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April 28, 2020

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

RE: Senate Bill 192

Dear Governor Hogan:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 192, “Budget Reconciliation and Financing Act of 2020.”¹ In reviewing the bill, we have considered whether any of its provisions violate the one subject requirement of Article III, § 29 of the Maryland Constitution. It is our view that two provisions involving funding mandates raise significant issues. Moreover, to the extent that one of the provisions increases a funding requirement for the upcoming fiscal year, it is our view that the enhanced funding requirement is inconsistent with the Constitution’s timing restrictions for funding mandates. As explained further below, it is our view that both provisions should be construed as non-binding expressions of intent. We also write to clarify that Section 8 of the bill is not an appropriation.

The Constitution’s 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 “one subject” requirement traditionally has been given a “liberal” reading by the Court of Appeals so as not to interfere with or impede legislative action. *MCEA v. State*, 346 Md. 1, 13 (1997). At the same time, that liberal reading was “never intended to render the Constitutional requirement meaningless” *Delmarva Power v. PSC*, 371 Md. 356, 369 (2002).

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).

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. 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 reviewing the Budget Reconciliation and Financing Act (“BRFA”) in prior years, 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, April 4, 2018; *see also* Bill Review Letter on House Bill 1407 of 2019, April 3, 2019. As we noted in our letter on the 2018 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.

It has been the consistent advice of this Office that new funding mandates typically are not an appropriate subject for the BRFA. Bill Review Letter on House Bill 152 of 2017, April 4, 2017; Bill Review Letter on Senate Bill 172 of 2014, May 14, 2014; Bill Review Letter on House Bill 147 of 2005, May 19, 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.” Bill Review Letter on House Bill 1407 of 2019. We have, however, recognized that funding mandates in the BRFA are “more defensible” when they are a legislative reaction 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 (“shift[ing] future

mandated funding from the transfer tax special fund to the related Next-Gen Program can be viewed as a legislative response to the Governor’s proposal to delay reimbursement of the [transfer tax] special fund”); Bill Review Letter on House Bill 152 of 2017 (increase in future mandated funding not clearly unconstitutional to the extent it could be viewed as a legislative response to a delay in construction funding).

Provisions in the 2020 BRFA

In reviewing this year’s BRFA, we have identified two provisions that raise significant concerns under the one subject requirement. The first adds a funding mandate in the fiscal year 2025 budget for the Maryland Agricultural and Resource-Based Industry Development Corporation (“MARBIDCO”). The other provision modifies a requirement that the Governor include funding in next year’s Budget Bill to fund a cost-of-living adjustment (“COLA”) in fiscal year 2021 for certain Executive Branch employees. To the extent the latter provision purports to increase mandated funding for fiscal year 2021, it also is inconsistent with the Constitution’s timing restrictions for funding mandates. It is our view that the enhanced funding required by both of these provisions should be construed as an expression of intent that is not binding on the Governor.

Funding for MARBIDCO

State law requires that the Governor include in the Budget Bill each year, through fiscal year 2024, \$2.875 million to MARBIDCO for rural business development and assistance. Economic Development Article, § 10-523. The BRFA, as passed by the General Assembly, reduces the required funding to \$2.735 million for fiscal years 2022 through 2024 – a combined reduction of \$420,000 over three fiscal years – but extends the funding mandate by one year by requiring that \$2.735 million be included in the Budget Bill for fiscal year 2025. The net effect is an increase of \$2.315 million in mandated funding.²

To the extent the new funding mandate for fiscal year 2025 could be characterized as merely a deferment of some of the funding required for fiscal years 2022 through 2024, the provision would be easier to defend. However, the net increase of \$2.315 million in mandated funding is particularly problematic. That increase in mandated funding is

² The BRFA further provides that the funding for fiscal years 2022 through 2025 shall be used to support MARBIDCO’s rural business loan and small matching grant programs, and, contingent on the taking effect of Senate Bill 985 or House Bill 1488, \$435,000 of that amount shall be used to provide certain grants and near-equity investments. Both Senate Bill 985 and House Bill 1488 passed the General Assembly and were approved by this Office for constitutionality and legal sufficiency by letter dated April 9, 2020.

contrary to the primary purpose of the BRFA, it does not appear to be a legislative reaction to a budget action taken by the Executive, and it is the type of BRFA provision that this Office has identified as “the most difficult to defend.”

Consistent with our prior bill review letters addressing funding mandates in the BRFA, we recommend that the \$2.735 million in new mandated funding for MARBIDCO for fiscal year 2025 be construed as a non-binding expression of legislative intent. If the General Assembly wants to impose a legally binding funding requirement for fiscal year 2025, we recommend that it re-enact the funding mandate through separate legislation. In the absence of such a legislative fix, it is our view that the Governor is not required to include the \$2.735 million in the Budget Bill for fiscal year 2025.

Funding for COLAs

The BRFA also amends State Finance and Procurement Article (“SFP”), §§ 7-329 and 7-330 to modify a requirement that the Governor include funding in the budget to provide a COLA of up to 2 percent, beginning July 1, 2020, for permanent employees of the Executive Branch of State government who are in certain bargaining units. That funding requirement was enacted by last year’s BRFA, Ch. 16 *Laws of Maryland* 2019, and while we noted there was “a legitimate question” as to whether the provision was consistent with the purpose of the BRFA, we concluded it was “not clearly unconstitutional under the one subject requirement of Article III, § 29.”³

In addition to the one subject issue, we raised concern about the provision because it purported to mandate funding in the fiscal year 2022 Budget Bill as a deficiency appropriation for fiscal year 2021. Though we expressed “reservations” about the General Assembly’s authority to mandate funding through a deficiency appropriation, we concluded, in light of the absence of legal precedent to the contrary, that such a mandate is not clearly unconstitutional. In reaching that conclusion, however, we also noted that the provision in the 2019 BRFA “does not contravene the timing restrictions regarding funding mandates in Article III, Sec. 52(11) and (12) because [it] does not mandate funding in the Fiscal Year 2020 budget.”

