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March 3, 2022

The Honorable Jill P. Carter
Maryland Senate
422 Miller Senate Office Building
Annapolis, Maryland 21401

Re: *Senate Bill 441/House Bill 991 – Baltimore City – Civilian Review Board*

Dear Senator Carter:

You have inquired with respect to the authority of the General Assembly to enact certain provisions in Senate Bill 441/House Bill 991 (“Baltimore City – Civilian Review Board”) and whether the bill constitutes a public local law for a charter county that violates home rule restrictions under Article XI-A of the Maryland Constitution. You also ask if the General Assembly may authorize the Civilian Review Board of Baltimore City (“Board”) to sue and be sued and to require Baltimore City (“City”) to include a specific appropriation to fund the Board.

With respect to the provisions of the bills in proposed § 16-43 of Article 4 of the Public Local Laws of Baltimore City relating to the hiring authority of the Board, in my view the bills do not present a home rule violation under Article XI-A of the Maryland Constitution. With respect to the Board’s authority to sue and be sued and the budgetary provisions contained in proposed § 3-102(e)(4) and (5) of the Public Safety Article (“PS”), respectively, in the bills as introduced, potential home rule concerns with those provisions could be ameliorated if those provisions are moved by amendment to the bills from proposed PS § 3-102(e) to appropriate provisions of Article 4, § 16-41 *et seq.* of the Public Local Laws of Baltimore City under the bills.¹

¹ This conclusion presupposes that the proposed legal standing and budgetary provisions in PS § 3-102(e)(4) and (5), respectively, under the bills are intended to apply to the Board with regard to *all* of its activities, and not just those related to its proposed role as the Police Accountability Board for Baltimore City under that proposed section. Otherwise, if the intent was to limit the scope of those provisions exclusively to the Board’s proposed role as the Police Accountability Board, perhaps that intent should be more clearly reflected in the bills.

Additionally, with respect to the provisions under the bills authorizing the Board to sue and be sued, while not entirely without doubt, in my view, in light of the General Assembly's establishment of the Board and its autonomy from City control under the statute and in the bills, a court likely would conclude that, for the limited purposes of sovereign immunity, the Board would be considered a State instrumentality and the General Assembly has authority to waive sovereign immunity for the Board as provided in the bills. Lastly, regarding the proposed requirement for an appropriation to fund the Board, in my view the General Assembly has the authority to enact a local law for the City regulating a City appropriation because the authority to enact budgets and appropriate funds is not an express power of the City.

In pertinent part, the bills as introduced amend Art. 4, § 16-43 of the Public Local Laws of Baltimore City to require the Board to hire staff to carry out its functions and prevents an employee or a member of the City government who is not a member of the Board from controlling a hiring decision of the Board. The bills also amend PS § 3-102 (as enacted by Chapter 59 of Acts of 2021) to authorize the Board to sue and be sued, and requires the City to include an appropriation in its annual budget for staffing, legal expenses, and other approved expenditures of the Board.

Article XI-A of the Maryland Constitution limits the right of the General Assembly to consider certain local matters that were vested in counties that have adopted home rule charter and in Baltimore City. *State's Attorney of Baltimore City v. City of Baltimore*, 274 Md. 597, 603 (1975). Under Art. XI-A, § 2, the express powers granted to charter counties and Baltimore City “shall not be enlarged or extended by any charter formed under the provisions of this Article, but such powers may be extended, modified, amended or repealed by the General Assembly.” Additionally, under Art. XI-A, § 4, after the adoption of a charter, “no public local law shall be enacted by the General Assembly for said City or County on any subject covered by the express powers granted[.]”

Under Art. XI-A, § 2 and § 4, while the General Assembly has the authority to determine what express powers may be exercised by the City and charter counties, it “may not enact a public local law for the City or any charter county which modifies the powers so granted.” *State's Attorney*, 274 Md. at 604. However, “[i]f the General Assembly wishes to diminish the powers granted to Baltimore City or a charter county, it must do so by *amending the acts which granted the powers*. It may not do so by enacting a separate public local law which is merely inconsistent with the acts granting the express powers to the City or to the charter counties.” *Id.* (Emphasis added). As the Court of Appeals explained:

If the General Assembly, in its grant of powers to Baltimore City, subsequently concludes that the grant of powers contained a subject upon which the General Assembly should have authority to legislate, and not the city authorities, it can only accomplish this by amending or repealing the act granting and delineating the powers. The Legislature has the power to describe the field

within which the local authorities may legislate, but having once done this, it cannot restrict or limit this field of legislation without changing its boundaries. The legislation in respect to the subjects contained in the granted powers is therefore committed exclusively to the local authorities and denied to the General Assembly, so long as the grant of powers remained unchanged.

Id. at 605.

The General Assembly established the Civilian Review Board of Baltimore City in Article 4, § 16-41 *et seq.* of the Public Local Laws of Baltimore City through enactment of Chapters 196 and 197 of the 1999 Acts of Maryland. The enactment established the powers, duties and administration of the Board and authorized the City to hire an independent administrator for the Board and required the Mayor to assign certain City staff to the Board for its meetings. *See* PLL § 16-43. Senate Bill 441 and House Bill 991 amend that provision to repeal the Mayor's assignment of staff to the Board and to authorize the Board to hire staff and prevent an employee or member of City government who is not a member of the Board from controlling a hiring decision of the Board.

