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April 29, 2010

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

Re: Senate Bill 235 and House Bill 103

Dear Governor O'Malley:

We have reviewed Senate Bill 235 and House Bill 103, which are identical. Both bills require that mobile home park owners submit a resident relocation plan as part of a change of use application where the plan is to close the park. In addition, an owner of a park with more than 38 sites that is closing must pay relocation assistance to each household "equal the amount of rent for the premises, excluding taxes and utilities, paid for the 10 months immediately preceding the date the resident vacates the premises." We have considered whether these bills cause an unconstitutional taking. Because we find that they do not, we hereby approve them for constitutionality and legal sufficiency.

The Fifth Amendment of the U.S. Constitution and Article III, §40 of Maryland's Constitution "prohibit the taking of private property for public use without the payment of just compensation to the property owner." *King v. State Roads Commission*, 298 Md. 80, 84 (1983). The Maryland Court of Appeals has directed that the decisions of the Supreme Court interpreting the takings clause of the U.S. Constitution are authoritative in interpreting the State's comparable takings provisions. *Id.*

Maryland has long regulated mobile home parks and imposed some requirements upon park owners. *See* Maryland Code, Real Property Article, Title 8A. The State's current laws governing mobile home parks have been upheld as constitutional. *See Cider Barrel Mobile Home Court v. Eader*, 287 Md. 571 (1980). The Act has been amended since that time, but the statutory provisions at issue in *Eader*, like these bills, "placed some restrictions on the park owner's use of his property." *Id.* at 580. The Court of Appeals determined that the Act's requirements do "not constitute an unconstitutional 'taking' of private property." *Id.* at 582. In so holding the Court noted that "[r]egulations generally constitute a 'taking' only if the owner affirmatively demonstrates that the

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restrictions imposed deprive him of essentially all beneficial use of the property." *Id.* at 580.

Senate Bill 235 and House Bill 103 require park owners to send a copy of the required notice to tenants of termination of the lease to the local governing body of the county or municipal corporation in which the park is located. This provision does not raise any constitutional concerns. But the requirements in the legislation that require a park owner to bear some of the expenses of relocating a mobile home warrant further examination. The Supreme Court has characterized another state's mobile home regulations that imposed strict rent control on park owners as legitimate land use regulations. *Yee v. Escondido*, 503 U.S. 519 (1992). *See also Greenfield Country Estates Tenants Association v. Deep*, 666 N.E.2d 988 (Mass. 1996)(regulations giving mobile home park tenants right of first refusal when park owners wish to sell land are not an unconstitutional taking of the property of the park owners). In cases examining land use regulations, the applicable standard to determine if a constitutional taking has occurred is whether the regulation substantially advances a legitimate government interest. *Dolan v. Tigard*, 512 U.S. 374 (1994)(addressing standard for land use regulations that are neither a physical taking of property by the government nor a transfer of property to the government). If there is a legitimate government interest, the next question is whether there is a nexus between the regulation and the interest to be advanced. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

A handful of other states have analyzed whether mandatory payment by park owners of tenant relocation assistance constitutes taking of a mobile park owner's property. In Minnesota, a court determined that the relocation assistance was not a constitutional taking and that the regulation advanced a legitimate state interest. *Arcadia Dev. Corp. v. Bloomington*, 552 N.W.2d 281 (Minn. App. 1996). "By requiring a park owner to pay mitigation fees or relocation costs to displaced residents when that owner decides to close its park or change its use, the ordinance has a direct nexus or connection to the interest of lessening the economic devastation imposed on displaced residents." *Id.* at 287; *see also People v. H & H Properties,* 201 Cal. Rptr. 687, 690 (App. 1984) (relocation assistance for tenants "who are displaced by condominium conversions and are forced back into the housing market" is related to the valid purpose of tenant protection); *Briarwood Properties v. City of Los Angeles*, 217 Cal. Rptr. 849 (App. 1985)(relocation assistance ordinance was constitutional; *Gibbs v. Southeastern Investment Corp.*, 705 F. Supp. 738 (D. Conn. 1989); *Beeding v. Miller*, 520 N.E.2d 1058 (Ill. App. 1988).

In Washington and Florida, however, state courts have struck down relocation assistance regulations as unconstitutional. *See Guimont v. Clarke*, 854 P.2d 1 (Wash. 1993) and *Aspen-Tarpon Springs Ltd. Partnership v. Stuart*, 635 So. 2d 61 (Fla. App. 1994). In *Guimont*, the Washington Supreme Court announced that the relocation assistance was not an unconstitutional taking; nevertheless, the court went on to decide that the regulations were "unduly oppressive" and violated the park owners' substantive due process rights. *Guimont*, 854 P.2d at 38. The court noted that although the general unavailability of low income housing is a fundamental reason that the assistance is needed, "[a]n individual park owner who desires to close a park is not significantly more responsible for these general society-wide problems than is the rest of the population." *Id.* at 43.

