OFFICE OF THE COUNTY ATTORNEY

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MEMORANDUM

November 28, 2011

TO: Steven Silverman, Director
Department of Economic Development

FROM: Marc P. Hansen *Marc Hansen*
County Attorney

RE: Bill No. 33-11, Urban Renewal and Community Development – Community Benefits Agreements – Large Retail Stores

Opinion

As currently drafted, Bill No. 33-11 is not constitutional. Bill 33-11: 1) unlawfully delegates government power to determine what is in a community's best interests into the hands of private persons; 2) permits the unlawful taking of private property interests; 3) contains provisions that are not local laws and, thus, are beyond the County's authority to enact; and 4) exempts retail stores of equal or larger size in a manner that violates the equal protection guarantees of the United States and Maryland Constitutions. Although the latter two legal problems can be remedied by amendments, there are no readily apparent amendments that would resolve the delegation and takings problems without changing the fundamental nature of the Bill. Finally, the Bill contains an inconsistency that would deny County financial assistance to a large retail store even if the Executive were to find that the store had made a good faith but unsuccessful effort to enter into the required community benefits agreements. This inconsistency could be remedied by an amendment.

Background

Bill 33-11 proposes to amend Chapter 56 of the County Code by adding a new Article VIII titled "Community Benefits Agreement." The Bill would require the operator of a "large retail store" to enter into a "community benefits agreement" with "3 or more recognized civic organizations" or demonstrate that "it has made a good faith effort to negotiate" such an agreement before the store may "open to the public." The Bill further provides that "each

community benefits agreement must be treated by all parties as a binding contract, for which consideration has been rendered," that the agreement is enforceable in a court, and that the agreement is "disclosable" under the "state Public Information Act." The Bill would preclude the County from offering financial assistant to the operator of a large retail store that does not enter into a community benefits agreement.

The Bill defines a "community benefits agreement" as "a document that binds a party to take one or more actions for the mutual benefit of the parties regarding any of the following subjects:"

(1) hiring practices and training programs for County residents, including potential preferences or incentives to hire residents within a certain distance of the store;
(2) design, operating hours, deliveries, security, traffic mitigation, environmental impacts, use of open spaces, noise and lighting; and other operating effects;
(3) assistance to community organizations and programs;
(4) affordable and workforce housing; and
(5) any other issue that is relevant to the operation of a large retail store or the community near that store.

A "large retail store" is any single site of a business that:

(1) derives more than 50% of its revenue from the sale of goods directly to the public; and
(2) is the primary occupant of a building with a footprint of at east 75,000 square feet.

A "recognized civic organization" is an "organization, including an unincorporated association," that:

(1) is composed of residents of and businesses located within 5 miles of a large retail store, or other organizations that represent those residents or businesses; and
(2) is not controlled or funded by or otherwise affiliated with, the operator or owner of any large retail store.

According to the legislative request report that accompanies the Bill, the problem purportedly addressed by the Bill is that "[l]arge stores generally have large community impacts, some of which may be negative . . . ." The report further states that the Bill is intended to require "new large retail stores to make a good faith effort to negotiate community benefits agreements that will lessen negative impacts, and promote positive impacts, on the surrounding community."

In a September 30, 2011, memorandum accompanying the Bill, Council President Valerie Ervin explained that community benefit agreements "ensure that development is equitable and

benefits the community . . . ." Ms. Ervin cites to an "evaluation" by Michael Siegel from Public and Environmental Finance Associates of the impact on surrounding businesses by "big box retailers, such as Wal-Mart . . . ." Ms. Ervin quotes Mr. Seigel as noting that mid-sized and local small businesses "have little ability to compete against far larger companies . . . ." Ms. Ervin identifies that the goal of the Bill is "to create a broadly inclusive and focused process that involves key stakeholder groups, creates quality jobs and generates community benefits in areas where big box retailers are looking to locate."

