, a portion of projected and unappropriated “nonwithholding income tax revenues” are to be deposited in the Fiscal Responsibility Fund (“FRF”) at the end of Fiscal Year 2020, and at the end of each subsequent 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”) § 7-329.² The Governor must include in the Budget Bill for the second following fiscal year an appropriation equal to the amount in the FRF for public school capital projects, including projects at public institutions of higher education. SFP § 7-330(g) and (j). Thus, the Governor’s budget submission for Fiscal Year 2022, for example, must include an appropriation for public school capital projects equal to the amount of nonwithholding income tax revenues, if any, that were deposited into the FRF at the end of Fiscal Year 2020 pursuant to SFP § 7-329.

The BRFA amends SFP § 6-104(e) so that, for Fiscal Year 2020, a greater share of projected nonwithholding income tax revenues is credited to the State’s General Fund. The bill also amends SFP § 7-329 so that the nonwithholding income tax revenues not distributed to the General Fund are deposited in the FRF, rather than being allocated between the RSA and the FRF. It is our understanding that projected revenues to the FRF for Fiscal Year 2020 would decrease modestly as a result of these BRFA provisions.

The BRFA also amends SFP §§ 7-329 and 7-330 to provide that any nonwithholding income tax revenues allocated to the FRF at the end of Fiscal Year 2020 are to be used to fund a cost-of-living adjustment (“COLA”) of up to 2 percent beginning July 1, 2020,³ for permanent employees of the Executive Branch of State government who are in certain bargaining units. Pursuant to new SFP § 7-330(i)(3), the Governor must include in the Budget Bill submitted at the 2021 session an appropriation equal to the amount distributed

² 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).

³ July 1, 2020, is the start of State Fiscal Year 2021.

to FRF for the purpose of funding the COLA. The effect of these provisions is 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).

Although these provisions, collectively, result in a modest reduction of future mandated expenditures, the reallocation of funding does not serve the BRFA's primary purpose of balancing the State budget. The budget balancing is achieved by the amendment to SFP § 6-104(e), which results in additional estimated revenues accruing to the General Fund for Fiscal Year 2020. The reallocation of funding to State employee COLAs is independent of the amendment to SFP § 6-104(e), is not related to any other provision in the BRFA, and does not itself serve to balance the budget.

As we have noted before, funding mandates in the BRFA are the types of provisions that are the most difficult to defend. This position "is consistent with one of the underlying purposes of the one subject rule – to protect the Governor's veto power." Bill Review Letter on House Bill 152 of 2017. We recognize that the new funding mandate for employee COLAs, however, is more defensible given that it replaces an existing mandate and does not increase State expenditures. In light of this, it is our view that, although there is a legitimate question about inclusion of this provisions in the BRFA, the provision mandating funding for COLAs is not clearly unconstitutional under the one subject requirement of Article III, § 29.

We also write to comment on the funding mandate to the extent it requires the Governor to include funding for COLAs in the Fiscal Year 2022 Budget Bill as a deficiency appropriation for Fiscal Year 2021.

Article III, § 52 requires that the Governor, in January each year, submit to the General Assembly "a Budget for the next ensuing fiscal year." § 52(3). The budget "shall contain a complete plan of proposed expenditures and estimated revenues for said fiscal year and shall show the estimated surplus or deficit of revenues at the end of the preceding fiscal year." *Id.* The Governor shall submit the budget to the presiding officers of each House, along with a Budget Bill containing all of the proposed appropriations of the budget. § 52(5). Thus, in describing the Governor's constitutional obligation to submit a budget and a Budget Bill, Article III, § 52 speaks to the budget plan for "the next ensuing fiscal year."

Subsections (11) and (12) detail how the Governor is to develop that budget plan. "For the purpose of making up the Budget, the Governor shall require from the proper State

officials ... such itemized estimates ... as directed by the Governor. An estimate for a program required to be funded by a law which will be in effect during the fiscal year covered by the Budget and which was enacted before July 1 of the fiscal year prior to that date shall provide a level of funding not less than that prescribed in the law.” § 52(11). The Governor has broad discretion to revise the spending estimates for State agencies, but the Governor may not reduce any estimate below the level of funding prescribed by a law “which will be in effect during the fiscal year covered by the Budget, and which was enacted before July 1 of the fiscal year prior thereto.” § 52(12).

