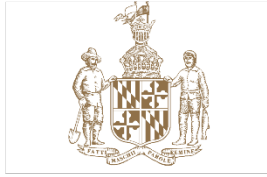


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April 12, 2021

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

***RE: House Bill 1293 and Senate Bill 783, Baltimore City –West North Avenue  
Development Authority***

Dear Governor Hogan:

We have reviewed and hereby approve for constitutionality and legal sufficiency House Bill 1293 and Senate Bill 783, “Baltimore City –West North Avenue Development Authority.” We write to discuss potential constitutional issues with the bill and to provide advice for implementation to avoid those issues. Specifically, given the responsibilities of the Authority, having members of the General Assembly serve as members raises a separation of powers issue under Article 8 of the Maryland Declaration of Rights or and a dual office issue under Article III, §11 of the State Constitution. It is our view, however, that by limiting the legislator members’ role to purely advisory, the problems can be avoided.

This bill establishes the West North Avenue Development Authority for the purpose of developing a comprehensive neighborhood revitalization strategy for the benefit of the “target area” and “buffer zone” in Baltimore City. The Authority is comprised of 16 members, including one member of the Senate and one member of the House of Delegates. The board members are not paid, but are entitled to reimbursement of expenses. Among the powers granted to the Authority are the ability to manage appropriated funds from Baltimore City and the State, and to supervise, manage and terminate staff and consultants. In addition, the Authority may receive donated services from accountants, lawyers, or other consultants. Further, the Fiscal Note states, “[t]he bill does not explicitly allow the authority to finance neighborhood improvements and economic development

initiatives that are typical for development authorities. However, to the extent that it receives funds from Baltimore City and the State for those purposes, the authority may initiate those types of projects.”

It is our concern that having legislative members of an entity that is empowered to manage State funds and initiate projects, among other actions, could implicate the separation of powers of Article 8 of the Maryland Declaration of Rights or cause a violation of the prohibition against dual office holding found in Article III, §11 of the State Constitution. Article 8 of the Declaration of Rights 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.” Article III, Section 11 of the Constitution states: “No person holding any civil office of profit, or trust, under this State shall be eligible as Senator or Delegate.”

In 1976, Attorney General Burch opined that these two constitutional provisions would be infringed by the service of members of the General Assembly on the Washington Suburban Transit Commission. 61 *Opinions of the Attorney General* 152, 159-62 (Jan. 22, 1976). In 2009, we advised the Governor about legislation reestablishing the Commission on the Establishment of a Maryland Women in Military Service Monument. Because the legislation empowered the Commission, the membership of which included members of the General Assembly, to enter contracts regarding “the funding, design, construction, or placement of an appropriate monument,” and not merely to give advice regarding a monument, we advised that the exercise by the Commission of those executive powers could infringe these two provisions. Bill Review Letter on House Bill 944 and Senate Bill 367 (May 15, 2009).

Similarly, it is our concern that if the Authority created by these bills exercises the powers granted, it is performing a core executive branch function. For legislators to be members of a State board exercising such powers could risk a court finding a separation of powers violation because it is a core executive function that cannot be exercised by legislative branch officials either individually or as members of another State instrumentality. Moreover, because we believe that the power to manage funds, accept gifts, and initiate projects on behalf of the Authority is an exercise of the sovereign power of the State, we believe that membership on the Authority could be found to be an “office of trust” that is incompatible with simultaneous service in the State legislature.

Nevertheless, concerns under both Article 8 of the Declaration of Rights and Article III, § 11 of the Constitution are substantially ameliorated by the fact that most of the

The Honorable Lawrence J. Hogan, Jr.  
April 12, 2021  
Page 3

responsibilities of the Authority are otherwise advisory in nature. In particular, we note that it is very possible that the Authority will have no funds to manage nor will it initiate any projects; moreover, these responsibilities are at most occasional. Thus, the courts likely would not conclude that membership on the Authority is an “office of trust.” At the same time, a colorable separation-of-powers concern would be raised by exercise of these duties through the votes of members of the legislature cast in those legislators’ other capacity as members of an entity functioning, for purposes of the Authority, as an Executive Branch entity.

It is also our view, however, that the foregoing constitutional concerns would be addressed if the legislators who are members of the governing board abstained from participating on votes managing funds or initiating projects, and that legislators have no role in supervising staff or consultants. Thus, it is our view that if the legislators on the Authority limited their role to the advisory roles, there are no constitutional problems with having two members of the General Assembly on the Authority. Accordingly, it is our view that House Bill 1293 and Senate Bill 783 constitutional and legally sufficient.

Sincerely,

A handwritten signature in blue ink, reading "Brian E. Frosh", enclosed in a thin black rectangular border.

Brian E. Frosh  
Attorney General

BEF/SBB/kd

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