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BY EMAIL AND HAND DELIVERY

The Honorable Ned Lamont
Governor
State Capitol
210 Capitol Avenue
Hartford, CT 06106

Dear Governor Lamont:

You have requested a formal opinion on the constitutionality of Senate Bill 1134, captioned *An Act Restructuring the State Bond Commission and Establishing a Dedicated Bonding Section within the Legislative Office of Fiscal Analysis* (Proposed Bill). The Proposed Bill would transfer the State Bond Commission (Bond Commission) from the executive to the legislative branch, eliminate all executive officers on the Bond Commission and replace them with legislative members, and move certain staff from the Office of Policy and Management to the legislative Office of Fiscal Analysis. Specifically, you ask whether (1) the Proposed Bill would empower the legislative branch to perform executive functions in violation of the separation of powers, and (2) resolutions adopted by the reconstituted Bond Commission would violate the presentment clause of the state constitution, which requires legislation to be adopted by both chambers and presented to the Governor for his approval or veto. After careful consideration, we conclude that it is highly likely that a Connecticut court, if presented with the issue, would determine that the provisions of the Proposed Bill violate the separation of powers of Article II and the presentment clause of Article IV, § 15 of the Connecticut Constitution.

Background

Section 3-20 of the General Statutes established the Bond Commission, consisting of the Governor, Treasurer, Comptroller, Attorney General, Secretary of the Office of Policy and Management (OPM), Commissioner of Administrative Services, and the cochairpersons and ranking minority members of the joint

standing committee of the General Assembly having cognizance over finance, revenue and bonding matters.¹ Conn. Gen. Stat. § 3-20(c). The Bond Commission's principal authority is to determine whether and for what purposes and projects bonds should be issued. When the General Assembly has enacted a bond act empowering the Bond Commission to authorize bonds for any project or purpose, the Bond Commission may by majority vote adopt a resolution authorizing the issuance of bonds upon finding that such authorization is in the state's best interests. Conn. Gen. Stat. § 3-20(g)(1). Upon adopting such a resolution, the bond proceeds are "deemed to be an appropriation" for such project or purpose. Conn. Gen. Stat. § 3-20(g)(3). The authorizing resolution may include the terms and conditions of the bonds. *Id.* Traditionally, the Governor sets the agenda for the Bond Commission when requests for funding are considered.

The Proposed Bill would eliminate all the executive branch members. Instead, the Bond Commission would include the president pro tempore of the Senate, the speaker of the House of Representatives, the majority and minority leaders of both the House and Senate, and the cochairpersons and ranking minority members of the joint standing committee of the General Assembly having cognizance of finance, revenue and bonding matters. Proposed Bill, § 1(c)(1). The Senate president pro tempore and the speaker of the House would serve as cochairpersons of the Bond Commission and would jointly prepare the agenda for commission meetings. *Id.*, § 1(c)(2).

Under the Proposed Bill, the Bond Commission would be expressly part of the legislative branch. *Id.*, § 1(c)(1). A new, separate bonding section would be established as part of the legislative Office of Fiscal Analysis, and would have transferred to it the current staff members in the Budget and Financial Management division of OPM having responsibility for bonding matters. *Id.*, § 2. Requests for projects or bonding allocations to be included on the Bond Commission agenda would be made by the Secretary of OPM for the executive branch and the chief court administrator for the judicial branch. *Id.*, § 1(c)(3).

¹ The executive members may designate a deputy to attend meetings and act on their behalf, and the legislative members may designate another member of the joint standing committee to do so. Conn. Gen. Stat. § 3-20(c).

Discussion

You question whether the Proposed Bill is consistent with the state constitution. Enacted legislation ordinarily carries a strong presumption of constitutionality and will be struck down only if its unconstitutionality is proved beyond a reasonable doubt. *Doe v. Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 405 (2015). Our task is to offer our best forecast as to how a court, if faced with the question, would evaluate the constitutionality of the Proposed Bill.²

The Connecticut Supreme Court has directed that when construing the Connecticut Constitution, six factors, commonly called the *Geisler* factors, should be considered when applicable. They are “(1) the text of the operative constitutional provision; (2) holdings and dicta of [the Supreme] and the Appellate Court; (3) persuasive and relevant federal precedent; (4) persuasive sister state decisions; (5) the history of the operative constitutional provision, including the historical constitutional setting and the debates of the framers; and (6) contemporary economic and sociological considerations, including relevant public policies.” *Kerrigan v. Commissioner of Public Health*, 289 Conn. 135, 157 (2008) (citing *State v. Geisler*, 222 Conn. 672, 685 (1992)); accord *Feehan v. Marcone*, 331 Conn. 436, 449-50 (2019). These factors may be “inextricably interwoven,” and not every such factor is relevant in all cases. *Bysiewicz v. Dinardo*, 298 Conn. 748, 790 (2010).

