BALTIMORE COUNTY
MARYLAND

JAMES T. SMITH, JR.
County Executive

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Legislative Liaison Office

House Bill 580

To:	**House Environmental Matters Committee**
From:	**James T. Smith, Jr., County Executive**
Staff Contact:	**Erin P. Favazza, State Affairs Director**
Title:	**Ground Rents – Limitation of Actions – Registry of Ground Leases**
Sponsor:	**Delegate McIntosh and the Speaker (By Request – Administration)**
Position:	**SUPPORT**

Baltimore County **SUPPORTS** House Bill 580 because it is part of an overall legislative package to reform Maryland's antiquated ground rent system that has unjustly caused families to lose their homes. While Baltimore County does not have definitive data on the number of ground rents in the County, based on anecdotal accounts, many are located in the County.

Additionally, the County supports the other pieces of the Governor's legislative package to reform ground rents that will provide homeowners with better protection, understanding, and opportunities to buy their own ground rents, as well as provide a more equitable remedy for failure to pay the ground rent. Those pieces of legislation include:

- Prohibit the use of ejectment as a remedy for the nonpayment of ground rent;
- Establish that the sole remedy for the nonpayment of ground rent is the creation of a lien in the amount of the ground rent due;
- Require that in order to create a lien, the ground rent must be at least 6 months in arrears and the ground rent owner must provide written notice to the tenant;
- Repeal the waiting period for a tenant to redeem a ground rent and require that the ground rent owner give the tenant the first opportunity to redeem a ground rent before offering to a third party;

- Create a registry and on-line database for ground rents and properties subject to ground rents with the Maryland State Department of Assessments and Taxation; and
- Decrease, from 20 years to 3 years, the amount of time after which, if no demand or payment of ground rent is made, a ground rent is extinguished.

For these reasons, Baltimore County **SUPPORTS** HB 580 and requests a **FAVORABLE** report.

State of Maryland
DEPARTMENT OF ASSESSMENTS AND TAXATION
Office of the Director

MARTIN O'MALLEY
Governor
C. JOHN SULLIVAN, JR.
Director
WAYNE M. SKINNER
Deputy Director

Bill:	Ground Rents – Limitations On Action – Registration	Bill No.:	HB 580
Committee:	Environmental Matters	Hearing:	2/22/07
Position:	Favorable		

SUMMARY

This bill would allow a tenant to have a ground lease extinguished if the landlord has not demanded payment and payment has not been made for more than 3 consecutive years. This bill also requires the Department to create a ground rent registry.

BACKGROUND:

The Department of Assessments and Taxation has information on all 2,197,254 properties in the State of Maryland. This bill would require landlords to register any ground leases with the Department by September 30, 2010. The landlord is required to provide information concerning the name and address of the landlord and tenant as well as to whom the ground rent payment is sent. The landlord is also required to provide information about the creation of the ground lease, amount and due dates of payments, and liber and folio reference for the landlord's deed. Any information concerning past due ground rents or ejectment filings must also be provided. The initial registration must be accompanied by $20 for each ground lease registered. Any changes to required information, past due ground rents, filing for ejectment, or redemption of the ground lease must be provided to the Department and must be accompanied by $5 for each ground lease.

The Department will provide the registry on its website. The fees will be used to hire an additional employee in the Charter Filing Section and to pay for processing costs and web hosting fees. The Department respectfully requests a **favorable** report on HB 580.

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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

February 5, 2007

The Honorable Maggie McIntosh
251 Taylor House Office Building
Annapolis, Maryland 21401-1991

Dear Delegate McIntosh:

You have asked for advice concerning proposed legislation that would require the registry of ground leases. Specifically, you have asked about the constitutionality of a provision of the proposed legislation that would extinguish a ground lease if it is not registered within the time limits set by the proposed legislation. It is my view that the provision in question is constitutional.

The proposed legislation would require a landlord to register a ground lease with the Department of Assessments and Taxation ("the Department") by submitting a registration application and a $20 fee. Proposed Real Property Article § 8-703. It would also require that, once registered, the landlord notify the Department of changes in the name or address of the landlord, tenant or person to whom the ground rent payment is to be sent, a redemption of the ground lease, actions taken to collect past due ground rent including actions for ejectment, and any other information that the Department requires. Proposed RP § 8-705. A landlord has until September 30, 2010 to register a ground rent created prior to October 1, 2007, which is the effective date of the bill. Proposed RP § 8-706(a)(1). For ground leases created after that date, the registration must be made within six months of the execution of the ground rent. RP § 8-706(a)(2). If the landlord is under a legal disability at the expiration of the registration period, then the ground lease must be registered two years after the removal of the disability. RP § 8-706(b). Proposed RP § 8-707(a) says that if a landlord does not satisfy the requirements of § 8-706 then "the reversionary interest of the landlord under the ground lease is extinguished and ground rent is no longer payable to the landlord." No penalty is provided for a failure to give the notices required by Proposed RP § 8-705.

In *Texaco, Inc. v. Short*, 454 U.S. 516 (1982) the Supreme Court considered a challenge to a law under which a severed mineral interest that had not been used for a period of twenty years would lapse and revert to the current surface owner of the property unless the mineral owner filed a statement of claim in the county recorder's office. Under the law of the State in question, a severed mineral estate was treated as a vested property interest. The Court stated that "We have no doubt that, just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest." *Id.* at 526.

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In reaching this conclusion, the Court looked to early Supreme Court cases such as *Wilson v. Iseminger*, 185 U.S. 55 (1902), which upheld a Pennsylvania law that provided for the extinguishment of a reserved interest in ground rent if the owner collected no rent and made no demand for payment for a period of 21 years.[1] The Court in *Texaco* noted that these early cases "emphasized that the statutory 'extinguishment' properly could be viewed as the withdrawal of a remedy rather than the destruction of a right." *Id.* at 528. Thus, the Court in *Iseminger* stated that such statutes "do not, in one sense, destroy the obligation of contracts as between the parties thereto, but they remove the remedies which otherwise would be furnished by the courts." The Court also looked to cases such as *Jackson v Lamphire*, 28 US (3 Pet.) 280 (1830), which upheld a recording statute that could act to void transfers that were made but not recorded. The Court found that these cases supported the validity of the law before it: "In each case, the Court upheld the power of the State to condition the retention of a property right upon the performance of an act within a limited period of time. In each instance, as a result of the failure of the property owner to perform the statutory condition, an interest in fee was deemed as a matter of law to be abandoned and to lapse." Noting that "[e]ach of the actions required by the State to avoid an abandonment of a mineral estate furthers a legitimate state goal," the Court held that the "requirement that an owner of a property interest that has not been used for 20 years must come forward and file a current statement of claim is not itself a 'taking.'" *Id.* at 530.

In *United States v. Locke*, 471 U.S. 84 (1985), the Supreme Court upheld a federal law requiring that holders of unpatented mining claims meet annual filing requirements or be deemed to have abandoned their claims. Applying *Texaco v. Short*, the Court stated the test as requiring it to first address the issue of legislative power, and concluded that:

> Even with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties. As long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives, the legislature acts within its powers in imposing such new constraints or duties.

Id. at 104. The Court then looked to the issue of whether the legislature would nonetheless be barred from enacting the legislation "because it works an impermissible intrusion on constitutionally protected rights," specifically, whether it worked a taking. *Id.* at 107. And the Court concluded that "[r]egulation of property rights does not 'take' private property when an individual's reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed." Finally, the Court found that the statute provided:

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[1] Maryland has a similar law at Real Property Article § 8-107.

> appellees with all the process that is their constitutional due. In altering substantive rights through enactment of rules of general applicability, a legislature generally provides constitutionally adequate process simply by enacting the statute, publishing it, and, to the extent the statute regulates private conduct, affording those within the statute's reach a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements

Id. at 108.

