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Honorable William C. Smith, Jr., Chair  
Judicial Proceedings Committee  
2 East, Miller Office Building, Annapolis, MD  
21401

Re: Opposition to SB 783– Constitutional Amendment –  
Environmental Rights

Dear Chairman Smith:

On behalf of the Maryland Builders and NAIOP, I write in opposition to SB783

1. **Increased Litigation:** This proposed constitutional amendment will result in extensive litigation between private parties and by private parties against the State. As the fiscal note recognizes, "...the bill may increase opportunities for litigation for a person to enforce those [environmental] rights or the State's responsibilities under the bill." The extent of the new litigation cannot be reliably estimated but it might impact "multiple agencies." In addition, "A local government could be party to litigation under the bill, which could have an impact on local expenditures."

Since the bill enacts a constitutional provision, the litigation can override statutes passed by the General Assembly and zoning decisions by local authorities. "Any person" can bring a challenge to forbid the establishment or expansion of a facility that the person alleges is not "healthful" or "sustainable" even if the facility complies with all legal requirements.

Even if suit is not brought directly against a private defendant, the litigation will necessarily involve the private party. Under this amendment, a facility could have received all zoning and permits required to operate but "any person" could then sue to stop the facility from being built on the grounds that it is not "sustainable." Obviously, the person or company planning to build the facility will either be named a defendant or need to move to intervene as a defendant to protect their interests.

2. **Uncertain Scope of Litigation:** The problem with an amendment that authorizes a "healthful and sustainable environment" is that what one person considers healthful and sustainable is not always the same as another. Are existing power plants healthful and sustainable? Are new roads healthful and sustainable? Are livestock farms healthful and

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sustainable? Is a crematorium healthful and sustainable? Maryland statutes and regulations carefully define what is and is not permissible. The proposed constitutional amendment would overwrite those carefully balanced provisions with a vague standard that preempts all other measures.

3. **The Constitutional Amendment Would Preempt Local Zoning Decisions:** Local authorities must frequently balance the needs of economic development and job creation against localized impacts. Zoning laws are specifically designed to provide that balance and permit necessary development in locations where any harm will be limited and contained. The Amendment, however, would permit litigation against facilities that are in compliance with zoning laws if “any person” argued that the facility was not “sustainable.” For example, a municipality may decide that a landfill must be expanded for the public good. The Amendment would authorize litigation to stop the expansion even if the landfill complied with all zoning and environmental laws if “any person” claimed that the expansion was not “sustainable.”
4. **Almost Unprecedented:** There is no corresponding national provision and only a very few state or local provisions. Proponents will no doubt point to a provision in the Pennsylvania constitution which has different wording. But the Pennsylvania Supreme Court carefully limited the interpretation of that provision in a series of cases starting with *Payne v. Kassab*, 312 A. 2d 263 (Pa. 1976). There is no certainty that the Maryland Court of Appeals would place similar restrictions on a Maryland Amendment. Indeed, recent Pennsylvania cases suggest that the limitations may be loosened there.

The change in Pennsylvania law was gradual as new cases wore away at the Payne doctrine but in the few years since the erosion began in 2017, there have already been thirteen cases that reached the Supreme Court. Still, the crucial test of applying the provision to permits and zoning has not yet occurred. As legal scholars in Pennsylvania have recognized, Pennsylvania’s recent decisions have not yet involved:

“permitting and enforcement work of state and local environmental agencies, nor do they involve the adoption and implementation of local zoning decisions. As a result, much of the law about how [the amendment] applies in these in other situations has yet to be decided. Because of the uniqueness of [the amendment] among states, and the lack of any federal constitutional analogue, there are few other places or courts from which to get interpretative guidance.”<sup>1</sup>

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<sup>1</sup> Thinking Anew about the Environmental Rights Amendment: An Analysis of Recent Commonwealth Court Decisions, John C. Dernbach, Commonwealth Professor of Environmental

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Simply put, Pennsylvania is not a good guide to the impact of the proposed amendment and virtually no other example exists. The limited evidence suggests extensive litigation (13 Supreme Court cases in five years) but the crucial challenges have not yet been brought.

5. **Eliminates Federal and State “Standing” Requirements:** As the Fiscal Note recognizes, both Maryland and Federal Law restrict litigation to parties who have “standing.” In other words, no one may bring litigation against the state or a private party unless the person “has a sufficient stake in a controversy.” The Amendment, however, appears to eliminate that requirement. Indeed, it provides that “every person” has a right which they can defend in Court. It is not even clear that the person must be a Maryland citizen but there is no requirement that the individual reside or work near the challenged activity.
6. **The Amendment would Authorize Nearly Unlimited “NIMBY” litigation:** The proposed standard is “a healthful and sustainable environment.” No definition of either term is provided and the definition of sustainable, in particular, could apply to a very wide range of activities. For example, some activists may argue that anything which produces greenhouse gases is not “sustainable.” But almost every activity creates greenhouse gases. All of our transportation, all of our buildings, and all of our factories produce carbon dioxide. All of our livestock farms produce methane. If a suit can be brought to stop any activity that produces CO<sub>2</sub> or methane, then litigation can be used to stop all new activities. This would be an open invitation for groups wanting to stop new facilities in their backyards.

We all support clean air, water, and a healthful environment. That is the reason why the General Assembly and Congress have adopted volumes of environmental laws and the EPA, MDE and DNR have adopted even more volumes of regulations. But those carefully crafted provisions should not be overwritten by a blanket and vague provision and then subject to never ending litigation.

Sincerely,

*Michael C. Powell*

Michael C. Powell

MCP