Discussion

Delegation

Subject to certain exceptions, a legislature may not delegate its lawmaking function to others. *See Pressman v. Barnes,* 209 Md. 544 (1956). However, the Maryland courts allow legislative bodies to delegate rule making authority to executive branch officials. *Pressman,* 209 Md. 544, 552 (the Director of Traffic, who was appointed by the Mayor, could prescribe speed limits for Baltimore streets); *see also, Andy's Ice Cream v. City of Salisbury*, 125 Md. App. 125, *cert. denied*, 353 Md. 473 (1999).

But delegations of rule making authority to executive officials must be limited. Insofar as a delegation "requires the exercise of a certain amount of discretion which may be regarded as part of the police power . . . , such discretion [must be] guided and restrained by standards sufficient to protect the citizens against arbitrary or unreasonable exercise thereof." *Pressman*, 209 Md. at 552; *see also West Montgomery Citizens Association v. Maryland-National Capital Park and Planning Commission*, 309 Md. 183 (1987). Although the concept of delegating government authority to executive branch officials is well established, the premise of delegating government power to private persons does not rest on a similarly firm constitutional foundation.

The Maryland Court of Appeals has discussed the concept of whether government power may be "lodged in and permitted to private persons . . . ." *Board of Trustees of the Employees' Retirement System v. Mayor and City Council of Baltimore City*, 317 Md. 72, 94 (1989). In *Board of Trustees*, the Court addressed a challenge to a Baltimore City ordinance instructing the City's retirement system to divest its investment holdings in companies doing business in South Africa. Among various challenges to this ordinance, the plaintiffs challenged as an unconstitutional delegation of government power to private persons a provision in the ordinance that companies doing business in South Africa "shall be identified by reference to the most recent annual report of the Africa Fund entitled 'Unified List of United States Companies with Investments or Loans in South Africa and Namibia.'" *Id.* at 81.

The Court began its analysis of the delegation issue by noting that "the legislature acts in the exercise of a power conferred upon it by the people." *Id.* at 93. The Court observed that

"this principle follows from the nature of representative democracy" and that the "City Council members generally have no authority to substitute the judgment of others for their own judgment." *Id.* at 94. The Court acknowledged that "our cases have long sanctioned delegations of legislative power to administrative officials where sufficient safeguards are legislatively provided for the guidance of the agency in the administration of the statute." *Id.* With respect to the delegation of authority to private persons or entities, however, such delegation is "strictly scrutinized because, unlike governmental officials or agencies, private persons will often be wholly unaccountable to the general public." *Id.*

In this context, the Court cited with approval a New York case, *Fink v. Cole*, 302 N.Y. 216, 224, (1951), where the New York Court of Appeals struck down a statute that vested the Jockey Club with authority to license owners, trainers, and jockeys at horse races in the state. *Id. n.* 23. The Maryland Court of Appeals went on to note that legislation may sometimes incorporate fixed standards created by private entities[1], but with respect to delegating future revision of regulatory standards to a private entity, the courts have only approved such delegation "in limited circumstances such as where the standards are issued by a well-recognized, independent authority . . . [that] provide guidance on technical and complex matters within the entity's area of expertise." *Id.* at 96. This type of delegation usually involves accreditation programs established by professional organizations, such as the accreditation of law schools by the American Bar Association.

Bill 33-11 transfers the County's power to permit the operation of an otherwise lawful business (the retail sale of goods) into the hands of private parties. It is the retail store and civic organizations who determine the details of what constitutes benefits relevant to the community near the proposed store. The only role an elected official plays in implementing Bill 33-11 is the Executive's power to order the store not to open if the store has "not made a good faith effort to negotiate a community benefits agreement." This limited involvement of the Executive leaves very significant government power in the hands of private persons to define the contents of an agreement that would permit a large retail store to open its operations. In another words, there is no elected officials involved in determining that the "benefits" negotiated in fact benefit the community at large. This delegation of discretion is similar to the authority invalidly transferred to the Jockey Club to license horse trainers and jockeys, and is far removed from the delegation of authority to a "well-recognized, independent authority" that "provides guidance on technical and complex matters within the entity's area of expertise." It is in short, permitting private parties to determine what terms of a community benefits agreement are in the public interest—a practice condemned by the Court of Appeals in *Board of Trustees of the Employees' Retirement System v. Mayor and City Council of Baltimore City*, 317 Md. at 94.