For similar reasons, courts around the country have upheld laws that required filing of notices with respect to possibilities of reversion and rights of reentry in order to retain them. *Black Mountain Energy Corp. v. Bell County Bd. of Educ.*, ___ F.Supp.2d ___, 2006 WL 3759606 (E.D.Ky. 2006); *Severns v. Union Pacific Railroad Co.*, 125 Cal.Rptr.2d 100 (Cal.App. 2002); *Ludington & Northern Ry. v. Epworth Assembly*, 468 N.W.2d 884 (Mich.App. 1991); *Unknown Heirs, Devisees, Legatees and Assigns of Devou v. City of Covington*, 815 S.W.2d 406 (Ky.App. 1991); *Amana Soc. v. Colony Inn, Inc.*, 315 N.W.2d 101 (Iowa 1982); *Cline v. Johnson Co. Bd. of Ed.*, 548 S.W.2d 507 (Ky., 1977); *Presbytery of Southeast Iowa v. Harris*, 226 N.W.2d 232 (Iowa, 1975), *cert. den.* 423 U.S. 830 (1975); *Hiddleston v. Nebraska Jewish Education Society* 186 N.W.2d 904 (Neb. 1971); *Brookline v. Carey*, 245 N.E.2d 446 (Mass. 1969); *Tesdell v. Hanes*, 82 N.W.2d 119 (Iowa 1957); *Trustees of Schools of Twp. No. 1 v. Batdorf*, 130 N.E.2d 111 (Ill. 1955).

The proposed legislation clearly furthers the legitimate State interests in providing notice to owners, debtors and potential purchasers with respect to the ownership of property. It also provides a means for tenants with ground leases to keep track of where their payments are to be sent, thus helping to prevent reentry on the property of or ejectment of lessees who were ready and willing to pay their rent. Moreover, under the holdings of *Texaco* and *Locke* the proposed legislation does not work a taking, but simply alters the available remedy, making it dependent on the performance of an act within a reasonable time. Finally, as discussed in *Locke*, the passage and publication of the statute will provide constitutionally adequate notice of its requirements.

For all of these reasons, it is my view that the extinguishment of a ground lease for failure to register it is not unconstitutional.

Sincerely,

Kathryn M. Rowe
Assistant Attorney General

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House Bill 502 – Ground Rents – Notices Regarding Ground Leases

Position: Support with Amendments

The Maryland Association of REALTORS® (MAR) supports HB 502 which would require certain notices regarding ground rents.

HB 502 would require certain information to be included in the installment payment bill sent to ground rent tenants. The notice would have to specify to whom payments should be sent, the cost of the yearly ground rent, and the tenant's rights and responsibilities under the ground rent. MAR believes that this notice (which would occur at least annually) is important and justified. MAR believes that the date the ground rent was created as well as its redemption value should also be included in the notice.

Additionally, MAR supports the requirement the tenant notify the landlord of any change in address, so that bills may be properly mailed to them.

However, MAR is opposed to including a notice in real estate contracts. Real estate contracts are already required to include a notice informing buyers that a property with a ground rent could be subject to ejectment if an owner does not pay the ground rent.

In addition, unlike a bill payment where the notice provisions will clearly stand out, the notice requirement proposed by HB 502 for real estate contracts will be one page in a document that can easily exceed 40 pages. Much of this information could be "lost" to a buyer trying to read all of the contract provisions.

Finally, if the ground rent owner has not been identified, the existence of the ground rent may not even be known until a title attorney starts to prepare the title for the property transfer. That typically would occur near the end of the property transfer, a few weeks after the contract was signed by both parties. At that point, the seller of the property (who is not the ground rent owner) is liable for not providing a disclosure that the seller never even knew he/she had to provide.

MAR supports HB 502 with the amendments offered by the Greater Baltimore Board of REALTORS® (GBBR).

GBBR Amendments to HB 502

No. 1 On page 3, after line 25 insert:

THIS GROUND RENT WAS CREATED ON (DAY, MONTH AND YEAR GROUND RENT WAS CREATED) AND MAY REDEEMED FOR THE SUM OF $(USE THE LESSER OF THE REDEMPTION AMOUNT PROVIDED BY THE UNDERLYING GROUND LEASE OR REAL PROPERTY SECTION 8-110).

No. 2 On page 4, line 33, and on page 5, line 7, strike the brackets.

No. 3 On page 5, line 8 through page 6, line 19, strike in its entirety.

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Testimony in Opposition of HB 580- Ground Rents Limitation of Actions - Registry of Ground Leases On behalf of the Ground Rent Owners Coalition House Environmental Matters Committee

February 22, 2007

We are here today representing the Ground Rent Owners Coalition, composed of investors of all types who own ground rents, including attorneys who are experts in property law. Ground rent owners in Maryland have vested constitutional legal rights because they own the land and are protected just as any other land owner. The Coalition supports reasonable changes and improvements in the enforcement process, but ground rent owners deserve protection also. If owners' fees are established or so-called reforms overburden an already complex enforcement process, the ground rent owner may be deprived of legal rights also. We have submitted to the committee an exhibit showing the enforcement and notice process that exists today, and there are already numerous built-in protections and notice throughout the enforcement process. Thus, the legislative process must carefully balance the interests of all parties, including the owners who for hundreds of years have invested in ground rents in Maryland.

Although the Coalition is making many recommendations to support revisions to the process, we believe that the registry created under HB 580 is cumbersome, costly and counterproductive. HB 580 would require duplication of recordation of lengthy lease and other documents and would impose costs to the state, landlords and others that are unnecessary. The Coalition supports efforts to provide reasonable notice, but cannot support HB 580 in its current form.

Accordingly, the Ground Rent Owners Coalition requests an **unfavorable** report on HB 580.

Gary R. Alexander, Esq.
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Alexander & Cleaver

CONSTITUTIONAL ANALYSIS OF HOUSE BILL 580

prepared by

Professor Byron L. Warnken
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prepared for

The Ground Rent Owners Coalition

SUMMARY OF THE ANALYSIS

H.B. 580 is unconstitutional. By imposing a $20 registration fee on each ground rent, and automatically and permanently extinguishing that reversionary ownership interest as a penalty for late registration, H.B. 580 would violate the equal protection clause, the due process clause, and the takings clause of the federal and state constitutions.

Both the Equal Protection and Due Process Clauses of the Fourteenth Amendment and art. 24 of the Maryland Declaration of Rights prohibit laws that are arbitrary, capricious, and lack a rational basis. Under H.B. 580, ground rents would have to be recorded twice, and the failure to record the second registration timely would automatically and permanently extinguish the reversionary ownership interest. There is no rational basis for the State to require ground rents be recorded twice, yet all other real property interests only be recorded once, and then punish the failure to register timely by automatically and permanently extinguishing the reversionary ownership interest.

The registration fee is arbitrary, capricious, and has no rational basis because it equals 20% of the average annual ground rent. Moreover, lateness in registration may result in the reversionary ownership interest being automatically and permanently extinguished. The penalty, which is imposed solely because of a non-timely supplemental registration, is arbitrary, capricious, and has no rational basis.

H.B. 580, by automatically and permanently extinguishing certain ground rents, would constitute a "taking," under the Fifth Amendment Takings Clause and art. III, § 40, of the Maryland Constitution. Under the laws of adverse possession, it now takes 20 years to extinguish a real property interest, yet, under H.B. 580, the State would take the reversionary ownership interest, by automatically and permanently extinguishing it, if the ground rent registration, and the $20 fee, are more than six months late (three years for existing ground

rents). The Attorney General believes that the "taking" of the reversionary ownership interest, by way of automatic and permanent extinguishment of that interest, for the failure to register timely, is not a "taking," but is a mere regulation. That analysis is incorrect.

Moreover, the "taking" would be for an unconstitutional private purpose because it would directly take away the reversionary ownership interest from the ground rent owner, and give that property interest to the lessee, for that person's private use, by eliminating the right of re-entry.

