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February 28, 2025

To: The Honorable Brian Feldman, Chair
Members, Senate Education, Energy & Environment Committee

From: Craig H. Ulman

Subject: Senate Bill 430 – Land Use - Regional Housing Infrastructure Gap (Housing for Jobs Act)
UNFAVORABLE

As a Montgomery County resident for more than forty years, and as a lawyer with extensive experience in drafting and interpreting state statutes (and sometimes litigating over them), I urge your Committee not to approve SB 430 without first addressing its glaring deficiencies.

SB 430 seeks to alleviate housing shortages attributed to difficulties and delays in obtaining required approvals from county and municipal authorities. As the Director of the Montgomery County Office of Intergovernmental Relations has told the Montgomery County Council, SB 430 "is a sweeping preemption bill that is intended to force local jurisdictions to 'get to yes' on approving housing projects."

Even assuming that the premise of SB 430 is sound and that some Statewide changes in local zoning and planning processes could be warranted, the Bill cannot, at least in its current form, be expected to achieve its objective. It would lead to protracted, costly litigation over "housing development project applications," and over the meaning of many of the Bill's confusing provisions, long before it might contribute to development of additional housing in areas where it might be needed (assuming that additional "housing for jobs" will be needed, notwithstanding the impending losses of tens of thousands of federal jobs in Maryland).

If SB 430 were in effect today, each "local jurisdiction" in the "Washington Region" (Frederick, Montgomery and Prince George's Counties and their incorporated municipalities) and the "Baltimore Region" (Anne Arundel, Baltimore, Carroll, Harford and Howard Counties and their municipalities and Baltimore City) would have a "local housing infrastructure gap." Anytime any of those jurisdictions receives a "housing project development application" – broadly defined to include any "application for a building permit, a variance, a waiver, a conditional use permit, a special permit, a certification, and authorization, a site plan approval, a subdivision approval, or any other determination by a local jurisdiction relating to a housing development project" – the jurisdiction would be required either (i) "expeditiously" to approve the application or (ii) to establish "by clear and convincing evidence" that the application should be denied, based on at least one of six limited justifications, and to establish that the justification "clearly outweighs the need for housing." Thus, the local jurisdictions would be required to bear

the burden and expense of establishing that housing project development applications should be disapproved, rather than requiring applicants/developers to establish that that their applications should be approved.

Following are several of the issues presented by the Bill. Words and phrases quoted from the bill are explained in the accompanying bill summary.

- In order to deny a "housing project development application" based on any of the permissible justifications for denial, a local jurisdiction would have to establish that the justification "clearly outweighs the need for housing." How would a local jurisdiction be expected to weigh the need for housing or to compare it to any of the permitted justifications for denying an application? For example, would the possible need for a hundred, housing units to close a theoretical "local housing infrastructure gap" *clearly outweigh* a "specific adverse impact" on the public health or safety of residents, or *clearly outweigh* a project's obligation "to comply with specific State or federal law"?

- In order to deny a "housing project development application" based on several of the permissible justifications for denial, a local jurisdiction would have to establish that there is "no feasible method" to overcome the obstacle to the proposed project without rendering it "financially infeasible." How could a local jurisdiction be expected to establish the *absence* of any financially feasible alternative without, at a minimum, having extensive information about a project's financial feasibility for the applicant/developer? Why should an applicant/developer be expected to provide reliable financial information to enable to enable a local jurisdiction to establish grounds for denying the applicant/developer's own application?

- A "housing project development application" could appropriately be denied (assuming that other conditions for denial are met) if the project "would have a specific adverse impact on the public health or safety" of "the residents *that would live in the project*." Shouldn't denial of an application also be permissible if the project would adversely affect the health or safety of residents that live near the project and might be harmed by the project itself or during its construction?

- The Bill authorizes an applicant/developer to sue in Circuit Court to contest denial of a "housing project development application." It says nothing about the ability of neighbors or other local residents to participate in such Circuit Court proceedings. Does that omission mean that only the applicant/developer and the local jurisdiction would have standing?