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[1] An example of incorporation of a fixed standard created by a private entity can be found in § 22-14, which requires the Fire Chief to recommend that the Executive adopt by regulation parts of the National Fire Code as published by the National Fire Protection Association.

The Bill's delegation of government power to private persons raises another legal problem. The Montgomery County Charter § 201 provides that "[t]he executive power vested in Montgomery County by the Constitution and laws of Maryland and by this Charter shall be vested in a County Executive who shall be the chief executive officer of Montgomery County and who shall faithfully execute the laws." This vesting of executive power in a County Executive is reinforced by § 215, which empowers the County Executive to "appoint a **single** officer to head each department, principal office or agency of the Executive Branch." (Emphasis added).

Implementation of a county law is an executive function. *Eggert v. Montgomery County Council*, 263 Md. 242, 259 (1971). Bill 33-11 is implemented by private persons entering into a community benefit agreement that effectuates the government's consent to operation of a large retail store—all without any involvement of the County Executive. Hence, Bill 33-11 vests significant responsibility for its implementation with private persons. This type of delegation of executive authority is inconsistent with §§ 201 and 215 of the Charter.

It has been suggested that the delegation problem is resolved by the fact that the retail store may begin its operations without entering into community benefits agreements by obtaining a "good faith" exemption from the County Executive. At its core, this argument is predicated on the premise that entering into a community benefits agreement is a voluntary act—*i.e.* an act that is not compelled by the government. Hence, the only implementation of government power that is necessary (*i.e.* the good faith exemption) is performed by the County Executive.

This argument does not mend the unconstitutional delegation flaw in Bill 33-11, because, as already discussed, the Bill permits private parties to determine, outside of the control of an elected official, whether the retail store will receive economic development benefits and the nature of the community benefits that must be provided by the retail store. These benefits may not be in the general interest of the community (in the view of elected officials) and may even be bitterly opposed by segments of the community. In short, the elected representatives of the community have no role in policing the nature of the benefits negotiated or balancing competing interests of various interests groups within the community. Nevertheless, entering into the required number of agreements changes the government imposed "red light" to opening store operations to a "green light"—all without the involvement of elected representatives of the people.

No amendment to Bill 33-11 is readily apparent that would resolve these delegation concerns without fundamentally changing the nature of the Bill.

Takings

The Maryland and United States Constitutions prohibit the taking of private property by the government unless the taking is for a public purpose and the government pays the property owner just compensation. Article III, § 40 of the Maryland Constitution and the Fifth Amendment to the United States Constitution. Article III, § 40 states:

> The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation.

The federal analog to Article III, § 40, the Fifth Amendment, states:

> No person . . . shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fifth Amendment is "applicable to the states [and the County] through the Fourteenth Amendment." *King v. State Roads Commission*, 298 Md. 80, 83 (1983). Both the Fifth Amendment and Article III, § 40 "prohibit the taking of private property for public use without the payment of just compensation to the property owner." *King,* 298 Md. at 83. The "decisions of the Supreme Court interpreting the Fifth Amendment's just compensation clause are . . . practically direct authority" for the interpretation of Article III, § 40. *King,* 298 Md. at 83-84.

A claim under the takings clause invariably gives rise to a threshold question: What constitutes a taking? Physical occupation or acquisition of private property by the government provides an easy example of a taking. But, as the courts have discussed, a physical occupation or acquisition is not a necessary prerequisite to a taking. *See Lingle v. Chevron*, 544 U.S. 528 (2005); *Annapolis v. Waterman*, 357 Md. 484 (2000). In *Chevron*, the Supreme Court noted,

> The [Takings] Clause expressly requires compensation where government takes private property **"for public use."** It does not bar government from interfering with property rights, but rather requires compensation "in the event of **otherwise proper interference** amounting to a taking." [citation omitted] (emphasis in original). Conversely, if a government action is found to be impermissible—for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process—that is the end of

> the inquiry. No amount of compensation can authorize such action. 544 U.S. at 542-43.

