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June 24, 2022

The Honorable Mary Ann Lisanti
Maryland General Assembly
415 House Office Bldg.
Annapolis, MD 21401

Dear Delegate Lisanti:

You asked for advice whether “the Governor, and/or Board of Public Works have the authority to suspend the automatic gas tax increase scheduled to go into effect July 1. If so under what circumstances and if not, then who has the authority and under what situation.” The Board of Public Works has no authority to suspend the gas tax increase. As for the Governor, the law is not entirely clear, and, as a result, I have some doubts that the General Assembly intended the Governor’s emergency powers to reach this situation. At the same time, if the Governor can reasonably support that the current economic climate (the highest inflation in decades, supply chain issues, and the like) presents an imminent or occurring threat of widespread or severe economic disruption, he arguably could exercise his emergency powers to suspend the gas tax increase if the Governor reasonably concludes that doing so will protect the public health, welfare, or safety.¹

Maryland’s Gas Tax

State law imposes a per gallon tax on the sale of motor fuel. Tax-General Article (“TG”), § 9-305. The gas retailer imposes the tax at the pump when a consumer purchases gas. COMAR 03.03.01.02A. The retailer subsequently remits the tax collected to the Comptroller. TG § 9-314. The tax rate is codified at TG § 9-305(a) and, on an annual basis, is increased under a formula using the Consumer Price Index.

¹ At least two other governors have taken emergency measures to halt or reduce the gas tax in their states. On April 14, 2022, and renewed on May 26, 2022, Georgia Governor Brian Kemp issued an executive order declaring a “State of Emergency for Supply Chain Disruptions” and suspended the state’s gas tax. In addition, Kentucky Governor Steve Beshear issued an emergency regulation on June 2, 2022, to prevent his state’s scheduled statutory increase in the gas tax. To invoke price gouging protections, Governor Beshear also subsequently declared a State of Emergency on June 23, 2022, “relating to inflation and gas prices.” He indicated in his Executive Order that “[r]ising inflation in the United States is hurting Kentuckians every day. As a result of this inflation, and the Russian war against Ukraine, the prices of consumer goods and gasoline that our families depend on are increasing at a record pace...The ‘pain at the pump’ is piling on Kentucky families already suffering from the consequences of rising inflation...”

TG § 9-305(b).² In addition, the State also adds a sales and use tax. TG § 9-306. After making specified distributions, the revenue attributable to the sales and use tax and the revenue attributable to the increase in the motor fuel tax rate are distributed to the Transportation Trust Fund. TG § 2-1103.

The legislature must consent to any tax. The Maryland Constitution states that “[n]o...tax...ought to be rated or levied, under any pretense, without consent of the Legislature.” Md. Decl. of Rights, Article 14. Moreover, the Constitution directs the Comptroller to enforce the tax laws. Md. Const., Article VI, § 2 (“The Comptroller shall...superintend and enforce the prompt collection of all taxes and revenues.”). The Comptroller has limited authority to grant an extension for good cause to file motor fuel tax returns. TG § 9-308(1)(iii). This is not authority, however, to waive the tax. No legal authority exists for the Comptroller to waive or suspend the gas tax or the annual increase.³

Governor’s Emergency Powers

The General Assembly has enacted several provisions empowering the Governor to prepare for and tackle public emergencies. *See* Title 14, Public Safety Article (“PS”). The Maryland Emergency Management Act is in Subtitle 1. The express legislative policy of Subtitle 1 is generally “[t]o ensure that the State will be adequately prepared to deal with emergencies, to protect the public peace, health, and safety in the State, to preserve the lives and property of the people of the State, and to ensure the social and economic resilience of the State...” PS § 14-102(a).

The definition of emergency in Subtitle 1 is “the imminent threat or occurrence of severe or widespread loss of life, injury, or other health impacts, property damage or destruction, social or economic disruption, or environmental degradation from natural, technological, or human-made causes.” PS § 14-101(c).⁴ Accordingly, the Governor could potentially assert that the current situation is an “imminent threat or occurrence of severe or widespread...economic disruption” and declare an emergency. Once the Governor declares an emergency, State law authorizes the Governor, “in order to protect the public health, welfare, or safety, to suspend the effect of any statute or rule or regulation of an agency of the State or a political subdivision.” PS § 14-107(d)(1)(i). As a result, the Governor could suspend the gas tax increase. Whether such an emergency declaration and statutory suspension would survive a legal challenge, if one is made, depends on whether a court accepts the Governor’s determination that the current economic situation in Maryland presents an imminent or occurring threat of severe or widespread economic disruption and that suspending the gas tax increase will protect the public health, welfare, or safety.

