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May 8, 2013

The Honorable Martin O'Malley
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401-1991

Re: Senate Bill 370, "Garrett County – County Commissioners – Industrial Wind Energy"

Dear Governor O'Malley:

We have reviewed Senate Bill 370 entitled, "Garrett County – County Commissioners – Industrial Wind Energy." We write to point out a provision of doubtful constitutionality relating to adjoining property owners' consent to a variance for an individual industrial energy conversion system (commonly known as a "wind turbine") from a setback requirement. While it is our view that this consent provision is likely to be unconstitutional, we believe that it can be severed from the bill. There are also other legal problems relating to this variance provision that should be corrected in the next session of the General Assembly. The other provisions concerning bonds and decommissioning of wind turbines in Senate Bill 370 are constitutional and legally sufficient.

Senate Bill 370 provides for a minimum setback for a wind turbine of "no less than two and a half times the structure height" in Garrett County. The applicant of the proposed wind turbine may seek a variance from the setback requirement with the Garrett County Department of Planning and Zoning ("Department") of up to 50% of the minimum setback distance "on written authorization of all property owners of adjoining parcels." In addition, the bill provides for bonding requirements for wind turbines and requirements for the decommissioning of wind turbines if the turbine has not generated electricity for a certain period of time or the owner abandoned the turbine.

Garrett County is unique in Maryland in that the County has not adopted countywide zoning despite the fact that the Land Use Article of the Maryland Code grants commissioner counties the power to adopt comprehensive zoning. Rather, the Board of County Commissioners adopted zoning in only a small portion of the County, around Deep Creek Lake. In 2009, this Office was asked whether the Garrett County Commissioners could adopt a zoning ordinance to promulgate standards for the development of wind turbines in Garrett County to include tall structure conditions and restrictions and set-back provisions. Letter of Advice to Senator George Edwards, January 21, 2009. This Office advised that if the Garrett County Commissioners wished to adopt a conventional approach to zoning for wind turbines that would include setback provisions, it could only be accomplished through the adoption of comprehensive zoning for all uses in the County because the authority to zone delegated to counties envisioned "comprehensive zoning" rather than just zoning for a particular use such as wind turbines. Md. Code Ann., Land Use Article ("LU") §4-101.

Even though the Garrett County Commissioners are bound by the restrictions in the Land Use Article that require them to act comprehensively through zoning rather than by particular uses, the General Assembly is not bound by those restrictions. It is the State of Maryland that holds the power to zone, which is part of the police powers of the State, and the General Assembly may exercise that zoning power in a non-comprehensive way by placing a setback requirement on a particular use such as a wind turbine. Even though the General Assembly may enact a setback requirement for wind turbines in Garrett County, the exercise of that police power is subject to constitutional standards including due process.

While Maryland courts have not examined whether a consent requirement of all adjoining property owners or a portion of consent of adjoining property owners as a requirement for zoning or for seeking a variance from a zoning restriction, such as a setback, is constitutional, other courts have. In *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), the U.S. Supreme Court examined the constitutionality of a zoning ordinance that required the written consent of two-thirds of the property owners within 400 feet of the proposed building before a building permit could be issued for home for elderly residents. The Supreme Court struck down the zoning ordinance stating:

> [t]here is no provision for review under the ordinance; their [the neighboring property owners] failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the [proposed owner] to their will or

> caprice. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment.

Id. at 122.

A more recent case where consent of all of the adjoining or abutting property owners was required in order to obtain a variance from the lot area requirements and for a two-family dwelling was *Lakin v. City of Peoria*, 472 N.E. 2d 1233 (Ill. App. 1984). The property owner applying for the variance was unable to obtain the consent of all of the owners of property that adjoined or abutted the property and challenged the validity of the ordinance. *Id.* at 1235. The court held that the consent requirement was unconstitutional stating:

> [i]n the instant case, [the zoning ordinance] leaves the ultimate determination of whether a two-family dwelling will be detrimental to the public welfare to the whim and caprice of neighboring property owners rather than to a reasoned decision by the city. We hold, therefore, that the consent provision in [the zoning ordinance] has no bearing on the public health, safety or welfare and that it constitutes an invalid delegation of legislative power.