A government regulation may encroach upon property rights to such a degree that the regulation is tantamount to a taking. This concept of a "regulatory taking" was first recognized by the Supreme Court in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) where the Court observed that a regulation that "goes too far" will be "recognized as a taking." *Id.* at 415. As courts have subsequently explained, the Fifth Amendment "is violated when a land-use regulation 'does not substantially advance legitimate state interests [essential nexus] **or denies an owner economically viable use of his land.**'" *Annapolis v. Waterman*, 357 Md. at 509 (emphasis in original) (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1015-16 (1992)).

The courts apply a different standard to government exactions that do not limit the use of property, but, instead, require a property owner to convey something of value, including property or other rights, in order to receive governmental approval. Such an exaction is governed by the standards described in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The difference between the "exaction" (or *Dolan*) standard and the "regulatory takings" (or *Lucas*) standard applied to government conditions placed on the use of property has been explained by Judge Cathell in *Waterman*:

> There are two prongs to both exaction and regulatory takings. The first prong for both is generally the same, the essential nexus between the legitimate public purpose and the requirement. In practice, the essential nexus may need to be more specific in pure exaction cases because of the more specific nature of the taking, i.e., it may need to relate more specifically to the need for the exaction. The second prong for exactions is the rough proportionality analysis; the second prong for regulatory takings is whether there remains viable economic use of the entire tract involved. If the taking is an exaction, it is an actual taking and whether remaining viable economic use exists is irrelevant. [11] If it is a "regulatory taking," whether the limitation is "roughly proportional" to the demands for public services is irrelevant. This distinction is important because exactions now are scrutinized typically under Fifth Amendment Taking Clause jurisprudence pursuant to Dolan [citation omitted], while "regulatory takings" usually are examined under Lucas, [citation omitted], and related cases.
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> [Footnote 11: Any exaction, no matter how small or large, must comply with the rough proportionality standard of *Dolan*.]

357 Md. at 509-10.

Although a community benefits agreement under Bill 33-11 may impose a "regulatory" type condition on the retail store (*e.g.* operating hours), a community benefits agreement appears most likely to impose an exaction (*e.g.* financial support for a civic organization) on the retail store that would be governed by the *Dolan* standard. Bill 33-11 fails the *Dolan* standard, because it contains no language requiring that the terms of the community benefits agreement address any public need that arises from (*i.e.* has a nexus, and is proportionate, to) the impacts created by the large retail store. For example, the Bill envisions that a community benefits agreement may consist of financial support for a civic organization; but there are no controls on the amount or how this financial support may be expended. The Bill's provisions that authorize community benefits agreements to address such issues as hiring practices and affordable housing raise similar concerns regarding the nexus and proportionality requirement imposed under the *Dolan* standard.

Further, the Bill does not meet the nexus and proportionality standards under *Dolan*, because it allows civic organizations and retail stores to negotiate over matters that are already governed by County law. For example, a civic organization is authorized to seek "traffic mitigation" from the operator of the large retail store. "Traffic mitigation" could require, for example, the widening of a road or the construction of a traffic signal within a 5 mile radius of the store. But the County itself has already presumably determined through its development process that necessary traffic measures have been taken to mitigate the traffic impacts of the retail store. Forcing a retail store to provide more traffic mitigation than legally required raises serious concerns about whether the nexus requirement required by *Dolan* has been exceeded.[2]

New York University Law School Professor Vicki Been, in a 2010 article about community benefits agreements published in the University of Chicago Law Review, commented on the nexus/proportionality problem as follows:

> If the "leverage" community groups have to convince developers to enter into negotiations stems from an explicit or implicit requirement that the landowner enter into a CBA before seeking government approval of the land use proposal, the courts may view the negotiations as posing no less (and perhaps more) risk of "extortion," to use *Nollan* Court's term,[3] than the local government's processes at issue in that case.[4]

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[2] The Bill offers no explanation how a traffic mitigation provision of a community benefits agreement might be implemented and no assurance that it will be consistent with County law or with land use decisions made by the County or the Planning Board.