ANALYSIS

CONSTITUTIONALLY, H.B. 580 IS FATALLY FLAWED. H.B. 580 WOULD (1) IMPOSE A $20 REGISTRATION FEE ON EACH GROUND RENT, AND (2) AUTOMATICALLY AND PERMANENTLY EXTINGUISH THAT REVERSIONARY OWNERSHIP INTEREST AS A PENALTY FOR LATE REGISTRATION (SIX MONTHS FOR FUTURE GROUND RENTS AND THREE YEARS FOR CURRENT GROUND RENTS). H.B. 580 WOULD VIOLATE THE EQUAL PROTECTION CLAUSE, THE DUE PROCESS CLAUSE, AND THE TAKINGS CLAUSE OF THE FEDERAL AND STATE CONSTITUTIONS.

The reversionary ownership interest, like all other real property interests, must be recorded. It is that recordation that serves as the basis for all persons to be able to conduct the research to determine the owner of any property interest. Accordingly, all ground rents are now, and always have been, recorded in the land records. Nonetheless, the Maryland General Assembly would, through H.B. 580, require ground rent owners – and only ground rent owners – to have an additional recording, in the form of a ground rent registration. Moreover, that registration must be accompanied by a fee equal to 20% of the average annual ground rent. If the registration, with the $20 registration fee, is not done timely, H.B. 580 provides that six months later (three years for existing ground rents), the reversionary ownership interest would be automatically and forever extinguished.

A. Both the Equal Protection and the Due Process Clauses of the Fourteenth Amendment and art. 24 of the Maryland Declaration of Rights prohibit arbitrary and capricious laws that have no rational basis. Although all property interests must be recorded, under H.B. 580, ground rents would have to be recorded twice, with the second being a registration, with an accompanying $20 fee, per ground rent. This is arbitrary, capricious, and has no rational basis because the fee equals 20% of the average annual ground rent. Moreover, if the registration is six months late (three years for current ground rents), that lateness would result in the reversionary ownership interest being automatically and permanently extinguished. The penalty, which is imposed solely because of a non-timely supplemental registration, is arbitrary, capricious, and has no rational basis. There is no rational

basis for the State to (1) require that ground rents be recorded twice, yet all other property interests only be recorded once, and (2) punish the failure to register timely by automatically and permanently extinguishing the reversionary ownership interest.

H.B. 580, if enacted, would (1) impose a registration requirement on all ground rents that does not exist for any other property ownership interest, and (2) extinguish that reversionary ownership interest forever as a punishment for late registration (six months for new ground rents and three years for existing ground rents).

Both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment and art. 24 of the Maryland Declaration of Rights require equal treatment under the law and fundamental fairness. In Liggett Co. v. Lee, 288 U.S. 517 (1933), the Supreme Court held that a state licensing statute was unconstitutional because the fee was unreasonable, arbitrary, and violated equal protection.

Even assuming that the courts would apply the "any rational basis" test, there is no rational basis for the State to treat ground rent owners differently than it treats all other real property owners. First, because all property interests must be recorded, the ability to locate the owner of this reversionary ownership interest is no easier or harder than locating any other property interest. Thus, there is no rational basis for H.B. 580 to require that all property interests be recorded in one place, but requiring ground rent reversionary interests to be recorded in two places.

Second, even for reversionary ownership interests that are properly recorded, if those property interests are not also "registered," in addition to be recorded, under H.B. 580, the failure to register timely (six months for new ground rents and three years for existing ground rents) would result in the automatic and permanent extinguishment of that already properly recorded reversionary ownership interest. For all other properly recorded property interests, there are only two ways to lose such interests.

One way is to fail to pay the property taxes. Even that failure does not, in and of itself, cause, on a self-executing basis, the extinguishment of the property interest. Instead, there are many steps required for someone to obtain title, following delinquent taxes, and, after all of those steps, the owner still has the right of redemption. The other way is through the extremely rare adverse possession. Again, even the failure to use one's property for 20 years does not, in and of itself, cause, on a self-executing basis, the extinguishment of the property interest. Instead,

someone must use the property adversely and openly, as if it were their own, for 20 years, and then must file and win a law suit.

By contrast, H.B. 580 would cause the mere failure to register an already properly recorded reversionary ownership interest to result, after a mere six months, in the self-executing extinguishment of the properly recorded reversionary ownership interest. As such, H.B. 580 would violate equal protection.

H.B. 580, if enacted, would impose a registration fee of $20 per ground rent. Such a fee is arbitrary, capricious, and lacks a rational basis. The average annual ground rent is less than $100. Thus, the registration fee would take away one-fifth of a year's income just to register. If an individual owned 1,000 reversionary ownership interests, the registration fees would total $20,000. Members of the Maryland General Assembly earn $43,500 annually. If, by analogy, each member were required to register, as a condition to being a legislator, the registration fee would be $8,700 per legislator, paid from "take home" pay.

The case law supports the argument that this registration fee would be arbitrary, capricious, and bear no relationship to the reason for the fee. The City would collect more than $3 million in registration fees. In Air-Way Electric Appliance Corp., v. Ohio, 266 U.S. 71 (1924), the Supreme Court held that it is arbitrary when there is no logical connection between the fee and either the need for the fee or the purpose for which the fee will be used. In Ocean City v. Purnell-Jarvis-Ltd., 86 Md. App. 390, 405 (1991), the COA held that if a fee is imposed as a regulatory measure, the amount of the fee must be reasonable and must have a definite relationship to the purpose of the fee.

That is not the case with H.B. 580. In fact, H.B. 580 imposes a "penalty" for non-timely registration. The penalty is the automatic and permanent extinguishment of the properly recorded reversionary ownership interest. The closest analogy is as follows. Assume that an automobile owner fails to properly renew a vehicle registration, and the Maryland General Assembly enacts a law that if the vehicle owner is six months late in registering, the vehicle owner would forever forfeit ownership of the vehicle. Both the fee itself and the penalty for non-compliance with the fee violate due process.

B. H.B. 580, when extinguishing the reversionary ownership interest, constitutes a "taking" of the reversionary ownership interest, and that taking would not qualify as a taking for a "public purpose." Thus, it would violate the Fifth Amendment Takings Clause and art. III, § 40,

of the Maryland Constitution. The Attorney General believes that the "taking" of the reversionary ownership interest, by way of automatic and permanent extinguishment of that interest, for the failure to register timely, is not a "taking," but is a mere regulation. That analysis is incorrect. Moreover, the "taking" would be for an unconstitutional private purpose because it would directly take away the reversionary ownership interest from the ground rent owner, and give that property interest to the lessee, for that person's private use, by eliminating the right of re-entry.

There are about 160,000 ground rents in Baltimore City. A ground rent owner has a reversionary ownership interest in the property, through the right of re-entry, in the event the lessee violates the lease. (There are nine procedural steps/protections, taking more than a year before the right of re-entry may be exercised.)[1] H.B. 580 would require payment of a $20 registration fee to supplement the already properly paid for and recorded reversionary ownership interest. If the $20 registration fee is more than six months late (three years for current ground rents), it results in the reversionary ownership interest being automatically and permanently extinguished.

The right of re-entry is the only property interest of any value, and it is only because of that right of re-entry that the reversionary ownership interest can be enforced. Moreover, it is

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[1] The right of re-entry only becomes available after the ground rent owner has taken nine steps designed to provide the lessee with notice and with opportunity to pay the ground rent and avoid re-entry.

(1) Notify the purchaser of real property, through the contract of sale, that the property is subject to ground rent, and notify that if the ground rent is not paid timely, the ground rent owner may file suit for possession of the property.

(2) Wait for the arrearage on the lease payment to become at least six month.

(3) After the six-month arrearage period, send a certified letter, return receipt requested, to the lessee's last known address, stating that the ground rent is six months in arrears.

(4) Also after the six-month arrearage period, send a first class letter to the title agent or attorney listed on the deed or the intake sheet recorded with the deed.

(5) After another 45-day waiting period, bring an action for possession of the property, which must be personally served on the lessee or, if no lessee is in actual possession of the property, posted on the property.