Separation of Powers

The Connecticut Constitution includes an expressed separation of powers provision, which states: “The powers of government shall be divided into three distinct departments, and each of them confided to separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.” Conn. Const. art. II. Our Supreme Court has consistently held that:

² Because of the presumption of constitutionality and the Attorney General’s duty to defend the constitutionality of state laws, this Office historically has been hesitant to offer opinions on the constitutionality of legislation except where the statute is “unquestionably unconstitutional on its face.” See, e.g., A.G. Op. No. 2004-006, 2004 WL 1110332, at *5 (May 17, 2004) (internal quotation marks omitted).

in deciding whether one branch's actions violate the constitutional mandate of the separation of powers doctrine, the court will consider if the actions constitute: (1) an assumption of power that lies exclusively under the control of another branch; or (2) a significant interference with the orderly conduct of the essential functions of another branch.

Seymour v. Elections Enforcement Comm'n, 255 Conn. 78, 107 (2000) (internal quotation marks omitted). As it has explained:

The separation of powers doctrine serves a dual function: it limits the exercise of power within each branch, yet ensures the independent exercise of that power. Nevertheless, it cannot be rigidly applied always to render mutually exclusive the roles of each branch of government. As we have recognized, "the great functions of government are not divided in any such way that all acts of the nature of the function of one department can never be exercised by another department; such a division is impracticable, and if carried out would result in the paralysis of government. Executive, legislative and judicial powers, of necessity overlap each other, and cover many acts which are in their nature common to more than one department."

Massameno v. Statewide Grievance Committee, 234 Conn. 539, 552 (1995) (quoting *In re Clark*, 65 Conn. 17, 38 (1894)).

Thus, the Connecticut separation of powers doctrine provides for a degree of flexibility in the exercise of governmental functions. See *Univ. of Connecticut Chapter AAUP v. Governor*, 200 Conn. 386, 396-97 (1986). For example, the Court has held that legislative appointments to an executive branch board or commission do not violate the separation of powers. *Seymour*, 255 Conn. at 108. However, that flexibility does not permit one branch either to usurp an exclusive function of another or to interfere significantly in another branch's essential functions. *Id.* at 107.

The exercise of bonding authority – including the decision to issue bonds and the decision as to what projects or purposes bond proceeds should be dedicated – can be fairly characterized as relating to both the executive and legislative functions. After all, “[t]he legislative power necessarily encompasses the ‘power to appropriate funds to finance the operation of the state and its programs.’” *Univ. of Connecticut Chapter AAUP*, 200 Conn. at 395 (quoting *Eielson v. Parker*, 179 Conn. 552, 560 (1980)). Unquestionably, the legislature has the constitutional power to authorize the issuance of bonds for the financing of state purposes and programs. At the same time, if the legislature, as it has in enacting § 3-20, delegates such authority to an executive officer or commission, the exercise of that delegated authority is an executive function. In exercising this authority by making decisions to authorize bonds for specific projects or purposes, the executive is fulfilling the constitutional duty to ensure that the laws are faithfully executed. *Id.* at 397; Conn. Const., art. IV, § 12. Although the Bond Commission is not performing an exclusive executive function, the implementation of bond legislation is an *executive* function. The execution of the laws – here, the administration of bonding authority – is the principal function of the executive. See *Bowsher v. Synar*, 478 U.S. 714, 726 (1986); *Springer v. Government of Philippine Islands*, 277 U.S. 189 (1928).

As currently structured, having legislative members on the Bond Commission does not offend the separation of powers. See *Seymour*, 225 Conn. at 108. However, the Proposed Bill goes well beyond this sort of permissible sharing of authority. The Proposed Bill would expressly transfer the Bond Commission, presently an executive branch entity with a minority of legislative members, to the legislative branch and would compose the entire commission of legislative members. This does raise several constitutional concerns. Persuasive guidance can be found in the case law from the federal courts and other states.³

³ The Connecticut separation of powers doctrine has been characterized as more flexible than, for example, the doctrine as applied under the U.S. Constitution. The best example of that difference is in the case of legislative appointments to executive boards or commissions. Compare *Buckley v. Valeo*, 424 U.S. 1, 127 (1976) (holding that legislative appointment of members of Federal Elections Commission violated separations of power) with *Seymour*, 225 Conn. at 105-06 (upholding legislative appointments under more flexible analysis in light of lack of appointments clause in state constitution). Given the fundamental nature of the separation of powers defects in the Proposed Bill, we do not in this instance discern a principled basis to distinguish the federal court and other state precedents discussed below.