³ 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).” Though we acknowledged there was “a legitimate question” raised by including in the BRFA the funding requirement for employee COLAs, we ultimately concluded that doing so was not clearly unconstitutional.

Subject to certain limitations, the Governor has broad discretion in deciding the purpose and amount of appropriations included in the Budget Bill. *Judy v. Schaefer*, 331 Md. 239, 247-248 (1993). One such limitation is that the Governor must include in the budget a minimum level of funding required by a law enacted before July 1 of the prior fiscal year. Md. Const., Art. III, § 52(11) and (12). Accordingly, for the purpose of determining the level of funding to be included in the annual Budget Bill submitted to the General Assembly each January, the Governor is bound by a statutory funding mandate only if it was enacted before July 1 of the prior year. A law passed during the 2020 legislative session that purports to mandate funding in the fiscal year 2021 budget is not binding on the Governor. *See* Bill Review Letter on Senate Bill 172 of 2014.

This year's BRFA amends SFP §§ 7-329 and 7-330 to require that the funds distributed to the Fiscal Responsibility Fund pursuant to SFP § 7-329(b-1) be used to provide a COLA of up to 3 percent for employees of certain bargaining units, subject to available funding, rather than the 2 percent required under current law. To the extent this amendment increases the required funding for COLAs in fiscal year 2021, it is our view the enhanced funding requirement is not binding on the Governor. We think it is doubtful a court would accept that the General Assembly can effectively circumvent the timing restrictions regarding funding mandates in Article III, Sec. 52(11) and (12) by requiring that the Governor include funding in the fiscal year 2021 budget through a deficiency appropriation in the Budget Bill for fiscal year 2022.⁴ Consistent with the prior advice of this Office on bills that purport to mandate funding for the upcoming fiscal year, to the extent the amendments to §§ 7-329 and 7-330 would increase funding for COLAs, those amendments should be viewed as a non-binding expression of intent.

Section 8

We also write to clarify that a certain provision in Section 8 of this year's BRFA is not an appropriation. Under the State Constitution, there are two types of laws that can appropriate money from the Treasury: (1) the annual Budget Bill, which is initiated by the Governor, or (2) a supplementary appropriation bill, which is initiated by the General Assembly. Md. Const., Art. III, § 52(2), (5), and (8). Thus, outside of the Budget Bill, the only legislative vehicle for directly appropriating money is a supplementary appropriation

⁴ This position also is consistent with our Office's prior advice. *See* Letter to the Hon. John R. Leopold from AAG Bonnie A. Kirkland, April 6, 2005 (advising that a law passed at the 2005 legislative session could not mandate that the Governor include funding in the budget for fiscal year 2006 by way of a deficiency appropriation in the Budget Bill for fiscal year 2007).

bill. Supplementary appropriation bills are governed by Md. Const., Art. III, § 52(8), which provides that such a bill must, among other things, levy a tax to support the appropriation contained therein. As the BRFA does not levy a tax, it is not a supplementary appropriation bill and, therefore, cannot appropriate money.

Section 8 of the BRFA amends language in last year's Budget Bill (Ch. 565 *Laws of Maryland* 2019) that restricts \$2.35 million in transportation aid for Baltimore City. Specifically, Section 8 eliminates the requirement that the funds be provided to the City "on a reimbursable basis,"⁵ and, with respect to \$1.75 million dedicated to "improvements on Fort Smallwood Road," clarifies that the reference to Fort Smallwood Road includes the "continuation" of that road, which is designated as Hawkins Point Road.⁶

Although the issue has yet to be addressed by any court, this Office has advised that the General Assembly, through ordinary legislation, can effectively amend an enacted Budget Bill to exercise its constitutional power to "strike out or reduce" items of appropriation. *See* Letter to the Hon. Barbara A. Hoffman from Jack Schwartz, Chief Counsel, Opinions and Advice, April 1, 1994. There is considerable precedent for the General Assembly reducing an appropriation in a previously-enacted Budget Bill through ordinary legislation. It is not unusual for the General Assembly, for example, to include provisions in the BRFA that, by reference to specific items of appropriation in the Budget Bill from the prior legislative session, effectively amend the Budget Bill by cutting those appropriations. Because Section 8 does not increase an item of appropriation, initiate a new appropriation, or otherwise expand the purposes for which appropriated funds may be used beyond what was intended by last year's Budget Bill, it is our view that the provision is not an attempt to appropriate money outside of the Budget Bill or a supplementary appropriation bill.

At the same time, we caution that Section 8, which actually re-enacts the item of appropriation from the Budget Bill, may be, for that reason, more difficult to defend, if challenged, than the typical BRFA provisions that cut appropriations. Accordingly, we suggest in the future that the General Assembly reference the prior appropriation – as it has

⁵ The requirement that the funds be provided to Baltimore City "on a reimbursable basis" was eliminated as a result of a delay in the release of the funds after they mistakenly were identified as being "fenced off" by the General Assembly, with the delay effectively preventing the City from being able to incur the expenses prior to the end of the fiscal year.

⁶ The name of Route 173 changes from Fort Smallwood Road to Hawkins Point Road shortly after entering the City from Anne Arundel County.

The Honorable Lawrence J. Hogan, Jr.
April 28, 2020
Page 7

in the case of BRFA provisions that cut prior appropriations – rather than re-enact the item of appropriation.

Sincerely,

A handwritten signature in blue ink that reads "Brian E. Frosh". The signature is fluid and cursive, with 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