(6) Prior to entry of a judgment, provide written notice of the pending entry of judgment to each mortgagee of the property.

(7) Record the notice of judgment, indexed under the name of the mortgagor, with all identifying information related to mortgagees, mortgagors, and ground rent lease.

(8) Send a certified letter, return receipt requested, to the mortgagee, at the address stated in the recorded request for notice of judgment.

(9) Wait an additional six month after the execution of the judgment for possession for the ground rent and awarded costs to be paid by the lessee or any other person.

only because of the right to enforce the reversionary ownership interest that a ground rent owner has a property right that others in the marketplace have an interest in purchasing.

If enacted, H.B. 580 would automatically and permanently destroy the reversionary ownership interest for every ground rent for which the unconstitutional "second" recording, with fee, is not handled timely. When the Government takes away a property right that was enforceable in a court of law, the property has lost all value, and there has been, in constitutional terms, a "taking." H.B. 580, by automatically and permanently extinguishing certain ground rents, would constitute a "taking," under the Fifth Amendment Takings Clause and art. III, § 40, of the Maryland Constitution.

Under the laws of adverse possession, it now takes 20 years to extinguish a real property interest, yet, under H.B. 580, the State would take the reversionary ownership interest, by automatically and permanently extinguishing it, if the ground rent registration, and the $20 fee, are more than six months late (three years for existing ground rents). That is a "taking."

The most recent "takings" case in the Court of Appeals of Maryland (COA) was decided three months ago. In Neifert v. Department of Environment, 395 Md. 486 (2006), the Court re-stated the standard for determining whether there is a taking, as follows:

> Takings Clause of the Fifth Amendment to the United States Constitution does not prohibit regulation of property, but if a regulation goes too far, it will be recognized as a taking. Whether a particular regulation constitutes a taking depends on the particular circumstances of each case. It has been recognized that most regulatory takings cases should be resolved by balancing the public and private interests at stake, considering three primary factors: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the government action.

Applying Neifert to the impact of H.B. 580, if enacted, demonstrates that H.B. 580 is a "taking" within the meaning of the federal and state Constitutions. H.B. 580 would literally take away the entire reversionary ownership interest whenever the registration, with the accompanying $20 filing fee, is more than six months late (three years for existing ground rents).

The Attorney General has rendered an opinion regarding proposed H.B. 580. That opinion concluded that requiring a $20 registration fee for all grounds rents, with automatic and permanent extinguishment of the reversionary ownership interest for late filing, is constitutional because it is not a "taking," but a mere regulation. That analysis is incorrect. The Attorney General relies on four Supreme Court cases, none of which support the conclusion reached.

The first case relied on by the Attorney General is Texaco, Inc. v. Short, 454 U.S. 516 (1982). That case is completely distinguishable. First, in Texaco, the period for extinguishment was 20 years -- not six months. Second, owners of at least ten mineral interests were given a 60-day period to remedy any non-compliance, following actual notice of their lapse through actual receipt of a lapse notice. The Attorney General quoted language from the case to the effect that the constitutional standard is lower if the extinguishment is viewed as a mere withdrawal of a remedy rather than as the destruction of a right. However, in the very next sentence of the opinion, the Supreme Court stated: "We have subsequently made clear, however, that, when the practical consequences of extinguishing a right are identical to the consequences of eliminating a remedy, the constitutional analysis is the same." Id. at 528.

The second case relied on by the Attorney General is Wilson v. Iseminger, 185 U.S. 55 (1902). That case is likewise completely distinguishable. In Wilson, there was a 21-year adverse possession period before the extinguishment of any property right – not six months. The third case relied on by the Attorney General was the 1830 case of Jackson v. Lampshire, 28 U.S. (3 Pet.) 280 (19830), which voided the property interest because the property interest was never recorded in the first instance. That case is likewise completely distinguishable.

The fourth case relied on by the Attorney General is United States v. Locke, 471 U.S. 84 (1985), which is the only case of the four that requires closer analysis before determining its applicability to H.B. 580. In Locke, Congress enacted a statute that provided that unpatented mining claims were abandoned if there was no annual filing of intent to "hold" or to "work" the claim. The Court upheld the statute against a constitutional challenge. The Court recognized that it must consider the "character" of the property interest at issue. In Locke, because it was the Government that owned a fee title, the Court stated that Congress could "regulate" the usage of the mining claim. The Court noted that this was particularly so when considering that, in 1975, there were six millions mining claims, many of which had been abandoned.

H.B. 580 constitutes a "taking" for those ground rents that it would automatically and permanently extinguish solely because the properly recorded property interest is not subsequently accompanied by a timely registration and accompanying $20 fee. Because H.B. 580 would effectuate a "taking" for any extinguished ground rent, the constitutional analysis is triggered. Once the constitutional analysis is triggered, the two remaining questions narrow the

issue to (1) whether that taking is unconstitutional and, thus, cannot take place, or (2) whether that taking may take place, but only with the State paying "just compensation."

Courts extend deference to state and local legislatures regarding what qualifies as a "public purpose" taking. The most recent Supreme Court case is the 5-to-4 decision in Kelo v. City of New London, 545 U.S. 469 (2005), in which the Court held that the taking of private property for development to increase the tax base and revitalize an economically distressed city was a public purpose because the development would increase business, jobs, and the tax base. The Court said that it must look to the purpose of the taking to determine whether it is a public use.

The taking that would be effectuated by H.B. 580 would be a private taking because that taking would not be for a "public purpose." Through H.B. 580, for each ground rent not registered timely, and accompanied by a $20 fee, the State would directly take away the reversionary ownership interest from the ground rent owner and give that property interest to the lessee. In other words, through H.B. 580, the State would "take," from the ground rent owner, the reversionary ownership interest – the right of re-entry – and would "give" that "taken" property interest to a private person – the lessee -- for the private use of that person and not for a public purpose.

If there is a taking, and if that taking is not for a public purpose, the taking itself is unconstitutional and cannot be permitted. If there is a taking, and if that taking is for a public purpose, the taking is constitutional, but only if the State pays "just compensation." Thus, even if the taking, per H.B. 580 extinguishment, were constitutional, it would require the State to pay for each extinguished ground rent.

CONCLUSION

For the foregoing reasons, it is respectfully suggested that both H.B. 580 is unconstitutional and should not be enacted.

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February 22, 2007

GROUND RENT BILL TESTIMONY of Amy Macht
February 22, 2007

I am the proud owner and manager of ground leases.

In the book "The Baltimore Row House" by Mary Ellen Hayward and Charles Belfoure published in 1999 by the Princeton Architectural Press the authors state on Page 3.

" The goal of builders to make a profit, the desire of most residents to own a home, investors looking for a return on their money, transit companies seeking to expand, and the governments growing sense of responsibility for public health all came together to create a city. In Baltimore, a special glue held it all together, the ground rent, which made homeownership possible for a much larger cross-section of people."

The current vilification of ground rents has me bewildered.

While I am perfectly happy to assist in the legislative efforts to put into effect a safety net that would prevent a homeowner from losing their home over the non payment of their ground rent due on the ground lease, I am amazed at the way ground leases are being re-characterized as an evil instrument and the way I am being treated as an evil person for holding an investment that has been of great benefit to the development of Maryland, and is the most modest and non-speculative of all real estate investments.

It seems the ground rent is being attacked because, as it is so small, it is unacceptable for it to be of any consequence. I would like to point out that the very fact that it is so small, and therefore could not pose any economic hardship to the person who is supposed to pay it, means that when there is a problem in payment, it does not stem from the inability to pay the ground rent but rather from another problem.

The problem is generally going to arise from some other abandonment of the responsibilities of property ownership, such as lack of title, lack of proper recordation, lack of notice of an address change of the homeowner or mortgagee, death or lack of mental capacity on the part of the homeowner, or actual physical abandonment of the property. Problems of this kind will generally respond to the intervention of a social worker or legal support to the non-compliant party, and this is how the General Assembly and the Courts should try to address these problems.

