

BRIAN E. FROSH
ATTORNEY GENERAL

ELIZABETH F. HARRIS
CHIEF DEPUTY ATTORNEY GENERAL

CAROLYN A. QUATTROCKI
DEPUTY ATTORNEY GENERAL



THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

SANDRA BENSON BRANTLEY
COUNSEL TO THE GENERAL ASSEMBLY

KATHRYN M. ROWE
DEPUTY COUNSEL

JEREMY M. MCCOY
ASSISTANT ATTORNEY GENERAL

DAVID W. STAMPER
ASSISTANT ATTORNEY GENERAL

February 14, 2021

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

RE: Senate Bill 496, "Recovery for the Economy, Livelihoods, Industries, Entrepreneurs, and Families (RELIEF) Act"

Dear Governor Hogan:

We have reviewed and hereby approve Senate Bill 496, "Recovery for the Economy, Livelihoods, Industries, Entrepreneurs, and Families (RELIEF) Act," for constitutionality and legal sufficiency. While we approve the bill, we write this letter to highlight certain provisions that call for the disbursement of State funds, and which must be supported by a valid appropriation to implement. In addition, we note there is some risk that transferring the full \$23 million derived from the merger of AltaGas Ltd. and WGL Holdings to provide customer arrearage assistance, as authorized by the bill, would amount to an unconstitutional abrogation of vested rights. Nonetheless, as explained in greater detail below, it is our view a portion of those funds can be redirected for that purpose without raising concerns of potentially abrogating vested rights.

Senate Bill 496, an emergency bill, includes a number of measures aimed at providing economic relief for individuals and businesses, including, among other measures, income tax relief, an adjustment to the method for calculating the unemployment insurance tax, a temporary enhancement to the State's refundable earned income credit, and enhanced funding for various State programs.

Economic Impact Payments

Section 6 of the bill directs the Comptroller to distribute economic impact payments to each taxpayer who received a State earned income tax credit, pursuant to Tax-General Article (“TG”), § 10-704, for tax years 2019 or 2020. The economic impact payments are not made as part of a tax credit program. Rather, they are cash payments targeted at low and moderate income wage earners who are identified as such based on their eligibility to receive the earned income credit.¹ It is our view that these payments must be supported by a valid appropriation.

Under the State Constitution, the Treasurer receives and deposits into the State Treasury the “moneys of the State.” Md. Const., art. VI, § 3. Article III, § 32 of the Constitution provides that “[n]o money shall be drawn from the Treasury of the State . . . except in accordance with an appropriation by Law.” There are two types of laws that may appropriate State money. The first is the annual budget bill, which is prepared and initiated by the Governor. The second is a supplementary appropriation bill, which is initiated by the General Assembly. Md. Const., art. III, § 52(2), (4), and (8). Thus, any bill, other than the annual budget bill, that appropriates State money is considered a supplementary appropriation bill, subject to the requirements and restrictions in Article III, § 52(8). Of particular relevance here, a supplementary appropriation bill must levy a tax to “provide the revenue necessary to pay the appropriation [made] thereby,” and the General Assembly may not pass a supplementary appropriation bill “until after the Budget Bill has been finally acted upon by both Houses.”

Senate Bill 496 cannot, itself, appropriate the necessary funds, as it is not a supplementary appropriation bill. It does not levy a tax, and it was passed before final action on the budget bill. We have been advised that neither the budget bill for the current fiscal year nor the budget bill currently under consideration contains an appropriation for this purpose. The budget bill currently under consideration could be amended with a “supplemental budget” to provide the necessary appropriation.² Another possible means of appropriating the funds is the budget amendment procedure in § 7-209 of the State Finance and Procurement Article. We note, however, that the constraints of the statutory budget amendment procedure may limit its use as a viable route for making the appropriation.

¹ In this way, the economic impact payments are distinguishable from a refundable tax credit payment, the amount of which is based on the tax liability of each taxpayer.

² Article III, § 52(5) authorizes the Governor, with the consent of the General Assembly, to “amend or supplement” the budget.

Grants from the Local Reserve Account

The State collects State and local income tax payments and distributes the receipts in accordance with the procedures in TG Title 2, Subtitle 6. After making the disbursements required by TG §§ 2-604 through 2-607, including disbursements to the Local Reserve Account and to municipal corporations and special taxing districts, the Comptroller distributes to each county the remaining individual income tax revenue attributable to the county income tax for each county. TG § 2-608. After the distributions to the counties, the remaining income tax revenues are distributed to the State's General Fund. TG § 2-609.

The Local Reserve Account, established pursuant to TG § 2-606, is used to manage the cash flow of local income tax revenues collected by the State and distributed to local jurisdictions. Section 11 of the bill authorizes the Comptroller to distribute from the Local Reserve Account grants to those counties that have an unrestricted fund balance of less than five percent of their general fund revenues for fiscal year 2021.