- The Bill provides for identification of housing infrastructure gaps based on housing unit totals that do not include "pipeline" units, i.e., units that have received necessary approvals but have not yet been built. In some cases already-approved units could be more than sufficient to close a "local housing infrastructure gap." For example, in fall 2024 Montgomery County had 35,240 approved, un-built housing units, according the

Development Pipeline data published by the County Planning Board. See (https://montgomeryplanning.org/wp-content/uploads/2024/10/Sep2024Pipeline_RecordLevel.pdf). The State Department of Housing and Community Development has determined that under SB 430, Montgomery County currently would have a "local housing infrastructure gap" of 31,364 housing units (not counting the "pipeline" units). If the objective of SB 430 is to alleviate housing shortages attributed to difficulties and delays in obtaining required approvals for new housing units, shouldn't housing units that already have received all required approvals be counted in identifying and measuring shortages?

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These and other issues may be addressed through appropriate amendments, but they would have to be carefully drafted, with extensive input from counties and municipalities throughout the State and from concerned State residents, whose neighborhoods and communities could be profoundly affected by the sweeping changes in State and local law proposed in SB 430.

For further information:

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Summary of House Bill 503 / Senate Bill 430

***Designation of Regions*.** HB 503/SB 430 (the "Housing for Jobs Act") would divide Maryland into six regions, one of which, the Washington Suburban Region, would comprise Montgomery, Prince George's and Frederick Counties. (HB 503, p. 5, lines 16-28; SB 430, p. 5, lines 15-29.)

Identification and Allocation of Regional and Local "Housing Infrastructure Gaps." The State Department of Housing and Community Development and Department of Planning would be required to publish annually, for each region, a "jobs-to-housing" ratio, i.e., the total number of "jobs by place of work" in the region divided by the total number of housing units in the region. Where the ratio for the region exceeds 1.5 there would be a "regional housing infrastructure gap." (HB 503, p. 5, lines 12-14; p. 6, lines 4-15; SB 430 p. 5, lines 11-13; p. 6, lines 2-13.) 1/ The gap (expressed as the total number of additional housing units "needed for the region to reach a jobs-to-housing ratio of 1.5 or less") then would be apportioned to each county and each incorporated municipality in the region based on its respective "share of regional jobs" (rather than its share of housing units or its contribution, if any, to the "regional housing infrastructure gap") (HB 503, p. 6, lines 16-22; SB 430, p. 6, lines 14-20.)

The portion of a "regional housing infrastructure gap" (i.e., the number of new housing units required to reduce the entire region's "jobs-to-housing" to 1.5 or less) apportioned to a "local jurisdiction," i.e., an individual county or municipality, 2/ would be its "local housing infrastructure gap." (HB 503, p. 5, lines 7-9; SB 430, p. 5, lines 6-8.) Because gaps would be apportioned based solely on locations of jobs, any county or municipality that has any places of work and is in a region that has a "regional housing infrastructure gap" would have at least a small "local housing infrastructure gap."

Special Treatment of Housing Development Project Applications Where There Are Local Housing Infrastructure Gaps. Each county or incorporated municipality that has a "local housing infrastructure gap"–

- Would have "an affirmative obligation to expeditiously approve a housing development project application"; and
- Would be prohibited from denying a "housing development project" unless the jurisdiction has a "justification" that –
  - (1) "Clearly outweighs the need for housing;" and
  - (2) "Is supported by clear and convincing evidence."

(HB 503, p. 10, lines 24-31; SB 430, p. 10, lines 26-29.) The term "housing development project" means "the new construction or substantial renovation of a residential real estate project." "Housing development project application" is broadly defined to mean "an application for a building permit, a

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1/ It is unclear whether a jobs-to-housing ratio of exactly 1.5 would give rise to a "regional housing infrastructure gap." The definition of "regional housing infrastructure gap" refers to a ratio "*below* 1.5," while the provision spelling out the calculations to be made by the Department of Housing and Community Development and Department of Planning refer to a ratio of "1.5 or less." (Compare HB 503 p. 5 lines 12-14 and SB 430, p. 5, lines 11-13 with HB p. 6, lines 11-15 and SB 430, p. 6, lines 9-13.)