Id. at 1236; *Janas v. Town of Fleming*, 382 N.Y.S.2d 394, 397 (N.Y.App. Div. 1976) (special zoning permit that required consent of majority of adjoining property owners before the permit could be granted by the zoning board was unconstitutional because it delegated zoning authority to individual landowners who, by withholding their approval, may effectively prevent the board from considering an otherwise proper application); *but see, e.g., Robwood Advertising Associates, Inc. v. Nashua*, 153 A.2d 787 (N.H. 1959) (consent provision for a variance was constitutional because it was a condition precedent to a hearing on the variance).[1]

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[1] There are some cases like *Robwood* that have found consent provisions for variances to be constitutional based on a subtle distinction between creating a zoning restriction by prohibiting a use and waiving a zoning restriction through a variance process. We do not believe that the Court of Appeals of Maryland will adopt this reasoning. Indeed, the Supreme Court of Illinois, which initially used this distinction reversed itself two years later noting "...we have given the matter further study and feel that the subtle distinction between 'creating' and 'waiving' a restriction cannot be justified. Each constitutes an invalid delegation of legislative power where the ordinances, as here, leave the ultimate determination of whether the erection of the [gas] station would be detrimental to the public welfare in the discretion of individuals rather than the city." *Drovers Trust & Savings Bank v. City of Chicago*, 165 N.E.2d 314, 315 (Ill. 1960).

By requiring the consent of all adjoining property owners prior to the applicant applying for the variance, the General Assembly in Senate Bill 370 has given neighboring property owners the power to determine whether or not a variance from the setback requirement for wind turbines would be detrimental to the public health and welfare. Thus, it is our view that such a delegation of zoning authority to individual landowners is of doubtful constitutionality. We believe, however, that this consent requirement can be severed from Senate Bill 370. Md. Ann. Code, Art. I, §23 (provisions severable unless "specifically stated" that they are not); *see also Lakin* at 1238 (consent provision in zoning ordinance was not an integral or essential part of the ordinance).[2] We suggest that if you approve the bill notwithstanding the defect, that Garrett County should administer the law as if the adjoining property owners' consent is not required. Next year, the offending provision should be excised.

Severing the adjoining property owner consent requirement from the variance provision does not, however, remove all legal problems. We note that this provision gives the Department the authority to grant a variance from the wind turbine setback requirement but provides no standards for the Department to apply in deciding whether the variance should be granted. Generally, when legislative power is delegated to administrative officials it is constitutionally required that adequate guides and standards be established by the delegating legislative body. *Commission on Medical Discipline v. Stillman*, 291 Md. 390, 413-414 (1981). These standards are necessary so that the administrative officials, appointed by the executive and not elected by the people, will not legislate, but will find and apply facts in a particular case in accordance with the policy established by the legislative body. While Senate Bill 370 does not contain a variance standard nor does Article 25 of the Code where this provision is located, it is our recommendation that the Department should apply the variance standard for commissioner counties that is found in the LU Article §4-206. The General Assembly in the next session should either amend §238G(c) of Article 25 to add a variance standard to this provision, or transfer this provision to the Land Use Article so that the variance standard in that Article would more clearly apply.[3]

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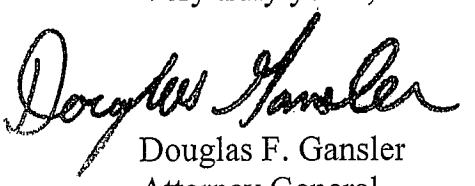
[2] Under Maryland common law, an adjoining property owner has standing in court to challenge a land use decision because an adjoining owner is deemed to be "specially damaged, and therefore a person aggrieved." *Ray v. Mayor and City Council of Baltimore*, 430 Md. 74, 81 (2013).

[3] Senate Bill 370 also does not provide a statutory mechanism for an appeal of the Department's decision to grant a variance from the wind turbine set back. This lack of appeal provision does not remove the Department's decision from judicial review because other review

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/DF/ASC/kk

cc: The Honorable George C. Edwards
The Honorable John P. McDonough
Stacy Mayer
Karl Aro

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mechanisms provided through the Maryland Rules are likely to apply. *See* Md. Rules 7-401 to 7-403 (administrative mandamus). However, the General Assembly may wish to consider adding an appeal provision to this section since all other land use variances authorized by State law have statutory provisions for an appeal. If the General Assembly moves this provision to the Land Use Article then the Board of Appeals would hear an appeal of the Department's decision. *See* Md. Ann. Code, LU §§4-305 and 4-306.