Encouraging the non-compliance of people who do not understand their responsibilities for paying a ground rent, or a mortgage, or a tax bill, or a water bill, or an electric bill, by demonizing the entity to which they owe this responsibility will only enlarge the problem for the individual suffering under such misunderstanding and for the general organization of a functioning society where most people must be relied upon to voluntarily meet their responsibilities. The ground rent system as a whole has the lowest delinquency rate of any of the other payments required for property ownership, which is surely due to its low dollar amount, the fact that the amount never changes, and the harsh penalty if non-payment actually continues to ejectment.

In the earlier days of the 20th century the value of the ground lease financing equaled as much as 50% of the sale price of a house. By the 1950's it was more likely to be 20 to 25% of the sale price. Remembering those percentages makes it obvious why the ground lease was a property right and why the penalty for non-payment of the ground rent would be ejectment. Now that the redemption value of the ground rent is generally less than 1% of the house value this arrangement seems strange. This is why it is easy to be confused into making the ground lease owner into the bad guy.

In fact, due to its small amount, a ground lease is more comparable to a small consumer loan. When viewed as such it can be evaluated for its true economic relationship to the homeowner. It is a small loan, usually about $1,600.00 which carries a 6% fixed interest rate without regard to the homeowner's credit rating. No principal payment is required and no prepayment penalty is charged if the consumer decides to pay off the loan. There is no interest charged on late payments, no late charges, no collection fees until payment is more than 6 months delinquent and no default judgment or acceleration payment clause. Compare this to the terms of a credit card advance. This is why ground leases are still around 35 years after the General Assembly made them redeemable, because they are a good deal for the homeowner.

If the legislature intends to alter the fundamental nature of the ground rent as a property right with the ultimate security, then it will need to alter all the other terms of this new financial instrument in order to bring it into reasonable parity with other current loan terms dictated by its new consumer loan status. If not, you will have stripped the ground lease of its value. However, if the legislature proceeds with the concept of transforming the

ground lease into a normally functioning consumer loan, it should realize that 99 % of homeowners with ground rents will not thank you for this change.

Regional Management, Inc. (RMI), the company of which I am president, manages 3,522 ground leases. In the last 20 years, RMI has filed one suit for ejectment. This suit was settled when the investor who owned the home paid the ground rent owed. There are currently 36 entities for which RMI manages ground rents including two non-profits that own 459 ground leases. I personally own 150 ground leases.

Essentially all of these ground leases come from the land development endeavors of my grandfather, Morton Macht, and the building activity of the Welsh Construction Company when it was presided over by Morton Macht, and my father, Philip Macht. That the ownership of the ground leases is now so broadly distributed is because of charitable contributions, bequests at the death of Morton Macht, and gifts.

We have done nothing unethical in creating or holding or managing these ground leases. The homeowners who bought their homes from Welsh Construction Company received a good product at a good price. The ground leases that Morton Macht retained represented the only profit on the sale of the houses he built. These houses have appreciated over time from original sale prices in the 1950's in the $8,000.00 range to a range of $100,000 to $250,000 in 2007. The ground lease owners investment has not changed one dollar. The annual rent that was $90.00 in 1952 is still $90.00 today. Since 1971, a homeowner has been able to redeem any of these ground leases for a 6% capitalization rate of the annual rent. This means a $90/year ground rent can be redeemed for $1,500. In the last 30 years we have had 1250 redemptions. This means that 74% of all the homeowners who could have decided to get rid of this $90/year obligation, by paying off the ground lease owner, decided it was in their best interest to keep their property subject to a ground rent in order to hold onto the $1,500.00 that the ground lease owners advanced to the first purchaser when the house was first sold, and which was transferred to them when they bought the home.

I tell you all this to personalize who you are stripping of the value of these 3522 ground leases. As an officer, as a trustee, as a director it is my duty to defend the value of these investments. As a granddaughter, I cannot allow you to distort and rewrite the history of ground rents in order to create a

stampede to strip them of their value. Why this has become such a crusade I do not know. I can only guess at the various motives. Perhaps for the city housing department the goal is just to save them the redemption money as they acquire property for re-development, perhaps for others it is to relieve the national mortgage market of the bother of dealing with ground rents or the liability of providing accurate title searches, and perhaps for some it is in order to sell newspapers.

I suspect that the people instigating this mob reaction are comfortable to do so, not because these ground rent investments have been so profitable for the ground lease owners, (because they have not been), but rather because the value of each individual ground lease is so small and has lost so much value over time to inflation. I suspect that these people considered ground lease owners "chumps". After all, people like me, are people who didn't know better than to disinvest in Baltimore in favor of newer less "arcane" investments. The ground rent owners are seen as weak and insignificant, and, therefore, the value of their property can be confiscated as a supposedly unintended or unfortunate by-product of fixing an "evil system ". In fact, the ground rent system is a good system which has provided good value to the homeowners but which has a very solvable problem, a problem that occurs in about one tenth of one percent of ground rents per year, a problem rate which is about 50 times lower than the mortgage and property tax system.

There are many bills proposed in the legislature this year. Not being a coordinated package, nor a response to one another, they have many provisions that are at odds with one another, without actually being alternatives to each other. While I have technical issues with each, I will confine my detailed comments to the two most objectionable bills: HB 580/SB 622 and HB463/SB396

If these bills pass they would make the ground leases RMI manages virtually worthless. How can this be and why do I say it is so?

Effects of HB 463 on RMI managed Ground Leases:

First: The proposed lien system in this bill is a sham. It takes a property right with first standing before a mortgage and puts it in line with all other liens as of the date filed. This changes the priority of the lien, putting

it behind the mortgage and will eliminate the lien if the mortgage and foreclosure costs are greater than the foreclosure sale price. A ground rent is not due until six months in arrears, and one cannot by law send a notice of delinquency until 6 month later. The ground lease owner must wait another 45 days before filing a lien. When a homeowner stops paying on a mortgage, the entity holding the mortgage can file for foreclosure within 3 months. This would be 3 months before the ground rent is even due, and 1 year and 45 days before the ground lease owner could file a lien. As mortgage companies are usually the ones paying the ground rent for the homeowner out of their escrow accounts, once the ground rent is no longer a superior lien to the mortgage, the mortgage holder will stop paying the ground rent.

Second: As written, the ground lease holder cannot file for any costs associated with collecting the delinquent ground rent, even though many of those costs are dictated by the statute and are paid to the Courts, the State, and the City. If the lien is granted by the judge, the judge can award costs of no more than $500.00 to the ground rent holder. Therefore, if the suit is settled before going to a judge there is no cost recovery at all and if it goes to court the cost recovery is limited not by reasonable costs, as are all other liens of this kind, but by a fixed dollar amount, that wouldn't change even if the court cost of filing the suit itself exceeded $500.00 at some future date.

Third: If the Judge awards the lien in the amount of the back due rent, the homeowner has the option of paying the greater of the lien, **or** the redemption value to the ground rent holder! This means that all homeowners are being told by the legislature to stop paying their ground rent for as long as they can before they plan to redeem, because the back rent they owe will be canceled if they redeem! This lien collection system insures that the minimal amount of these rents will not justify the costs of trying to collect delinquent ground rents and strips the ground rents of their value. The owners would be better off having them be normal debts in small claims court than to have the status of property rights under the system proposed which imposes all the legal burden of establishing the property right with none of the benefit.

Effects of HB 580 on RMI managed Ground rents:

First: $20.00 registration fee for 3522 GR = $70,440.00. This is now proposed as a one time initial fee, but requires additional fees for mandated updates, even for the ground rent owner to register and update information on the homeowner, clearly an impossibility. It is easy to see this fee increasing over time to an amount equal to or larger than the annual ground rent.

Second: The information required to be collected, given and copied for the State Dept. of Assessment will require RMI to dedicate an employee to this effort for the next three years.
Estimated cost = $120,000/ 3 years.