2/ The term "local jurisdiction" is not defined in HB 503/SB 430, but as it is used in the Bill (and is defined, for different purposes, in Md. Code, Land Use §101(i)), the term refers to both counties and incorporated municipalities.

variance, a waiver, a conditional use permit, a special permit, a certification, and authorization, a site plan approval, a subdivision approval, or any other determination by a local jurisdiction relating to a housing development project." Denial of a "housing development project application" would include denial "at any stage in the development process" as well as imposition of a requirement that a project wait for a year or more before receiving a building permit. (HB 503, p. 9 lines 7-14, 21-28; SB 430, page 9, lines 6-13, 23-27.)

Limited Conditions for Denial of Housing Development Project Applications. In order to deny a "housing development project application" a "local jurisdiction" would be required to establish – by "clear and convincing evidence" – at least one of six narrowly defined justifications:

(i) That the project would have "a specific adverse impact on the health or safety to the residents that would live in the project" (not the health and safety of neighbors or the community generally); a "specific adverse impact" would have to be "a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions."

(ii) That denial of the application or imposition of conditions is required "in order to comply with specific State or federal law";

(iii) That the project is "located in an area with inadequate water or sewer facilities to serve the project";

(iv) That the project is "located in an area zoned for heavy industrial use," or is on "conservation property" or "agricultural land";

(v) That the project is "located, at the time of application, in a school attendance area that, inter alia, "has been determined by the local jurisdiction, using uniformly verifiable, objective criteria, to have inadequate school capacity"; and

(vi) "[A]t the time of application submission the project "does not comply with objective written development standards." Such standards cannot be "subject to personal or subjective judgment by a public official" and must be "uniformly verifiable by reference to an external and uniform benchmark or criterion . . .; and . . . applied to facilitate and accommodate development at the density permitted on the site." (HB 503, p. 10, lines 12-15; p. 11, line 1 – p. 12, line 12; SB 430, p. 10, lines 10-13; p. 11, line 1 – p. 12 line 12).

None of the six justifications would be permissible unless the "local jurisdiction" established that it "clearly outweighs the need for housing." For justifications (i), (ii) and (vi), the "local jurisdiction" also would be required to establish that there is "no feasible method" to overcome the obstacle to the proposed project without rendering it "financially infeasible."

Reduction of "Local Housing Infrastructure Gaps." A local jurisdiction's "local housing infrastructure gap" could be reduced by 1.5 housing units for each new unit that either meets specified affordable housing criteria or is located within 0.75 miles of a passenger rail station, including a Metro station. (HB 503, p. 7, lines 21-30; SB 430, p. 7, lines 18-27.)

Circuit Court Review. If a "housing development project application" for a project in a "local jurisdiction" that has a "local housing infrastructure gap" is not "expeditiously" approved, or if the applicant/developer contends that the application was denied in a manner that does not comply with

the statutory conditions for denial, the applicant/developer would be authorized to bring an action in Circuit Court to compel the "local jurisdiction" to comply with its obligations. A court would be authorized to enter an order or judgment "requiring the local jurisdiction to take action on the "housing development project" or "directing the local jurisdiction to approve" the project. (HB 503, p. 12 lines 17-29, SB 430, lines 17-29.)

Participation By Affected Residents and Communities. HB 503/SB 430 does not indicate what voice, if any, local residents and communities would have in a local jurisdiction's decision "expeditiously" to approve or, if applicable, to deny, a "housing development project application" for a project in a "local jurisdiction" that has a "local housing infrastructure gap." While it expressly authorizes an applicant to sue in Circuit Court to contest a denial, the Bill does not authorize a neighbor or other local resident or a community to contest approval of an application, or to participate in a Circuit Court contest over a denial.