[3] *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987) (Government could not require owner to grant public easement across beachfront property as a condition of

It has been suggested that the takings issue is avoided because the retail store may refuse to provide a community benefit that fails the *Dolan* test and still open its store—the reason being because the retail store would be entitled to a "good faith" exemption from the Executive under § 56-36 of the Bill. At its core, this argument is predicated on the premise that entering into a community benefits agreement is a voluntary act—*i.e.* an act that is not compelled by the government. Hence, a retail store will not be in a position to maintain a challenge under a takings analysis.

This argument does not mend the constitutional takings flaw in Bill 33-11for two key reasons. First, under this argument the retail store bears the "responsibility" to determine if the benefit sought by a civic organization is roughly proportional to an impact caused by the store. For the reasons discussed in the previous section, this delegation to a private party of the responsibility to use a government power is unconstitutional. Second, there is no language in Bill 33-11 to suggest that the Executive should or must grant a "good faith effort" exemption to a retail store that refuses to provide a community benefit sought by a civic organization just because the benefit would not meet the *Dolan* or *Lucas* standards. Therefore, a retail store would be able to assert to a court that there is an element of government compulsion in Bill 33-11 that would trigger a takings analysis.

The nexus/proportionality problem appears to be inherent in the very nature of Bill 33-11. Amendments to the Bill that would resolve this problem would require significant revisions to the concept of a community benefits agreement as defined in § 56-35. Providing that a community benefit could include financial assistance to a civic organization, providing affordable housing, and labor practices of the retail store would most likely not pass the nexus prong of the *Dolan* standard. Limitations imposed on store operations would need to pass the *Lucas* standard. Finally, imposing a requirement that a community benefits agreement meet the *Dolan* and *Lucas* standards simply brings into clearer focus that Bill 33-11 is taking a government power that must be exercised under applicable constitutional standards and placing the implementation of that standard into private hands—a practice that is unconstitutional for the reasons discussed under the *Delegation* section above.

Local Laws

Montgomery County "is a charter home rule county under Article XI-A of the Maryland Constitution." *Holiday Universal v. Montgomery County*, 377 Md. 305, 313 (2003). "The so-

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development).

[4] Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exaction Theme?*, 77 U. Chi. L. Rev. 5, 27.

called Home Rule Amendment, Article XI-A of the Maryland Constitution, 'enabled counties, like Montgomery County, which chose to adopt a home rule charter, to achieve a significant degree of political self-determination.'" *Id.* (internal citations omitted). The purpose of the Home Rule Amendment "was to transfer the General Assembly's power to enact many types of county public local laws to the Art. XI-A home rule counties." *McCrory Corp. v. Fowler,* 319 Md. 12, 16 (1990). The Home Rule Amendment "limits the Montgomery County Council to enacting 'local laws' on matters covered by the Express Powers Act." *Id.* at 17. The *McCrory* court recognized that the law of contracts is among those "affairs exclusively . . . of the state . . . ." *Id.* at 21 (quoting *Adler v. Deegan*, 251 N.Y. 467, 167 N.E. 705, 713 (1929) (Cardozo, C.J., concurring)).

Section 56-36(d) of the Bill proposes to define what constitutes a binding contract enforceable in a Maryland court. That is not permissible. Contract law is a matter of state-wide concern; the County does not have the authority to determine what constitutes an enforceable contract in the Maryland courts. Likewise, the Bill seeks to define what constitutes a public document under the state Public Information Act. The County has no authority to, in essence, alter a state statute by determining what documents the statute applies to.

These local law problems with Bill 33-11 are easily remedied by amendments to the Bill. For example, the Bill would only need to require that the parties enter into a legally binding agreement—it is unnecessary for the Bill to state that the agreement is enforceable in court. Likewise the Bill could require that a copy of the community benefits agreement must be given to the County. Once the agreement is in the custody of the County it becomes a public record subject to the Public Information Act.

Equal Protection

The 14th Amendment of the United States Constitution ensures that no state "shall . . . deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const. amend. XIV, § 1.* "Although the Maryland Constitution does not contain an express guarantee of equal protection of the laws, it is well established that Article 24 embodies the same equal protection concepts found in the Fourteenth Amendment to the U.S. Constitution." *Verzi v. Baltimore County*, 333 Md. 411, 417, (1994).