Third: The requirements for registration are left vague. The bill allows SDAT to impose other burdens and to deny registration without providing notice or reason.

Fourth: The penalty for non-registration is the elimination of the ground lease. These are property rights that are recorded in the land records. A registration's acceptance or rejection is left to the discretion of SDAT. How can a computerized database of no legal standing trump the land records?

If HB 463, and HB 580 are enacted by the legislature, it will be clear that you as a body are inciting property owners whose properties are subject to a ground rent to stop paying their ground rents.

I really don't understand this. Why would the legislature do this? The Maryland Legislature has legislated continually on matters concerning ground rents from redemption values and collection costs to notice provisions. For ground lease owners who have always followed the laws passed by the Maryland Legislature it is upsetting to suddenly hear ground rents portrayed as unfair and arcane, and to realize that the goal of this legislature is to punish them for having these investments.

I know that the come back response to my question will be, "If one person loses their house over a non payment of ground rent then that is one too many."

I could well challenge the sincerity of that statement by pointing out the hypocrisy of how avidly the city and counties promote the sale of tax certificates. A whole website for Baltimore induces speculators from all over

the country to buy tax certificates and allows them to charge 24 % interest and high fees. These tax sales certificates when not redeemed result in the loss of property and equity by homeowners.

However, I do not even need to have anyone face up to the results of government tax sales, or to the impeding disaster of increased foreclosure sales imminent because of sub prime lending practices and teaser adjustable rate mortgages.

And the reason that I don't need to, is because the number of ground rent delinquency cases that go forward to a motion for ejectment is so small (about 100/year) and the amount of money owed so small (except for when the judgment includes city and state property taxes) that these extremely rare exceptions to a system which works 99.9% of the time, could be addressed by an ombudsman to the court who could intercede to find a solution to the problem when a suit proceeds to a motion for ejectment.

For instance, in the highly publicized case of the Onheisers, the central problem was that when Mary and Joseph Onheiser died in 1995 and 1996, their heirs never opened an estate, never transferred title to the property, and never paid taxes or water bills. The relatives who lived in the house also accepted notice on behalf of Joseph and Mary Onheiser, without informing the court that the Onheisers were dead. The court could stay the proceeding in a case for ejectment in order to set up a mediation, order an investigation to proceed, allow time for the appointment of a guardian or, as needed in the Onheiser case, to deal with the Orphans Court and Registry of Wills.

Certainly, I am sure, no one in this legislature would excuse the Onheisers from their obligations to follow the rules established by government for inheriting property, for accepting notice of service by the court, for titling property, for paying property taxes or water bills, (especially as the house valued at $160,000.00 was not even encumbered with a mortgage), but perhaps having a person who could intercede and explain these duties of property ownership to citizens who find themselves in possession of property without understanding the obligations and responsibilities would be helpful. The State is not accustomed to thinking of homeowners as people so lacking in the understanding of their responsibilities as property owners, but perhaps it is time to recognize that some people become property owners without having acquired the necessary skills to fulfill their responsibilities without assistance. This type of service could be useful not only for potential

ground rent ejectment situations, but for the far more common tax ejectment cases, and foreclosures. Of course, these other cases will be far harder to actually solve, because, unlike ground rent cases where the amount of money is so small that it will not actually present a hardship, tax cases and foreclosures most likely do.

There are of course, other ways to make sure that people who have not abandoned their property do not lose the property to ejectment without stripping the value of the ground lease from the ground lease owner. In cases where there is an actual owner of the property, the debt could become a personal judgment, accruing interest, reportable to a credit bureau and subject to wage attachments. If left as a property lien, it could be made to remain a priority lien in front of a mortgage or tax lien. But the legislature should remember that if they alter the security of the investment by ending ejectments they must also change the other terms of the instrument to make them collectable at reasonable and recoverable costs, or they will have preformed a regulatory taking.

If part of the goal is to increase information exchange when ground lease holders and homeowners lose track of one another, the registering of ground leases could be done in such a way as to provide some benefit to the ground lease holder in return for the cost of registration. For example, registration could be a step in requiring homeowners to redeem the ground lease when the property is transferred, and for mortgagees to include the redemption price in any financing offered. A registration system could be more gradually assembled by requiring it only upon transfer or only before bringing suit for ground rent delinquencies. (The legislature might want to consider requiring mortgagees to register on the SDAT site as well when mortgages are recorded and transferred.) Now, however, HB463 and HB580 together end up requiring the payment of a fee and the registration of a property right that has been effectively taken away.

Calling a ground rent evil, calling the Onhesiers situation a suit about a $24 ground rent and $18,000 in fees, when $13,500 of the charges are for 7 years of back city taxes, does not make these things true. The legislature should be wary. The rallying cry may be to protect the few people that get caught up in the ejectment process, but the responses are out of line with that objective. The legislature should use a more deliberative process to come up with a rational solution to a very manageable problem that effects a very

small number of people and not be pressured to make laws that are ill advised and perhaps unconstitutional.

We have asked that the legislature form a study group and I am aware that some people think that the call for study is just a delaying tactic that will allow ejectments to proceed. To make sure that is not true, the legislature should pass a law declaring a one year moratorium on the execution of warrants in ground rent ejectment cases so that no ejectments can happen while the legislature gets a chance to study the issue. Perhaps during the year the study group could have the court appoint a liaison to present it with the cases that come before the court so that the study group gains first hand knowledge of the different circumstances that people find themselves in.

If the city or bankers, or mortgage originators have reason to want Maryland to change the ground rent system they need to present their objectives to the study group, not hide behind their supposed concern for the person who might lose their house in a ground rent ejectment. We all know that far more homeowners lose their property to tax sales, foreclosures, and seizures for eminent domain.

In the long run, if Maryland really wants to get rid of ground rents in an equitable way, it will need to decide on a way to make the homeowners redeem the ground rents under certain circumstances such as at the refinancing or sale of the property. This idea can also be examined by the study group.

Even in light of the current rhetoric regarding ground rents and ground rent owners, I am willing to be called upon in legislative hearings to share what I know to help solve the ejectment issue without stripping the value from the ground leases. I am trying to help the legislature avoid the mistake of a regulatory taking. However, I do need to be clear that if legislation passes that does strip the value from the ground leases it will be my obligation to seek appropriate relief.

I remain, a proud owner and manager of ground leases,

Amy Macht, President
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MAGGIE MCINTOSH
43rd Legislative District
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The Maryland House of Delegates

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House Bill 580
Ground Rents- Limitation of Actions- Registry of Ground Leases
Environmental Matters Committee
February 22, 2007
Testimony by Maggie McIntosh

Members of the Environmental Matters Committee, I am pleased to present testimony today on HB-580 to continue the modernization of Maryland's ground rent system.

In order to pay your ground rent fee you must know whom to pay, how much to pay, and where to send the payment. When a tenant cannot find their ground lease owner for a number of years it can trigger a chain of events that may result in the tenant owing back rent and exorbitant legal fees, and in the most extreme cases, can culminate in a tenant losing their home after an ejectment action is filed.

This bill will require ground lease owners, or "landlords" under the Real Property Title, to register existing and newly created ground leases with the State Department of Assessments and Taxation. Registration of ground leases will benefit landlords and tenants by requiring the landlord to provide, and to update, vital information needed to locate the landlord in order to pay the ground rent fees. The landlord will also be required to submit to the Department any late payment notifications to tenants, notice of filings for ejectments, and redemptions of ground rent leases among other requirements.

$20

The Department will post online the information on landlords and tenants of ground leases, and properties subject to ground leases for easy access by the public. The landlord will incur a twenty dollar fee to register a ground lease.

If a ground lease created before October 1, 2007 is not registered by September 30, 2010, it will be extinguished. A ground lease created on or after October 1, 2007 must be registered within six months of the date of execution of the lease, or it will be extinguished. If a ground lease is extinguished the tenant will no longer be required to pay ground rent, and the landlord will no longer have a reversionary interest in the land.