It should be noted, however, that the Washington courts that have determined that the mandatory relocation laws are unconstitutional have done so based primarily on a violation of the state's constitution. *See Manufactured Housing Communities v. Washington*, 13 P.3d 183 (2000)("the structural differences [between the Washington state's constitution and the federal constitution] allow Washington courts to forbid the taking of private property for private use even in cases whether the Fifth Amendment may permit such takings").[1] Indeed, a federal court examining Washington state law

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[1]Article I, section 16 of the Washington State Constitution provides:

> Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal until full compensation therefore be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public: *Provided,* That the taking of private property by the state for land reclamation and settlement purposes is hereby declared to be for public use.

The takings clause of the Fifth Amendment of the federal constitution states that "nor shall private property be taken for public use, without just compensation." Maryland's constitution

requiring relocation assistance in condominium conversions found no federal constitutional violation. *Garneau v. Tenants Union*, 147 F.3d 802 (9th Cir. 1998)("Even if [property owners] had asserted that the relocation assistance provisions led to the devaluation of their apartment buildings, it is well settled that mere diminution in value, standing alone, does not establish an unconstitutional taking without just compensation.").

The Maryland Court of Appeals has said, "It is well-settled that zoning regulations are a valid exercise of a government's police power so long as the limitations imposed are in the public interest and are related substantially to the health, safety, or general welfare of the community." *Casey v. Rockville*, 400 Md. 259, 306 (2007). The Court went on to note that a regulation could be a taking "'if not reasonably necessary to the effectuation of a substantial purpose, or perhaps if it has an unduly harsh impact on the owner's use of the property'." *Id.* (quoting *Pennsylvania Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)). The Court of Appeals has typically required that for a regulation to be a taking, the owner must show that it deprives the owner of "all beneficial use of the property... ." *Id.* at 307 (citations omitted). Thus, Maryland courts are unlikely to follow the Washington decisions.

Unless a mobile park owner could show that the legislation deprives the owner of all beneficial use, it is likely that a court would determine that the provisions would not be an unconstitutional taking of property. A court evaluating whether the requirements of Senate Bill 235 and House Bill 103 constitute a taking likely will follow the tests recently outlined by the Fourth Circuit Court of Appeals in *Adams v. Village of Wesley Chapel*, 259 Fed. Appx. 545 (4th Cir. 2007) (unpublished). In that case, the court observed that "overly burdensome government regulation can constitute an unconstitutional taking." *Id.* at 549.

> [A] regulatory action only becomes a compensable taking under the Fifth Amendment if the government interference has gone "too far," which it does when some people alone are forced to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Id. (citations omitted). The test to be used when an ordinance causes substantial economic harm but does not deprive the owner of all economic value "depends on 'the

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provides that "[t]he General Assembly shall enact no law authorizing private property, to be take 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." Art. III, § 40.

regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable-investment-backed expectations, and the character of the government action.'" *Id.* The Fourth Circuit clarified, however, that "diminution in the property value alone cannot establish a taking." *Id.* (citing *Penn Central Transp.*, 438 U.S. at 131). In the *Adams* case, no taking occurred despite that the property was not worth as much before the government adopted its ordinance because the owners were still able to get a reasonable return on their investment. In addition, the court pointed to the legitimate government interest in controlling growth.

Applying the reasoning used in *Penn Central* and *Adams*, it is our view that a facial challenge to the legislation would not be sustained. The bills support a legitimate government interest to protect mobile home owners who may be vulnerable when a mobile home park changes use. *Marimon v. M.O.M., Inc.*, 75 Md. App. 386, 392 (1988) (recognizing that the removal of a mobile home "from one park to another becomes more than a mere hitching to a truck or tractor and pulling it away" and that mobile home park residents are offered additional protections based upon their "inherent vulnerability as a person who owns a home but leases the land on which that home is located"). Moreover, the legislation does not deny the owner all economic value to the park property. Although there is a slight possibility that an individual park owner may be able to demonstrate that the burdens of the legislation as applied to that owner unreasonably interferes with the owner's property rights, we do not believe that the legislation is on its face unconstitutional.

In accordance with the foregoing, we hereby approve the constitutionality and legal sufficiency of both Senate Bill 235 and House Bill 103.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/SBB/kk

cc: The Honorable John P. McDonough
Joseph Bryce
Karl Aro