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May 4, 2007

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

Dear Governor O'Malley:

We have reviewed for constitutionality and legal sufficiency SB 979 and HB 1344, identical bills which would prohibit certain zoning applicants in Frederick County from making a political contribution to a member of the Board of County Commissioners during the pendency of the application.¹ In our view, the legislation would not violate the free speech guarantees of the Federal and State constitutions.

¹ The legislation defines:

(I) "Contribution" as "a payment or transfer of money or property worth at least \$100, calculated cumulatively during the pendency of the application, to a candidate or a treasurer or political committee of a candidate" and

"Pendency of the application" as "any time between the acceptance by the County Department of Planning and Zoning of a filing of an application and the earlier of:

- (1) 2 years; or
- (2) the expiration of 30 days after:
 - (I) the Board has taken final action on the application; or
 - (II) the application is withdrawn".

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Senate Bill 979 / House Bill 1344 not only prohibits “developer” contributions, but also provides that:

After an application has been filed, a board member may not vote or participate in any way in the proceedings on the application if the board member or the treasurer or political committee of the board member received a contribution from the applicant during the pendency of the application.

The legislation is patterned in large part on the “Prince Georges Ethics Law”, now codified at §§ 15-829 - 15-835 of the State Government Article, whose earlier versions were subjected to constitutional challenge in *Porten Sullivan Corp. v. State*, 318 Md. 387 (1990) and *State v. Prince Georgians for Glendening*, 329 Md. 68 (1993).²

In a number of respects, the Frederick County legislation is narrower than the Prince George’s County statute. For example, the former does not affect zoning “agents”, has a narrower definition of “contribution” and allows some contributions, *viz.*, those of less than \$100. On the other hand, both legislative schemes do not attempt to regulate core political speech, *viz.*, independent candidate expenditures by developers and volunteer activity, *cf.* Election Law Article §13-322.³ Nor do these measures affect contributions to nonincumbent candidates.

Senate Bill 979 / House Bill 1344 serves a substantial government interest by taking aim at a discreet class of contributors whose political activity raises concerns of *quid pro quo* corruption (or its appearance) and conflicts of interest on the part of incumbent office holders / zoning decision-makers. Thus, the legislation is not drawn into question by the U.S.

Supreme Court’s recent decision in *Randall v. Sorrell*, 126 S. Ct. 2479 (2006), which invalidated Vermont’s strict and general contribution limits - - \$200 - \$400 for candidates

² Although the Prince George’s legislation was challenged on First Amendment grounds, both appellate decisions were decided on the basis of a one-subject violation. The only court to read free speech contentions was the Circuit Court for Prince George’s County, which in 1989 rejected the plaintiff’s challenge.

³ The Frederick County legislation applies only to contributions of money and property, not any “other thing of value”. *Compare* Election Law Article, §1-101(o).

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for state office - - as too low to survive First Amendment scrutiny. *See* 2007 WL 778907 (Tenn. A.G.)(distinguishing *Randall* in upholding an in-session ban on contributions to members of the General Assembly).

On the other hand, most courts have upheld the constitutionality of total bans on individual contributions by various professions and persons whose political activity raised concerns of corruption or conflict of interest. *See e.g. North Carolina Right to Life Inc. v. Bartlett*, 168 F. 3d 705 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000)(lobbyists); *Blount v. SEC*, 61 F. 3d 938 (D.C. Cir. 1997), *cert. denied*, 517 U.S. 1119 (1996)(municipal securities professionals); *Gwinn v. State Ethics Commission*, 426 S.E. 2d 890(Ga. 1993)(insurers); *Schiller Park Colonial Inn, Inc. v. Berz*, 349 N.E. 2d 61 (Ill. 1976)(liquor licensees); *In re. Petition of Soto*, 565 A. 2d 1088(N.J. Sup. 1989), *cert. denied* 583 A. 2d 310 (N.J. 1990), *cert. denied* 496 U.S. 937 (1990) and *Casino Association of Louisiana v. State of Louisiana*, 820 So. 2d 494 (La. 2002), *cert. denied*, 537 U.S. 1226 (2003)(casino officers and employees). *See also* 2 U.S.C. §441C (banning individual contributions by government contractors).

In our view, this array of authorities supports the constitutionality of SB 979 / HB 1344 as narrowly drawn and serving a substantial government interest.

Very truly yours,

/s/

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Attorney General

DFG/RAZ/as

(2007 BR) sb979 / hb 1344

cc: Joseph Bryce
Secretary of State
Karl Aro