Current law provides that if a Landlord has not demanded ground rent and a tenant has not paid the ground rent for more than 20 years, the ground lease is conclusively presumed to be extinguished. This bill includes a provision to decrease the length of time needed from twenty years to three years to presume a ground lease extinguished if no demand for, and no payment of, the ground rent is made. However, no ground rents will be extinguished under this provision before April, 1, 2008.

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GROUND RENT OWNERS COALITION
TESTIMONY IN **OPPOSITION TO** HB 580

GROUND RENTS - LIMITATION OF ACTIONS - REGISTRY OF GROUND RENTS

Offered Before The House Environmental Matters Committee

February 22, 2007

The GRO Coalition is a collection of real estate investors, attorneys, and other individuals from across Maryland who own ground rents.

The GRO Coalition's mission is to adequately strike a balance between protecting consumer rights and protecting existing property interests of its member real estate investors and professionals.

The GRO Coalition extends its open hand to the legislature in modernizing the existing procedure for the collection of ground rents. Of the eight administration bills, the GRO Coalition supports, with amendments, most, but not all.

The GRO Coalition supports efforts to make ground rent redemption a natural part of every capital real estate transaction so that, by natural means, ground rents will become extinct, within a short period of time.

Meanwhile, however, Tenants have an existing obligation to pay ground rent. Tenants may be given several notices to pay their obligations, but the nature of the ground rent property interest is such that failure to pay does result in consequences.

The GRO Coalition welcomes the opportunity to work with the legislature in crafting appropriate solutions which balance the existing property rights of ground rent owners with reasonable additional protections for Tenants.

While GRO Coalition supports efforts to modernize ground rent law, this reduction of 20 years to 3 years to demand payment which then causes extinguishment of the property right is punitive and does not fairly address the issue of tenants trying to locate ground rent owners. The other provisions of the "registry" bill are also punitive, and do not fairly address the issue of tenants locating ground owners. Thus, the bill should be reported unfavorably.

Issue:

- Extinguishing the ground rent for not sending a bill or being paid for a period of three years amounts to a taking of the property interest of the ground rent.

GRO Coalition response:

- Current law of a 20 year lack of demand or payment is consistent with established Maryland legal principles for extinguishment of existing property rights like adverse possession, prescriptive rights, easements, etc.

- This entire provision should be deleted.

Issue:

- The bill as written does not rationally respond to the purpose of having a registry.

GRO Coalition response:

- Purpose of a registry is to enable tenants to identify ground rent owners for purpose of: (1) Paying their ground rent;
  (2) Verifying status of their ground rent payments; or
  (3) Redeeming the ground rent.

- Since ground rent owners are required to bill in order to obtain payment pursuant to House Bill 502, the only registry actually needed is for those tenants who do not pay their ground rent.

- If only delinquent payors need to use the registry, only ground rents which are delinquent should be registered.

- Registering only delinquent ground rents prior to any collection action being taken would create the least burdensome method of serving the purpose of the registry. The result of non-registration under those circumstances would be the inability to institute a collection procedure.

Issue:

- No other property owner is required to pay a fee for the Department of Assessments to maintain its records.

GRO Coalition response:

- Requiring ground rent owners to pay at all is not fair. Requiring ground rent owners to pay per property is unfair.

- Any registration should be free during an extended phase-in period. This would allow Department of Assessments to adapt its existing system of property data reporting to accommodate the slight additional ground rent owner information on each property report.

- Only after the phase-in period expires should there be a minimal fee for allowing registration. That minimal fee should be based on the landlord and not on the property. Thus, a sliding scale of fees for registration of portfolios should be the result.

Issue:

- The amount of information required for any such registration is excessive.

GRO Coalition response:

- The purpose of the registry is not to replace the Land Records. The registry is only intended to assist tenants in contacting their landlord for the purposes stated above (paying, verifying or redeeming).

- The only information required should be the name and address of the landlord, amount and due dates of the ground rent.

Issue:

- Updating of records of Department of Assessments should be consistent with other means of update.

GRO Coalition response:

- As us the case with all property transfers, the Department of Assessments obtains its information through the use of intake sheets. Updating information should be consistent with this existing method of data gathering.

- Closing agents/attorneys should make separate information as to ground rent ownership a part of any leasehold transfer intake sheet.

Issue:

- Penalty for failure to register is extinguishment which constitutes a taking of an existing property right.

GRO Coalition response:

- Extinguishment of ground rents for failure to register does not serve any rational purpose and must be deleted.

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OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

February 5, 2007

The Honorable Maggie McIntosh
251 Taylor House Office Building
Annapolis, Maryland 21401-1991

Dear Delegate McIntosh:

You have asked for advice concerning proposed legislation that would require the registry of ground leases. Specifically, you have asked about the constitutionality of a provision of the proposed legislation that would extinguish a ground lease if it is not registered within the time limits set by the proposed legislation. It is my view that the provision in question is constitutional.

The proposed legislation would require a landlord to register a ground lease with the Department of Assessments and Taxation ("the Department") by submitting a registration application and a $20 fee. Proposed Real Property Article § 8-703. It would also require that, once registered, the landlord notify the Department of changes in the name or address of the landlord, tenant or person to whom the ground rent payment is to be sent, a redemption of the ground lease, actions taken to collect past due ground rent including actions for ejectment, and any other information that the Department requires. Proposed RP § 8-705. A landlord has until September 30, 2010 to register a ground rent created prior to October 1, 2007, which is the effective date of the bill. Proposed RP § 8-706(a)(1). For ground leases created after that date, the registration must be made within six months of the execution of the ground rent. RP § 8-706(a)(2). If the landlord is under a legal disability at the expiration of the registration period, then the ground lease must be registered two years after the removal of the disability. RP § 8-706(b). Proposed RP § 8-707(a) says that if a landlord does not satisfy the requirements of § 8-706 then "the reversionary interest of the landlord under the ground lease is extinguished and ground rent is no longer payable to the landlord." No penalty is provided for a failure to give the notices required by Proposed RP § 8-705.

In *Texaco, Inc. v. Short*, 454 U.S. 516 (1982) the Supreme Court considered a challenge to a law under which a severed mineral interest that had not been used for a period of twenty years would lapse and revert to the current surface owner of the property unless the mineral owner filed a statement of claim in the county recorder's office. Under the law of the State in question, a severed mineral estate was treated as a vested property interest. The Court stated that "We have no doubt that, just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest." *Id.* at 526.

In reaching this conclusion, the Court looked to early Supreme Court cases such as *Wilson v. Iseminger*, 185 U.S. 55 (1902), which upheld a Pennsylvania law that provided for the extinguishment of a reserved interest in ground rent if the owner collected no rent and made no demand for payment for a period of 21 years.[1] The Court in *Texaco* noted that these early cases "emphasized that the statutory 'extinguishment' properly could be viewed as the withdrawal of a remedy rather than the destruction of a right." *Id.* at 528. Thus, the Court in *Iseminger* stated that such statutes "do not, in one sense, destroy the obligation of contracts as between the parties thereto, but they remove the remedies which otherwise would be furnished by the courts." The Court also looked to cases such as *Jackson v Lamphire*, 28 US (3 Pet.) 280 (1830), which upheld a recording statute that could act to void transfers that were made but not recorded. The Court found that these cases supported the validity of the law before it: "In each case, the Court upheld the power of the State to condition the retention of a property right upon the performance of an act within a limited period of time. In each instance, as a result of the failure of the property owner to perform the statutory condition, an interest in fee was deemed as a matter of law to be abandoned and to lapse." Noting that "[e]ach of the actions required by the State to avoid an abandonment of a mineral estate furthers a legitimate state goal," the Court held that the "requirement that an owner of a property interest that has not been used for 20 years must come forward and file a current statement of claim is not itself a 'taking.'" *Id.* at 530.

