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May 5, 2022

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

***RE: House Bill 878, “Howard County - Department of Housing and
Community Development - Housing Opportunities Trust Fund”***

Dear Governor Hogan:

We have reviewed for constitutionality and legal sufficiency House Bill 878, “Howard County - Department of Housing and Community Development - Housing Opportunities Trust Fund,” a public local law for Howard County. There is some risk that, if challenged, a court could find that the bill violates the constitutional prohibition on the General Assembly enacting a local law for a charter county on a subject covered by the express powers granted to charter counties.¹ Nonetheless, it is our view that the bill is not clearly unconstitutional.²

House Bill 878 establishes the Housing Opportunities Trust Fund (“Fund”) as a non-reverting special fund to be used by the Howard County Department of Housing and Community Development to promote equitable access to affordable housing in Howard County. The Fund consists of money appropriated by the County under its budgetary process to the Fund, gifts and grants made to the Fund, the repayment of loans made from the Fund, and any other earnings of the Fund. Money allocated to the Fund may only be

¹ Howard County has adopted a charter government.

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).

used to promote equitable access to affordable housing for households of limited income in the County. Authorized uses include: (1) providing assistance to renters and first-time home buyers, (2) developing, preserving, rehabilitating, and improving affordable housing, and (3) increasing the affordability or accessibility of housing for households of limited income.

Article XI-A authorizes Baltimore City and counties to adopt a charter to achieve a degree of political self-determination. The purpose of this constitutional provision was “to transfer the General Assembly’s power to enact many types of ... public local laws to the Art. XI-A home rule” jurisdictions. *McCrorry Corp. v. Fowler*, 319 Md. 12, 16 (1990). Section 2 of Article XI-A directs the General Assembly to “provide a grant of express powers” to those counties that adopt a charter form of government. Under § 3, a charter county has “the power to repeal or amend local laws of said ... County enacted by the General Assembly, upon all matters covered by the express powers granted” to charter counties. Section 4, in turn, precludes the General Assembly from enacting a public local law for a charter county “on any subject covered by” the grant of express powers.

The express powers granted to charter counties include the power to “provide for the financing of any housing or housing project wholly or partly, including the placement of a deed of trust, mortgage, or other debt instrument on the property to ensure repayment of funds used to purchase, construct, rehabilitate, or otherwise develop the housing project.” Local Government Article (“LG”), § 10-312(d). Charter counties also have been granted the authority to pass ordinances, not inconsistent with State law, that “may aid in executing and enforcing any power” in LG, Title 10 or “may aid in maintaining the peace, good government, health, and welfare of the county.” LG § 10-206(a).

It could be argued that HB 878 violates Article XI-A, § 4 because the subject of the legislation falls within charter counties’ express powers. But it is not clear that is the case. The Court of Appeals has recognized that the authority to budget and appropriate money is not an “express power” within the meaning of Article XI-A, §§ 3 and 4, and thus the General Assembly “is not precluded by § 4 from enacting such a law for a charter county.” *City of Annapolis v. Anne Arundel Cty.*, 347 Md. 1, 14 (1997). House Bill 878 regulates budgeting and the appropriation of funds by Howard County in that it establishes a mechanism by which the County, at its discretion, can dedicate money to a particular purpose. As to money that the County allocates to the Fund, the County can then spend that money only for the purposes specified in the bill.

City of Annapolis involved a dispute between the City and Anne Arundel County over the allocation of certain tobacco tax revenues by the County, in light of a 1945 public

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local law enacted by the General Assembly that required the County to allocate to the City 1/7 of any new revenue that the County received. That public local law pre-dated the County's adoption of charter home rule in 1964. The County took the position that the allocation to the City was not required because the 1945 public local law had been expressly repealed by a 1965 County ordinance, and it contended that it had the authority to repeal the law under Article XI-A, § 3. The court concluded that the authority to budget and appropriate money is not an "express power" of charter counties within the meaning of Article XI-A but is an inherent power of all counties. Accordingly, § 3 did not vest the County with the power to repeal the 1945 public local law. Likewise, the court recognized that § 4 would not preclude the General Assembly from enacting such a law for a charter county. Though § 3 did not provide the County with the power to repeal the 1945 public local law, the court found that the law was, in fact, repealed by the subsequent adoption of the County charter because the local law was "inconsistent with the basic budgetary and appropriation system set forth in the later home rule charter." *Id.* at 15.

Though there is some risk a court could find that HB 878 is a public local law on a subject covered by the express powers granted to charter counties, we believe the bill reasonably can be characterized as a budgetary or appropriation measure that is not covered by the express powers granted to charter counties. For that reason, it is our view the bill is not clearly unconstitutional.

Sincerely,

A handwritten signature in blue ink that reads "Brian E. Frosh". The signature is written in a cursive style and is contained within 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