

ANTHONY G. BROWN
ATTORNEY GENERAL

CANDACE McLAREN LANHAM
CHIEF OF STAFF

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

DAVID W. STAMPER
DEPUTY COUNSEL

SHAUNEE L. HARRISON
ASSISTANT ATTORNEY GENERAL

JEREMY M. McCOY
ASSISTANT ATTORNEY GENERAL

March 9, 2023

The Honorable Jill P. Carter
Maryland General Assembly
422 Miller Senate Office Bldg.
Annapolis, MD 21401
Via email

Re: *Senate Bill 758, “Baltimore City – Control Over Powers of Police Commissioner”*

Dear Senator Carter:

You asked for advice about current legislative authority over the Baltimore City Police Department (“BPD”) and whether Baltimore City has full local control over the BPD without the proposed bill. There is an argument that the City Council and Mayor have legislative authority over the BPD because as of January 1, 2023, the BPD is a City agency so the limiting language in Article II, § 27 no longer has any effect. Nevertheless, because the language has not been removed from that section, a risk exists that someone will challenge a future local ordinance as conflicting, impeding, obstructing, hindering, or interfering with the powers of the Police Commissioner. Therefore, in my view, enacting Senate Bill 758 would significantly reduce any such litigation risk and confusion. I will explain my reasoning below.

The General Assembly passed the Maryland Police Accountability Act in 2021, which became Chapter 133, for the purpose of making the BPD an agency and instrumentality of Baltimore City. The bill was contingent on the enactment of a Charter Amendment “that provides for the transfer and control of the [BPD] to the City of Baltimore from the State of Maryland” and ratification of it by voters of Baltimore City. *See* Section 5(a), Chapter 133. In essence, the General Assembly granted the City Council and Mayor the express power to accept the BPD as an agency of Baltimore City, which they exercised in July 2022. The voters subsequently approved the Charter Amendment during the November 2022 general election. As a result, on January 1, 2023, the BPD became a City agency. *See* Section 5(b)(1), Chapter 133.

Up until that time, the BPD was a State agency governed by enactments of the General Assembly. I found no indication in the legislative history of Chapter 133 that the General Assembly intended to keep any authority to enact Public Local Laws (“PLL”) governing the BPD. Chapter 133 was introduced at the request of the Baltimore City Administration. In his written testimony, Mayor Brandon Scott stated that “[t]ransferring control of the BPD to Baltimore City would enable City residents and local elected officials the ability to set policies and provide oversight without advocating for reform through state representatives.” See Written testimony in support of SB 786, Feb. 11, 2021. Further, the Fiscal & Policy Note explains that “[a]s a result of BPD being established as an agency and instrumentality of Baltimore City, the mayor and the City Council of Baltimore City are authorized to amend the law relating to BPD in order to implement policy changes.”

The Maryland Constitution, in Article XI-A, § 2, requires the General Assembly to enact a grant of express powers for Baltimore City and those counties that have adopted home rule charters. The enumerated powers for Baltimore City are codified in Article II of the City Charter. Section 27 of Article II states as to Police Power:

To have and exercise within the limits of Baltimore City all the power commonly known as the Police Power to the same extent as the State has or could exercise that power within the limits of Baltimore City; provided, however, that no ordinance of the City or act of any municipal officer, other than an act of the Mayor pursuant to Article IV of this Charter, shall conflict, impede, obstruct, hinder or interfere with the powers of the Police Commissioner.

The Maryland Supreme Court acknowledged in 2008 that the foregoing limitation “is reflective of the fact that the [BPD] is not an agency of the City of Baltimore...” *Mayor & City Council of Baltimore v. Clark*, 404 Md. 13, 23 (2008). Now that the BPD is a City agency, however, a question is raised to its relevance. Arguably Chapter 133 was a grant of express power to the City. “[T]he express powers of Baltimore City may be modified merely though a public local law effecting only the City of Baltimore.” Dan Friedman, “The Maryland State Constitution: A Reference Guide” (2006) at 220.

If the limiting language of § 27 (i.e., “no ordinance of the City or act of any municipal officer, other than an act of the Mayor pursuant to Article IV of this Charter, shall conflict, impede, obstruct, hinder or interfere with the powers of the Police Commissioner”) is still in force, it is unclear who has authority to legislate about the powers of the Police Commissioner.¹ The City Law Department has taken the position that the “language prevents the Mayor and City Council from enacting any legislation

¹ The Police Commissioner is designated as the chief executive officer of the Department by PLL § 16-4 and its affairs and operations are placed under the Commissioner’s supervision and direction. See *Beca v. City of Baltimore*, 279 Md. 177, 180-181 (1977).

effecting the powers of the Police Commissioner. These powers are established in PLL, Sec. 16-7. The Commissioner's powers under the PLL are extensive and provide little if any opportunity to legislate." See Memo from Chief Solicitor Elena R. DiPietro to Chezia Cager, Chief of Staff, Office of the Mayor, March 6, 2023.² Others have gone further and announced that "no one can write laws governing the Baltimore City Police Department at the moment..." Jessica Albert, "Baltimore's lawmakers learn that neither city nor state has power over the police department," CBS Baltimore (Feb. 21, 2023).

That no legislative body has authority to enact laws governing the Police Commissioner, now a local official, would be an illogical result. See *Blandon v. State*, 304 Md. 316, 319 (1985) (holding that "rules of statutory require us to avoid construing a statute in a way which would lead to absurd results"). At the same time, I find it unlikely that the General Assembly intended to keep legislative authority over the Police Commissioner and not grant it to the City when the City takes control of the BPD, especially given Section 2 of Chapter 133. That provision states "the [BPD] shall be considered to be an agency and instrumentality of the State for all actions arising out of acts, omissions, or events that have occurred prior to the date of transfer of control of the [BPD]. For all actions arising out of acts, omissions, or events that occur on and after the date of transfer of control of the [BPD], the [BPD] shall be considered an agency and instrumentality of Baltimore City." When BPD was a State agency, "no liability ordinarily attache[d] to Baltimore City under the doctrine of respondeat superior for the torts of Baltimore City police officers acting within the scope of their employment." *Clea v. Mayor & City Council of Baltimore*, 312 Md. 662, 668 (1988). See also *Estate of Anderson*, 6 F. Supp. 3d 639, 646 (D. Md. 2014) ("Try as they may, Plaintiffs cannot avoid the mountain of law insisting the City does not sufficiently control the BPD or Baltimore police officers. Neither can this Court.") (involving civil rights claims against the City under 42 U.S.C. § 1983). Section 2 reflects that now that the BPD is a City agency under local control, it will no longer have the sovereign immunity available to State agencies.

In summary, in my view, enacting Senate Bill 758 would clarify the perceived legislative limbo regarding the Police Commissioner and align § 27 with the legislative intent of Chapter 133.

Sincerely,



Sandra Benson Brantley
Counsel to the General Assembly

² The Chief Solicitor correctly points out that the City itself cannot amend Article II of the City Charter.