² The inflation adjustment rate under this section “may not be greater than 8% of the motor fuel tax rate effective in the previous year.” TG § 9-305(b)(5)(ii).

³ I found nothing authorizing the Board of Public Works to suspend or waive the gas tax increase.

⁴ State law provides for an “energy emergency” in PS § 14-304. But that is defined as “a situation in which the health, safety, or welfare of the public is threatened by an actual or impending acute shortage in energy resources.” PS § 14-301(c). We are not dealing with such a situation here; that provision is for gas shortages.

The Maryland Constitution provides room for the General Assembly to vest certain of its powers to another branch of government by stating “[t]hat no power of suspending Laws or the execution of Laws, unless by, or derived from the Legislature, ought to be exercised, or allowed.” Decl. of Rts. § 9. Thus, the Governor acts under a delegation of legislative authority when the Governor acts using statutory emergency powers. The General Assembly no doubt could suspend the gas tax increase, as it similarly waived the gas tax for a period of time earlier this year through emergency legislation. *See* Chapters 1 and 2 (2022).⁵ The General Assembly delegated its power to suspend laws to the Governor, “in order to protect the public health, welfare, or safety” in an emergency. PS § 14-107(d)(1)(i). The more difficult question is whether the General Assembly intended “economic disruption” as incorporated into the definition of emergency to include the current circumstances—a time of high inflation and rising gas prices, which then could serve as a basis to suspend the gas tax increase.

The legislature added the current definition of emergency in 2020. *See* Chapter 288 (2020).⁶ Previously, the definition did not include the term economic disruption. The former definition was

the threat or occurrence of:

- (1) a hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, landslide, mudslide, snowstorm, drought, fire, explosion, and any other disaster in any part of the State that requires State assistance to supplement local efforts in order to save lives and protect public health and safety; or
- (2) an enemy attack, act of terrorism, or public health catastrophe.

Chapter 288 (House Bill 648) was a departmental bill proposed by the Maryland Military Department. The bill does not define “economic disruption.” The written testimony from the Department indicates that, among other things, “[t]he proposal updates a number of key provisions pertaining to definitions and authorities.” Moreover, during the House Committee hearing, a legislator asked if the new definition in the bill includes natural disasters and the Department representative answered, “yes, any disasters.” The representative further explained that the bill brings definitions “up to speed” for “the 2020s.”

The small handful of other states that also use the term “economic disruption” regarding a state of emergency define the term, except one (New Jersey).

- Louisiana defines “abnormal economic disruption” as “a disruption or anticipated disruption to usual business conditions caused by a natural or

⁵ Notably, however, consistent with long-standing advice of this Office, any tax revenue pledged to pay debt service on constitutionally protected bonds cannot be repealed or diminished unless sufficient funds are appropriated for this purpose in the annual State Budget. When the General Assembly paused the gas tax for 30 days earlier this year, the constitutional issue was avoided because the Budget provided \$100 million in general fund revenues to offset the loss in special funds caused by the month long gas tax free period.

⁶ The 2020 session ended three weeks early due to the COVID-19 pandemic. As a result, the legislative history for many bills enacted that session, including this one, is sparse.

man-made disaster or emergency resulting from a terrorist attack, war, strike, civil disturbance, tornado, earthquake, fire, flood, or any other natural disaster or man-made disaster.” LSA-R.S. 29:723. Louisiana law further provides: “Upon the declaration of an abnormal economic disruption by the governor by proclamation or executive order, and continuing for a maximum of fifteen calendar days, a person is prohibited from charging any other person a price for any of the [specified] goods or services that is grossly in excess of the price generally charged for the same or similar goods or services in the usual course of business...” LSA-R.S. 29:724H(1).

