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April 22, 2009

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

RE: Senate Bill 964 and House Bill 455

Dear Governor O'Malley:

We have reviewed for constitutionality and legal sufficiency House Bill 455 and Senate Bill 964, companion bills entitled, "Caroline County Board of Education - Election and Appointment of Members - Referendum." While these bills may be signed into law, there are provisions that raise constitutional issues. One of these, a provision for de novo judicial review of removals of members of the Board, can be resolved by the manner in which the law is administered. The other provision requires that Board members have resided and been registered to vote in the County for three years prior to election. It is our view that both the residency requirement and the registration requirements pose significant constitutional problems. However, we believe that both requirements are severable from the remainder of the legislation and thus, the bill may be signed into law. We also write to discuss the differences between the two bills.

House Bill 455 and Senate Bill 964 provide for a change from the current appointed school board in Caroline County to one with both elected and appointed members. They further provide that this change will take effect only if approved by the voters in the general election held in 2010. Such a referendum with respect to the school board for a single county does not constitute the unconstitutional delegation to the voters of the power to enact a public general law. Bill Review letter on Senate Bill 716 and House Bill 204 of 1995, dated May 12, 1995.

The bills provide that a member of the Board who is removed from office has a right to de novo review of the removal by the Circuit Court for Caroline County. If this provision were read literally, it would violate the Separation of Powers requirement of

Article 8 of the Maryland Declaration of Rights by requiring a court to perform an executive and nonjudicial function. *See, Department of Natural Resources v. Linchester*, 274 Md. 211 (1975). However, as a result of the 1993 revision of the State laws on administrative procedure, Article 1, § 32(a), was enacted to provide, in relevant part, that:

> [I]n a statute providing for de novo judicial review or appeal of a quasi-judicial administrative agency action, the term 'de novo' means evidence as would be authorized by § 10-222(f) and (g) of the State Government Article.

So long as the de novo review provision is implemented in accordance with this section, it will not raise constitutional problems.

The bills further provide that a candidate elected to the County Board shall be a registered voter and a resident of Caroline County for at least 3 years. Courts have analyzed durational residency requirements, and, to a lesser extent, registration requirements, to determine whether they violate the Equal Protection Clause. Many of these courts have applied heightened scrutiny as a result that such statutes have on the right to travel, the right to vote, or a supposed right to be a candidate. Others have applied rational basis. The results of these cases cannot be summarized in any meaningful way, but reach inconsistent conclusions, on inconsistent grounds. *See* Bill Review letter on Senate Bill 518 and House Bill 576 of 2003.

One thing that is consistent in the cases is that the longer a durational residency requirement is, the more likely that it is to be held invalid. Three year requirements have generally been found to be unconstitutional. *Peloza v. Freas*, 871 P.2d 687 (Alaska 1994) (municipal office); *Hall v. Miller*, 584 S.W.2d 51 (Ky.App. 1979) (mayor); *Henderson v. Fort Worth Independent School Dist.*, 526 F.2d 286 (5th Cir.1976) (school board); *Cowan v. City of Aspen*, 509 P.2d 1269 (Colo.1973) (municipal offices); *Mogk v. City of Detroit*, 335 F.Supp. 698 (E.D.Mich.1971) (charter revision commission); *Bolanowski v. Raich*, 330 F.Supp. 724 (E.D.Mich.1971) (mayor); *Camara v. Mellon*, 484 P.2d 577 (Cal.1971) (city council), *but see Walker v. Yucht*, 352 F.Supp. 85 (D.Del.1972) (legislature). Most recently, the federal District Court for the District of Maryland found that a three-year residency requirement for the Mayor of Frederick was unconstitutional. *Young v. Dougherty*, Civil No. JFM-05-856 (D.Md. May 20, 2005). It is our view that these cases raise serious doubts about the constitutionality of a three-year durational residency requirement for members of the Caroline County school board.

There are comparatively few cases involving requirements that a person be registered to vote in a jurisdiction before running for office. Relatively short registration requirements, generally six months, have been upheld. *Fleak v. Allman*, 420 F.Supp. 822 (W.D.Okla. 1976); *Draper v. Phelps*, 351 F.Supp. 677 (W.D.Okla. 1972). Longer ones, however, have been found invalid. Thus, in *Board of Supervisors v. Goodsell*, 284 Md. 279 (1979) the Maryland Court of Appeals held that a five-year registration requirement for County Executive was invalid. The Court applied strict scrutiny based on the effect of the requirement on the choices available to voters, and held that the proffered justification of ensuring that only persons who are 'thoroughly informed' and have 'a deep seated awareness of the County' will serve as County Executive did not suffice: "Assuming without deciding that this would be a sufficient governmental interest to justify a substantial *residency* requirement, we are here dealing with a durational *registration* requirement." This case relied heavily on *Henderson v. Fort Worth Independent School Dist.*, 526 F.2d 286 (5th Cir.1976), in which the court held that a requirement that a person be registered for three years to run for school board trustee was invalid. *See also Hall v. Miller*, 584 S.W.2d 51 (Ky.App. 1979) (Three-year requirement for both residency and registration for mayor is invalid).