When reviewing laws under the equal protection clauses of Article 24 and the 14th Amendment, the legal analysis is similar to that employed under the due process clause. The Maryland courts have "traditionally accorded legislative determinations a strong presumption of constitutionality." *Verzi*, 333 Md. at 419 (quoting *State Board of Barber Examiners v. Kuhn,* 270 Md. 496, 507 (1973)). But "if a statute purporting to have been enacted to protect the public health, morals, safety and welfare has no real or substantial relation to those objects or is a palpable invasion of rights secured by fundamental law, it is [the court's] duty to so adjudge and

thereby give effect to the Constitution." *Maryland State Board of Barber Examiners v. Kuhn*, 270 Md. 496, 511; *see also*, *Dasch v. Jackson*, 170 Md. 251 (1936). The "decisive question, then, is whether the means selected . . . bear a real and substantial relation to the object sought to be attained." 270 Md. at 512. The Maryland Court of Appeals has quoted, favorably, the Supreme Court, to wit:

> The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Furthermore, some objectives -- such as a bare . . . desire to harm a politically unpopular group, -- are not legitimate state interests.[5]

Kirsch v. Prince George's County, 331 Md. 89 (1993) (quoting *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446-447 (1985) (internal citations omitted)).

The interests protected by Article 24 and the 14th Amendment include "the right to engage in those common occupations or callings which involve no threat to the public welfare . . . ." *Dasch v. Jackson*, 170 Md. 251 (1936), as well as the right "to engage in a lawful business . . . ." *Maryland State Board of Barber Examiners v. Kuhn*, 270 Md. 496, 510 (1973). When dealing with a statute that raises an equal protection issue and that also involves an important right, such as pursuing a lawful business, the Court of Appeals has applied an equal protection analysis that is more rigorous than the deferential rational basis test applied to statutes imposing economic regulations on some but not others. *See Verzi v. Baltimore County*, 333 Md. 411.

Bill 33-11 applies to a store with a "footprint" of 75,000 square feet. Thus, the Bill would not apply to a 100,000 square foot store that is comprised of two 50,000 square foot stories. It is fair to assume that a two-story 100,000 square foot retail store would have similar or even greater community impacts than a one-story 75,000 square foot store, yet the Bill is inapplicable to the larger store. Although the Bill's classification scheme is suspect, this equal protection problem could be addressed by an appropriate amendment or the development of a legislative record developing a strong reason justifying the different treatment accorded to stores of apparently similar size.

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[5] In this regard, portions of the legislative record of Bill 33-11 may prove problematic. A potential challenger to Bill 33-11 will certainly point to the County's apparent desire to protect existing mid-sized and local businesses from competition from "big box" retailers—specifically, Wal-Mart. *See* Council President Ervin's memorandum attached to Bill 33-11's introductory packet at page 7. Protecting local business from lawful competition will not likely be viewed as a legitimate County government goal by the Maryland courts. *Verzi v. Baltimore County*, 333 Md. 411

This equal protection problem is easily resolved by an amendment that identifies the class of retail stores affected by some other criteria.

An Inconsistency?

The Bill precludes the County from offering "any financial assistance" to the operator of a large retail store that "has not entered into a community benefits agreement . . . ." The Bill makes no exception for operators that have been relieved of the Bill's requirement under the good faith exception. Therefore, the operator of a large retail store that the County has deemed to have acted in good faith will still be denied financial assistance[6] from the County. It would be arbitrary to deny County benefits to an entity that has fully complied with the law. *See Dasch v. Jackson*, 170 Md. 251.

This potential legal deficiency could be resolved by an appropriate amendment that creates an exception to the prohibition against "any financial assistance" for a large retail store that has obtained a good faith exemption from the Executive.

Please contact me if you would like to discuss this opinion.

Cc: Valerie Ervin, President, County Council
Kathleen Boucher, Assistant Chief Administrative Officer
Michael Faden, Senior Legislative Attorney

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[6] Financial assistance could include anything from economic development funds to tax credits.