In this instance, SB 441/HB 991 specifically amend the General Assembly's express authorization for the powers, duties, and staffing of the Board granted under its earlier enactments of Chs. 196 and 197. The bills do not operate to improperly enact a public local law that is inconsistent with the express powers of the City with respect to its administration and general police powers, but rather to lawfully "amend the act granting and delineating the powers" of the Board, including its staffing and hiring decisions. By amending the act (Art. 4, § 16-41 *et seq.* of the Public Local Laws of Baltimore City) that granted the powers, duties, and staffing for the Board under the bills, the General Assembly is not violating home rule prohibitions under Art. XI-A of the State Constitution.²

With respect to the proposed authority under the bills for the Board to sue and be sued, while not entirely without doubt, in my view, in light of the General Assembly's creation of the Board and its apparent autonomy from City operation and control, a court likely would conclude that, for the limited purposes of sovereign immunity, the Board would be considered a State instrumentality and the General Assembly has authority to waive sovereign immunity for the Board as provided in the bills.

² Similarly, if the General Assembly wishes to generally grant the Board the authority to sue or be sued and to require the City to fund the Board through an annual appropriation without potentially running afoul of the home rule limits on the General Assembly under Art. XI-A, it may want to consider amending the bills to move such authority proposed in PS § 3-102(e), to the Board's enabling provisions under Art. 4, § 16-41 *et seq.* of the Public Local Laws of Baltimore City.

The Court of Appeals has explained that “[a]lthough a ‘sue and be sued’ provision ordinarily does not alone constitute a general waiver of [governmental] immunity, it does waive immunity in actions concerning the matters within the scope of the government agency’s duties and responsibilities.” *Frankel v. Bd. of Regents of U. Md. System*, 361 Md. 298, 309-10 (2000). The doctrine of sovereign immunity “is applicable not only to the State itself, but also to its agencies and instrumentalities, unless the General Assembly has waived the immunity either directly or by necessary implication.” *State Highway Admin. v. Kim*, 353 Md. 313, 333 (1999). The Court examines the application of sovereign immunity “by asking two questions: (1) whether the entity asserting immunity qualifies for the protection; and, if so, (2) whether the legislature has waived immunity either directly or by necessary implication, in a manner that would render the defense of immunity unavailable.” *Magnetti v. U. of Md.*, 402 Md. 548, 557 (2007) (citing *ARA Health Services v. DPSCS*, 344 Md. 85, 91 (1996)). “There is no single test for determining whether a statutorily-established entity is an agency or instrumentality of the State for a particular purpose. All aspects of the inter-relationship between the State and the statutorily-established entity must be examined in order to determine its status.” *A.S. Abell Publishing Co. v. Mezzanote*, 297 Md. 26, 35 (1983). “In some cases, the General Assembly has not expressly stated whether an entity that it has established is or is not agency or instrumentality of the State. ... Whether such an entity is characterized as an agency or instrumentality of the State for a particular purpose depends on the facts.” *Id.* at 39.

In this instance, while there are elements of the Board that suggest that it may not be considered a State entity for immunity purposes (for example, roughly two-thirds of the membership of the Board is made of members of the public appointed by the Mayor and confirmed by the City Council, and the Board is required to submit a semiannual report to City officials), the Board appears to operate independently and is served by an “independent administrator.” PLL § 16-43. However, in my view, the General Assembly’s establishment of the Board under statute as a “permanent, independent” agency³ that reviews complaints against members of the Baltimore Police Department, which currently remains a State agency,⁴ suggests that a court would be likely to view the Board as an instrumentality of the State and that the General Assembly has the authority to waive sovereign immunity for the Board under the “sue or be sued” provision under the bills. *See e.g., Katz v. WSSC*, 284 Md. 503 (1979) (statutory “sue and be sued” provision for WSSC constituted a valid legislative waiver of sovereign immunity for a “State agency” that was created by the State and not its member counties).

Lastly, with respect to the provision of the bills requiring a City appropriation in its annual budget to fund the Board, in my view the General Assembly has the authority to enact a local law

³ *See* Department of Legislative Services, Fiscal and Policy Note for SB 441.

⁴ Although the General Assembly enacted legislation to transfer control of the Baltimore Police Department from the State to Baltimore City (*see* Ch. 133 of the Acts of 2021), the transfer is contingent upon an amendment to the City Charter subject to ratification by City voters at either the 2022 or 2024 general election.

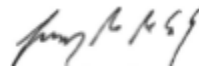
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for the City regulating a City appropriation because the authority to enact budgets and appropriate funds is not an express power of the City. No constitutional provision prohibits the General Assembly from imposing a financial burden on a county or the City. *See 76 Opinions of the Attorney General* 358, 365 (1991) (“In the exercise of its plenary legislative power, the General Assembly is free to impose costly duties on political subdivisions.”).

As the Court of Appeals has explained, “[s]ince the authority to enact budgets and appropriate funds is not an ‘express power’ of charter counties within the meaning of Article XI-A §§ 3 and 4 of the Constitution, it follows that charter counties are not authorized by § 3 to repeal local laws enacted by the General Assembly regulating appropriations, and that the General Assembly is not precluded by § 4 from enacting such a local law for a charter county.” *City of Annapolis v. Anne Arundel County*, 347 Md. 1, 14 (1997).

I hope this is responsive to your request. If you have any questions or need any additional information, please feel free to contact me.

Sincerely,



Jeremy M. McCoy
Assistant Attorney General