As the revenues distributed to the counties pursuant to TG § 2-608 are attributable to each county's income tax, those funds are not "moneys of the State," need not be deposited into the Treasury, and may be distributed to counties without an appropriation. *75 Opinions of the Attorney General* 124 (1990) (recognizing the validity of the statutory scheme by which the State collects and disburses local income tax revenues outside of the State's budget process). As we read Section 11, however, the intent is to authorize the Comptroller to use funds in the Local Reserve Account to provide grants to eligible counties that are *in addition to* the normal distribution of county income tax revenues under TG § 2-608.

The grants are, in effect, distributions of State income tax revenues. As such, it is our view they must be supported by a valid appropriation. *See 75 Opinions of the Attorney General* at 131 (advising that a lawful appropriation is needed to implement a provision directing the Comptroller to distribute to counties specific amounts of individual income tax revenues in addition to the county income tax revenues that are "derived from particular jurisdictions [and] marked off, year after year, for the use of those jurisdictions"). A possible vehicle for making the appropriation is the budget bill now under consideration, through a supplemental budget. The statutory budget amendment procedure is another possible option, though, as noted above, it might not provide a viable remedy given the constraints on budget amendments.

Funds Derived from the Merger of AltaGas and WGL Holdings

Section 10(a) of the bill provides that \$23 million of the money derived from the Public Service Commission's ("PSC") approval of the merger of AltaGas Ltd. ("AltaGas") and WGL Holdings, Inc. ("WGL"), and which was deposited in the Strategic Energy Investment Fund for the Maryland Gas Expansion Fund, may only be expended for utility arrearage assistance in fiscal year 2021. It further provides that those funds may be appropriated by budget amendment to the PSC.

By Order No. 88631 in Case No. 9449, the PSC approved the AltaGas / WGL merger, subject to several conditions, including the following:

In order to promote economic development in the State of Maryland, job creation and the expansion of natural gas infrastructure to underserved parts of Maryland, AltaGas will deposit \$30,320,000 in a fund (the "Maryland Gas Expansion Fund") to be administered by the [Maryland Energy Administration ("MEA")]. AltaGas shall deposit such funds into the Maryland Gas Expansion Fund no later than four months from Merger Close. MEA shall use such funds in its discretion for the purpose of promoting the expansion of natural gas infrastructure to serve businesses, residents, industrial enterprises, and utility generation facilities in Maryland. *At least a majority of these funds will be spent in Washington Gas's service territory. . . .*

PSC Order No. 88631, Appendix A, Condition No. 7 (emphasis added).

Because the PSC expressly required that "at least a majority" of the \$30.32 million be spent in Washington Gas's service territory "for the purpose of promoting the expansion of natural gas infrastructure," there is a risk that directing a majority of the \$30.32 million to the PSC for utility arrearage assistance would be viewed by a court as an unconstitutional abrogation of AltaGas's vested rights.

"Maryland's Declaration of Rights and Constitution prohibit the retrospective reach of statutes that would have the effect of abrogating vested rights." *Muskin v. SDAT*, 422 Md. 544, 555-57 (2011). While there is no precise definition of what constitutes a "vested right," it is "something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the

The Honorable Lawrence J. Hogan, Jr.
February 14, 2021
Page 5

present or future enjoyment of property, a demand, or a legal exemption from a demand by another.” *Allstate Ins. Co. v. Kim*, 376 Md. 276, 298 (2003) (citing *Godfrey v. State*, 530 P.2d 630, 632 (Wash. 1975)).

The PSC imposed this merger condition to ensure that the merger met the statutory criteria that it be “consistent with the public interest, convenience, and necessity, including benefits and no harm to consumers.” Public Utilities Article, § 6-105. Specifically, the PSC required that at least a majority of the \$30.32 million in the Maryland Gas Expansion Fund be spent in Washington Gas’s service territory for the purpose of “assuring that a majority of the benefit will accrue to Washington Gas *customers*.” (Emphasis added). Notwithstanding the express purpose of this condition (to benefit customers) there is at least some risk a court would find that the condition also provides a direct benefit to AltaGas and its subsidiary, Washington Gas, in the form of enhancements to the company’s gas infrastructure, and that using the full \$23 million designated by Section 11 for customer arrearage assistance would amount to an unconstitutional abrogation of AltaGas’s vested rights. Nonetheless, it is our view that some portion of the \$23 million can be redirected for customer arrearage assistance, without the risk of abrogating vested rights, as long as a majority of the original \$30.32 million is used to promote the expansion of natural gas infrastructure in Washington Gas’s service territory.

Sincerely,

A handwritten signature in blue ink, appearing to read "Brian E. Frosh", is enclosed in a thin black rectangular border.

Brian E. Frosh
Attorney General

BEF/DWS/kd

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