Several courts have found separation of powers violations when the legislature has transferred to a legislative board or entity the day-to-day administration of various government programs. *McInnish v. Riley*, 925 So.2d 174, 188 (Ala. 2005) (legislative committee authorized to approve or deny grants violated separation of powers); *Opinion of the Justices*, 380 A.2d 109, 115-16 (Del. 1977) (transfer of maintenance, security and communications administration from executive agency to legislative council violated separation of powers); *State ex rel. Schneider v. Bennett*, 219 Kan. 285, 547 P.2d 786 (1976) (state finance council consisting of nine legislators and governor with authority over executive agency having administrative and fiscal responsibilities violated separation of powers). The courts' reasoning in each of these cases was that the legislature, through a legislative entity comprised of members of the legislature, was in effect executing the laws, not legislating. *McInnish*, 925 So.2d at 188; *Opinion of the Justices*, 380 A.2d at 116; *State ex rel. Schneider*, 547 P.2d at 797-98; see also *Bowsher v. Synar*, 478 U.S. 714, 734 (1986) (legislative officer having ultimate authority over the determination of budget cuts unconstitutionally intruded on the executive function).

This is precisely what the Proposed Bill would do. It would take over from an executive agency the complete authority to implement bond authorization legislation. Although the Connecticut Constitution allows for flexibility in the exercise of the separate functions of government, the Proposed Bill would go too far. It would completely oust the executive branch from its role in executing the laws related to bond authorizations. Because the execution of the laws is the principle function of the executive branch, this would constitute a "significant interference with the orderly conduct of the essential functions of another branch." *Seymour*, 255 Conn. at 107. A Connecticut court would therefore likely conclude that the legislature's delegation to a legislative commission of the authority to execute and implement bonding legislation in such a fashion would be an impermissible intrusion on the executive.⁴

⁴ We note that this Office opined in 2002 that a statute that required the Commissioner of Social Services to submit applications for waivers of federal assistance programs to certain legislative committees for approval did not violate the Connecticut separation of powers doctrine. A.G. Op. No. 2002-021, 2002 WL 1486265 (June 28, 2002). The opinion viewed the requirement as sufficiently connected to the legislature's appropriations authority to not constitute a significant interference with the executive branch. For the reasons we discuss, the Proposed Bill, by contrast, would involve a far more fundamental and extensive intrusion.

Presentment

The scheme the Proposed Bill contemplates, however, suffers from an additional, even more fundamental constitutional flaw. If the legislature wants to exercise the power to authorize and direct specific bonding, it may do so by enacting legislation – to wit, by passage of a bill by both houses and presentment of the bill to the Governor as the constitution requires. Conn. Const., art. IV, § 15 (“Each bill which shall have passed both houses of the general assembly shall be presented to the Governor.”). Bypassing this constitutionally mandated process, the Proposed Bill would authorize a small group of legislators to act, independently exercising delegated authority. Again, precedents from other jurisdictions offer guidance.

In *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, the U.S. Supreme Court struck down as a separation of powers violation the creation of a commission composed of nine members of Congress with authority to review local decisions relating to the two Washington area airports. 501 U.S. 252 (1991). To the extent that this review authority was executive in nature, the Court concluded that Congress could not confer such executive power on itself. To the extent that it was an exercise of legislative power, the commission could not exercise the authority because it violated the bicameralism and presentment requirements of the Federal Constitution. *Id.* at 276. Plainly, the Proposed Bill has the same problem.

Similarly, in *North Dakota Legislative Assembly v. Burgum*, the North Dakota Supreme Court recently held unconstitutional the legislature's creation of a “budget section,” comprised of a subset of legislative members, to approve the transfer of certain funds appropriated for expenditure by the state water commission. 916 N.W.2d 83 (N.D. 2018). The court concluded that this approval authority intruded impermissibly on the executive. More importantly, this review “bypasses the mandatory legislative process.” *Id.* at 106. To exercise its power, the legislature ordinarily must act as a legislature as the constitution mandates. *Id.* at 105-06; *see also State ex rel. McLeod v. McInnis*, 278 S.C. 307, 295 S.E.2d 633 (1982) (legislative committee having broad authority over control of state expenditures without enacting new legislation violated separation of powers).

The legislature undoubtedly can enact legislation that authorizes specific bonds for specific projects, which the Governor would then have to sign, or

choose not to sign. Indeed, before the Bond Commission was created, the legislature often acted in such a fashion. *See, e.g.*, 26 Conn. Special Acts No. 216 (1951) (authorizing bonds for institutional buildings); 23 Conn. Special Acts No. 213 (1941) (authorizing bonds for University of Connecticut dormitory); 22 Conn. Special Acts No. 3 (1936) (authorizing bonds for state college buildings). But what it cannot do is delegate to a subgroup of itself its legislative powers or exercise those powers without presentment to the Governor. Doing so, as the Proposed Bill would, violates the presentment clause of Article IV, § 15.

In light of the governing constitutional text, existing Connecticut precedent and the persuasive decisions of other federal and state courts, it is highly likely that a Connecticut court, if presented with the issue, would conclude that the provisions of the Proposed Bill violates the Connecticut Constitution.

Very truly yours,



WILLIAM TONG