The case law discussed above makes it seem likely that both the residency and the registration requirement may be held unconstitutional. As a result, it may be advisable to reduce the length of both requirements in the future so as to avoid potential litigation.[1] Residency requirements of one year have fairly consistently been upheld. *City of Akron v. Bell*, 660 F.2d 166 (6th Cir. 1981) (City Council); *MacDonald v. City of Henderson*, 818 F.Supp. 303 (D.Nev. 1993) (City Council); *Joseph v. Birmingham*, 510 F.Supp. 1319 (E.D.Mich. 1981) (City Commissioner); *Daves v. Longwood*, 423 F.Supp. 503 (D.Fla. 1976) (City Council); *Hadnott v. Amos*, 320 F.Supp. 107 (M.D.Ala. 1970) *aff'd mem.* 410 U.S. 968 (1971) (Judge); *Lewis v. Gibbons*, 80 S.W.3d 461 (Mo. 2002) (Judge); *Cox v. Barber*, 568 S.E.2d 478 (Ga. 2002) (Public Service Commission); *White v. Manchin*, 318 S.E.2d 470 (W.Va. 1984) (Senator); *Wise v. Lentini*, 374 So.2d 1286 (La.App. 1979)

[1] Similar limitations appear in Education Article § 3-201(c) (nominee for Allegany County Board of Education must be a qualified voter and a resident of the County for at least one year); § 3-301(c)(3) (member of the Calvert County Board of Education must be a registered voter of the County for at least two years prior to the beginning of the term of the member); § 3-4A-01 (candidate for Cecil County Board of Education must be resident and registered voter of the County for three years); § 3-1002 (candidate for Prince George's County Board of Education must be resident of the County for at least three years before the election) § 3-10A-01(c)(3) (candidate for Queen Anne's County Board of Education must be registered voter and resident of the county for three years).

(City Council); *Castner v. Homer*, 598 P2d 953 (Alaska 1979) (City Office); *Ammond v. Keating*, 374 A.2d 498 (N.J.Super. 1977) (Senate); *Brewster v. Johnson*, 541 S.W.2d 306 (Ark 1976) (General Assembly); *Lawrence v. City of Issaquah*, 524 P.2d 1347 (1974) (Town Council); *Cowan v. City of Aspen*, 509 P.2d 1269 (Colo.1973) (One year for municipal office upheld, but three years bad); *State ex rel. Gralike v. Walsh*, 483 S.W.2d 70 (Mo. 1972) (Senator).[2] *See also* 72 *Opinions of the Attorney General* 209, 213 (1987) (One year residency requirement for notary public constitutional, but those longer than one year "typically fail equal protection review"). And as discussed above, a shorter registration requirement also is more likely to be upheld.

It is our view that both requirements discussed above are severable from the remainder of the legislation. Article 1, § 23, Annotated Code of Maryland, provides that the "finding by a court that some provision of a statute is unconstitutional and void does not affect the validity of the remaining portions of that statute, unless the court finds that the remaining valid provisions alone are incomplete and incapable of being executed in accordance with the legislative intent." The bills establish a method by which the voters of Caroline County can determine whether to alter the way in which their school board is selected and sets out the necessary provisions to make those changes. These provisions can stand alone and be executed without the necessity of a durational residency or registration requirement. Thus it is our view that, should either of these requirements be found invalid, they should simply be severed from the remainder of the statute. Therefore, there is no constitutional bar to signing this legislation.

There are minor differences between the two bills. The title to Senate Bill 964 twice provides that certain members of the Board are to be appointed by the Governor "with the advice and consent of the Senate," while this language does not appear in House Bill 455. Both bills, however, require the advice and consent of the Senate. In addition, Senate Bill 964 reflects that two members elected in November 2012 will serve

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[2] Those cases where one-year residency requirements were found invalid are easily distinguishable. In *Callaway v. Samson*, 193 F.Supp.2d 783 (D.N.J. 2002), the Court did not consider whether a requirement that a person running for City Council reside in the district for a year was facially unconstitutional, but held only that it was unconstitutional as applied to a person who had lived in the city his entire life and had worked in the district in question for 20 years. *Robertson v. Bartels*, 150 F.Supp.2d 691 (D.N.J. 2001) invalidated a one-year requirement as applied to candidates for the General Assembly who had been affected by redistricting. And *Headlee v. Franklin County Bd. of Elections*, 368 F.Supp. 999 (S.D.Ohio 1973) involved a situation where a significant recent annexation had the effect that a large percentage of people in the city did not qualify to run.

a four year term, while one member will serve a two year term. Page 8, lines 15-22. House Bill 455 provides that three elected members will serve a four year term while one member will serve a two year term. Page 8, line 29 to page 9, line 4. Because the Board will have only three elected members, and the language reflects an intent that they serve staggered terms, the language of the Senate Bill would appear to be correct, and should be signed second if both bills are to be signed.

Very truly yours,

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Attorney General

DFG/KMR/kk

cc: The Honorable Richard F. Colburn
The Honorable Richard A. Sossi
The Honorable John P. McDonough
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