In *United States v. Locke*, 471 U.S. 84 (1985), the Supreme Court upheld a federal law requiring that holders of unpatented mining claims meet annual filing requirements or be deemed to have abandoned their claims. Applying *Texaco v. Short*, the Court stated the test as requiring it to first address the issue of legislative power, and concluded that:

> Even with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties. As long as the constraint or duty imposed is a reasonable restriction designed to further legitimate legislative objectives, the legislature acts within its powers in imposing such new constraints or duties.

Id. at 104. The Court then looked to the issue of whether the legislature would nonetheless be barred from enacting the legislation "because it works an impermissible intrusion on constitutionally protected rights," specifically, whether it worked a taking. *Id.* at 107. And the Court concluded that "[r]egulation of property rights does not 'take' private property when an individual's reasonable, investment-backed expectations can continue to be realized as long as he complies with reasonable regulatory restrictions the legislature has imposed." Finally, the Court found that the statute provided:

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[1] Maryland has a similar law at Real Property Article § 8-107.

> appellees with all the process that is their constitutional due. In altering substantive rights through enactment of rules of general applicability, a legislature generally provides constitutionally adequate process simply by enacting the statute, publishing it, and, to the extent the statute regulates private conduct, affording those within the statute's reach a reasonable opportunity both to familiarize themselves with the general requirements imposed and to comply with those requirements

Id. at 108.

For similar reasons, courts around the country have upheld laws that required filing of notices with respect to possibilities of reversion and rights of reentry in order to retain them. *Black Mountain Energy Corp. v. Bell County Bd. of Educ.*, ___ F.Supp.2d ___, 2006 WL 3759606 (E.D.Ky. 2006); *Severns v. Union Pacific Railroad Co.*, 125 Cal.Rptr.2d 100 (Cal.App. 2002); *Ludington & Northern Ry. v. Epworth Assembly*, 468 N.W.2d 884 (Mich.App. 1991); *Unknown Heirs, Devisees, Legatees and Assigns of Devou v. City of Covington*, 815 S.W.2d 406 (Ky.App. 1991); *Amana Soc. v. Colony Inn, Inc.*, 315 N.W.2d 101 (Iowa 1982); *Cline v. Johnson Co. Bd. of Ed.*, 548 S.W.2d 507 (Ky., 1977); *Presbytery of Southeast Iowa v. Harris*, 226 N.W.2d 232 (Iowa, 1975), *cert. den.* 423 U.S. 830 (1975); *Hiddleston v. Nebraska Jewish Education Society* 186 N.W.2d 904 (Neb. 1971); *Brookline v. Carey*, 245 N.E.2d 446 (Mass. 1969); *Tesdell v. Hanes*, 82 N.W.2d 119 (Iowa 1957); *Trustees of Schools of Twp. No. 1 v. Batdorf*, 130 N.E.2d 111 (Ill. 1955).

The proposed legislation clearly furthers the legitimate State interests in providing notice to owners, debtors and potential purchasers with respect to the ownership of property. It also provides a means for tenants with ground leases to keep track of where their payments are to be sent, thus helping to prevent reentry on the property of or ejectment of lessees who were ready and willing to pay their rent. Moreover, under the holdings of *Texaco* and *Locke* the proposed legislation does not work a taking, but simply alters the available remedy, making it dependent on the performance of an act within a reasonable time. Finally, as discussed in *Locke*, the passage and publication of the statute will provide constitutionally adequate notice of its requirements.

For all of these reasons, it is my view that the extinguishment of a ground lease for failure to register it is not unconstitutional.

Sincerely,

Kathryn M. Rowe
Assistant Attorney General

KMR/kmr
mcintosh12.wpd

Legislative Liaison Committee
Section of Real Property, Planning & Zoning
Maryland State Bar Association
520 West Fayette Street
Baltimore, MD 21201

FEB 22 2007

February 21, 2007

Maggie
Laura
File

Delegate Maggie McIntosh
House Office Building, Room 251
6 Bladen Street
Annapolis, MD 21401

RE: **House Bill 580**

Dear Delegate McIntosh:

I am writing to you regarding the referenced House Bill as Chair of the Legislative Liaison Committee of the Section of Real Property Planning and Zoning of the Maryland State Bar Association. This Committee reviews proposed Legislation to comment on technical aspects of each bill, including possible unintended consequences with existing law.

The Committee reviewed the referenced bill at a recent meeting and offers the following comments:

1. This bill presents a constitutional issue, as the extinguishment of the real property interest could constitute a taking of property rights without just compensation.

2. This bill presents a constitutional issue, as a notice sent but not received could result in a forfeiture of a title interest, which may violate both the takings and due process protections.

3. This bill presents a constitutional issue, as the application of this bill to only ground leases, and not to each other form of real property interest creating document that is recorded among the land records, may be a violation of the equal protections clause.

4. This bill presents a constitutional issue, as the extinguishment of the real property interest and resulting extinguishment of remedies would constitute an impairment of contract.

5. The defined terms "Landlord" and "Tenant" are elsewhere defined in the Code. You may wish to rely on the existing definitions, or title the terms "Ground Landlord" and "Ground Tenant" for the purposes of this bill.

6. Ground leases are currently recorded among the Land Records of each jurisdiction. Requiring a re-registry of currently available public documents is duplicative, unnecessary and could result in an increased public service burden and cost.

7. Because the ground leases are already of public record, no additional but permitted protections would be created in favor of tenants under the proposed registry.

Please contact me if additional information or clarification is needed. Thank you for the opportunity to comment on this pending legislation.

Very truly yours,

Theresa B. Shea
Chair, Legislative Liaison Committee
410-470-1408

TBS:meg

cc: Mr. Richard Montgomery
Maryland State Bar Association
P.O. Box 49
Annapolis, MD 21404

Laura Lodge
Staff, Environmental Matters Committee
6 Bladen Street
Annapolis, MD 21401

Bill No. HB 580

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ENVIRONMENTAL MATTERS COMMITTEE

(PLEASE PRINT CLEARLY)

Date 2/22/07

PRO (for)
FWA (fav. with amend.)
OPP (against)

	Name	Address	Phone	Representing	PRO	FWA	OPP
1	Gary R. Alexander	Alexander & Cleaver	410 974 9000	GRO Coalition			X
2	Professor Byron Warnken			U of Baltimore School of Law			X
3	Lorenzo Bellamy	Alexander & Cleaver	410-974 9000	GRO Coalition			X
4	ROBERT YOUNG	Assessments and TAXATION (BALT)	410 767 1191	ASSESSMENTS & TAXATION	X		
5	Lee Hudson (written only)	40 State Circle 21401	410-268-4122	Lutheran office	X		
6	CAROLYN COOK & Bill Costelli & PANEL	GBBC/MAR	410 337 7200 410 841 6080	Realtors		✓	
7	Bill HAcher Jim Cosgrove	37 Maryland Ave Annap	410-268-0842	MD Land Title Assoc			✓
8	Paul GRATTANO	88 State Circle	410 269 0207	Balto City Housing	✓		
9	Bill Burgee	1	1	1			
10	Joseph Bryce	State House	410-974-3336	Governor's office	✓		

panel

panel

Bill No. HB 580

ENVIRONMENTAL MATTERS COMMITTEE

Page No. 2

(PLEASE PRINT CLEARLY)

Date 2/22/07

PRO (for)
FWA (fav. with amend.)
OPP (against)

	Name	Address	Phone	Representing	PRO	FWA	OPP
1	Katherine K Howard + Amy Mackt	Regional Management 11 E. Fayette St Balto Md 21202	410-539-2370	Regional Management			X
2	Kathleen Murphy	136 Duke of Gloucester Annapolis	410-269-5977	Maryland Bankers Assoc.		✓	
3	Bob Enter	"	"	Maryland Bankers Assoc		✓	
4	Charles Muskin	1506 Martus Cove Ct Annapolis MD 21409	410.349.9599	self		✓	✓
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