- Tennessee authorizes the Governor to proclaim an “abnormal economic disruption,” during which retailers cannot charge any price “that is grossly in excess of the price generally charged for the same or similar goods or services in the usual course of business...” T. C. A. § 47-18-5103(a)(1). The definition of “abnormal economic disruption” is “a disruption or anticipated disruption to usual business conditions caused by a natural or man-made disaster or emergency resulting from a terrorist attack, war, strike, civil disturbance, tornado, earthquake, fire, flood, or any other natural disaster or man-made disaster.” T. C. A. § 47-18-5102(1).
- Wisconsin law states that “No seller may sell, or offer to sell, in this state at wholesale or at retail, consumer goods or services at unreasonably excessive prices if the governor, by executive order, has certified that the state or a part of the state is in a period of abnormal economic disruption.” W.S.A. 100.305(2). “Period of abnormal economic disruption” is “a period of time during which normal business transactions in the state or a part of the state are disrupted, or are threatened to be disrupted, due to an emergency.” W.S.A. 100.305(1)(d).⁷

The foregoing state statutes use a gubernatorial declaration of an economic disruption to trigger a price gouging prohibition and describe “economic disruption” in terms of being caused by an emergency situation, as opposed to being an emergency situation in and of itself. Nothing in PS § 14-101(c) or elsewhere limits the impact of a gubernatorial emergency declaration based on the Governor’s finding of an economic disruption to price gouging. Nevertheless, it is possible that the new language was intended primarily to authorize the Governor to prohibit price gouging during emergencies. In 2020, the General Assembly expressly authorized the Governor to prohibit price gouging during the COVID-19 emergency. See Chapter 14, Laws of 2020. That emergency bill took effect on March 19, 2020 and expired on April 30, 2021.

Yet, as stated above, nothing in the current language or legislative history provides evidence as to the intended purpose of adding “economic disruption” to the definition of emergency. The definition includes “economic disruption” in a list of severe or widespread circumstances, such as loss of life, health impacts, property destruction, and environmental degradation, and arguably requires all of the items in the list as

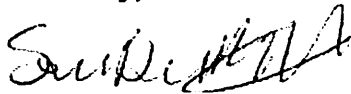
⁷ On June 21, 2022, Wisconsin Governor Tony Evers issued an executive order declaring that a period of “abnormal economic disruption” exists due to a disruption of energy supplies and prohibiting price gouging in gas sales until December 1, 2022.

being “from natural, technological, or human-made causes.” Thus, the General Assembly likely intended that the Governor’s exercise of emergency powers be limited to situations of a certain magnitude that present a genuine imminent or occurring threat to the public health, welfare, or safety. That is, the “economic disruption” would have to be of similar significant circumstances in line with other types of emergencies.

On the other hand, the General Assembly empowered the Governor to make the determination whether an emergency exists, and courts generally defer to a Governor’s determination. If the Governor determines that Marylanders face an imminent or occurring threat of severe or widespread economic disruption and that suspending the gas tax increase will protect the public health, welfare, or safety, I cannot rule out that a court would uphold the declaration unless the court finds suspending the increase has no real or substantial relation to protecting public health, welfare, or safety. *See Antietam KOA v. Hogan*, 461 F. Supp. 3d 214, 228 (D. Md. 2020) (holding that “[t]o overturn the Governor’s [emergency] orders, those who disagree with them must show that they have ‘no real or substantial relation’ to protecting public health, or that they are ‘beyond all question, a plain, palpable invasion of rights secured by the fundamental law’”).

Therefore, while I believe that the General Assembly intended that the Governor’s exercise of emergency powers be limited to situations that present a genuine severe or widespread imminent or occurring threat to the public health, welfare, or safety, the Governor may be able to make a reasonable case that the State faces such an emergency circumstance. Moreover, any concern that the Governor will abuse his discretion by overreaching to encompass situations not contemplated by the General Assembly to be emergencies is tempered somewhat by the statutory safeguard that “[t]he General Assembly by joint resolution may terminate a state of emergency at any time.” PS § 14-107(a)(4)(i).

Sincerely,

A handwritten signature in black ink, appearing to read "Sandra Benson Brantley".

Sandra Benson Brantley
Counsel to the General Assembly