Based on these provisions, there is a legitimate argument that the Governor’s constitutional obligation to “include a level of funding not less than that prescribed in ... law” relates only to the spending estimates for the next fiscal year, and the General Assembly, therefore, cannot mandate that the Governor include in the budget submission a minimum level of funding as a deficiency appropriation. We note, however, that there are existing statutory provisions that require the Governor to include deficiency appropriations in the budget under certain circumstances. *See, e.g.*, Tax-Property Article § 9-104(b)(3) (requiring a deficiency appropriation to fully reimburse counties for the homeowners’ tax credit if the initial appropriation is insufficient); Education Article §§ 16-305(e)(4) and 16-508(d) (requiring a deficiency appropriation under certain circumstances to support services at community colleges for students enrolled in an English for Speakers of Other Languages program). Moreover, we recognize that the long accepted practice of Governors including deficiency appropriations in the Budget Bill is not expressly authorized by Article III, § 52 but is essentially an implied power derived from the Governor’s general responsibilities over State finances under that constitutional provision. As such, it can be reasonably argued that the limitations of the Executive Budget Amendment, including those involving mandated appropriations, are equally applicable to this implied authority to provide for deficiency appropriations.

Though we have reservations about the General Assembly’s authority to mandate funding through a deficiency appropriation, for the above reasons we cannot say the BRFA provision, to the extent it purports to mandate a deficiency appropriation, is clearly unconstitutional.⁴ However, to address any question about the provision’s constitutional validity – under Article III, § 52 and the one subject requirement of Article III, § 29 – we recommend that the General Assembly reenact the provision through stand-alone

⁴ We note that the BRFA provision does not contravene the timing restrictions regarding funding mandates in Article III, Sec. 52(11) and (12) because the provision does not mandate funding in the Fiscal Year 2020 budget.

legislation during the 2020 session for the purpose of funding a COLA in Fiscal Year 2022.⁵

Town of Forest Heights Local Impact Funding

A conference committee amendment to the BRFA alters the allocation of video lottery terminal revenues distributed as local impact grants under State Government Article (“SG”) § 9-1A-31 by requiring the distribution of \$120,000 to the Town of Forest Heights. While this reallocation of funding does not result in any increase in State expenditures, it does not serve the primary purpose of balancing the State budget. Moreover, it does not appear to be related to any other provision in the BRFA or to any action taken in the Budget Bill. While it is our view that the provision is not clearly unconstitutional, we believe its inclusion in the BRFA is questionable under the one subject rule. Accordingly, we recommend that the General Assembly reenact this provision through stand-alone legislation next session.

We also note that, pursuant to Article III, § 52(11) and (12) of the Maryland Constitution, the General Assembly may not mandate an appropriation for the next fiscal year - i.e., for the fiscal year that is the subject of the budget then under consideration. Accordingly, the amendments to SG § 9-1A-31 cannot establish a funding mandate for the next fiscal year, and the Governor, therefore, is not required to provide an appropriation to support the distribution to the Town of Forest Heights in Fiscal Year 2020, though it is our view that he may, in his discretion, authorize the distribution.

Certification of Notice Requirement - Consolidated Transportation Program

The third provision, which relates to the State’s Consolidated Transportation Program (“CTP”), amends Transportation Article § 2-103.1(c)(6) to add an additional requirement for the inclusion of a major capital project in the construction program of the CTP. Specifically, it requires that an entity making a request for inclusion of a project provide a “certification that all members of the legislative delegation of the county in which the project is located have been notified.”

⁵ Because the balance in the FRF will not be known until after the Fiscal Year 2021 budget is submitted, the FRF fund balance could not serve as a measure for establishing the prescribed amount of funding for the Fiscal Year 2021 budget submission. This is likely why the BRFA provision mandates the funding in the Fiscal Year 2022 budget submission as a deficiency appropriation for Fiscal Year 2021.

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This provision does not serve the purpose of balancing the budget, and it is not related to any other provision in the BRFA or action taken on the Budget Bill. There is, of course, a general connection between the State budget and the BRFA provision in that the certification of notice requirement relates to projects for which an entity requests State funding. However, given that the purpose of the provision – to notify legislators of funding requests – is only indirectly related to the formulation of the budget, we believe the connection likely is too tenuous to satisfy the Constitution’s one subject requirement. Accordingly, as with the other provisions highlighted in this letter, we recommend that the General Assembly reenact it in standalone legislation next session.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian E. Frosh". The signature is fluid and cursive, with a large initial "B" and a long, sweeping underline.

Brian E. Frosh
Attorney General

BEF/DWS/kd

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