WITNESS SHEET
SENATE JUDICIAL PROCEEDINGS COMMITTEE

DATE OF HEARING: FEBRUARY 28, 2007

SENATE BILL NO.: 622 **HOUSE BILL NO.:**

SUBJECT: GROUND RENTS – LIMITATION OF ACTIONS – REGISTRY OF GROUND LEASES

SPONSORED BY: SENATOR GLADDEN

PLEASE PRINT CLEARLY AND LIMIT YOUR SPEAKING TIME TO 3 MINUTES OR LESS

SUPPORT	SUPPORT WITH AMENDMENTS	OPPOSE	NAME AND ADDRESS	REPRESENTING	PHONE NO.
✓			Robert Young 300 W. Preston St. Baltimore, MD	SDAT	410-767-1191
✓			Joseph Krome 8706 Crofts Mill Dr 21117	Myself	410-654-1307
✓			~~Atty~~ Gnrl Dept Gen Leg		
		✓	~~Amy Macht~~	Regional Management Inc.	539-2370
		✓	~~Kathy Howard~~	Regional Management Inc	410-539-2370
		✓	~~Lorenzo Bellamy, Esq.~~	Alexander & Cleaver	
		✓	~~R. Marc Goldberg, Esq.~~	Ground Rent Owners Coalition	
		✓	~~Prof. Byron Warnken~~	UB Law School	
		✓	~~Bill Pitcher~~ Jim Cosgrove	Maryland Land Title Association	
	✓		~~Carolyn Cook~~	GLSR	4103377200

✓ support

Joseph Bryce – Governor's Office

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page 7

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SUPPORT	SUPPORT WITH AMENDMENTS	OPPOSE	NAME AND ADDRESS	REPRESENTING	PHONE NO.
✓			Kathleen Skullney	Legal Aid Bureau	410-951-7784
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			Tim Perry	MD Bankers	443-837-1613
		✓	Charles Muskin	self	410 349 9599
		✓	William E Carey	Self	443 [illegible]

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SENATE OF MARYLAND
JUDICIAL PROCEEDINGS COMMITTEE
VOTING RECORD

DATE 3-16-07

SB 622 HB _____

SJR _____ HJR _____

MOTION FWA BILL PASSED ✓ FAILED _____

FAVORABLE _____

FAVORABLE WITH AMENDMENT ✓ AMENDMENT

RE-REFER _____ I.D. No./SPONSOR _____

UNFAVORABLE _____ VOTE FAV

HOLD _____ ADOPTED yes

OTHER _____ Add Sen. Stone

	YEAS	NAYS
SENATOR FROSH, CHAIRMAN	✓	
SENATOR GLADDEN, VICE CHAIRMAN	✓	
SENATOR BROCHIN		✓
SENATOR FOREHAND	✓	
SENATOR HAINES	✓	
SENATOR JACOBS		✓
SENATOR MOONEY		✓
SENATOR MUSE	✓	
SENATOR RASKIN	✓	
SENATOR SIMONAIRE		✓
SENATOR STONE	✓	
TOTAL	7	4

SENATE JUDICIAL PROCEEDINGS COMMITTEE
BRIAN E. FROSH, CHAIRMAN · COMMITTEE REPORT SYSTEM
DEPARTMENT OF LEGISLATIVE SERVICES · 2007 MARYLAND GENERAL ASSEMBLY

FLOOR REPORT

SENATE BILL 622

Ground Rents - ~~Limitation of Actions -~~ Registry of Properties Subject to Ground Leases

SPONSORS: Senator Gladden, *et al.*

COMMITTEE RECOMMENDATION: Favorable with amendments (6)

SHORT BILL SUMMARY:

This bill creates a new online registry of properties that are subject to a ground rent. Specifically, the bill:

- requires the State Dept of Assessments and Taxation (SDAT) to maintain the registry;

- requires a ground lease holder to register with SDAT and pay $10 for first ground lease, and for each additional ground lease, $3 in 2008, $4 in 2009, and $5 afterwards;

- requires a ground lease to be registered by Sept 30, 2010;

- provides that if a ground lease holder fails to register, the reversionary interest is extinguished (unless the ground lease holder is under a legal disability); the leasehold tenant gets fee simple title when the extinguishment certificate is recorded; and

- requires SDAT to work with State Archives to coordinate information in land records; to publish notices in newspapers in each jurisdiction where ground leases exist through Sept 30, 2010; and to report to the General Assembly at end of 2007 and 2008 about implementation of this Act, including recommendations about notifying ground lease holders about registration requirements.

COMMITTEE AMENDMENTS: The committee adopted 6 amendments.

Amendment No. 1 – adds cosponsors and makes technical changes to the title of the bill

Amendment No. 2 – strikes from the bill a provision regarding extinguishment of a ground lease after 3 years of no demand for and no payment of the ground rent

Amendment No. 3 – revises the defined terms and makes the bill applicable to residential property

Amendment No. 4 – streamlines the registration process; reduces the registration fees; and allows a ground lease holder up to extra 30 days to register if SDAT needs more information to register a ground lease

Amendment No. 5 – provides for certain rights and considerations if a ground lease is extinguished

Amendment No. 6 - requires SDAT to work with State Archives and publish notices about the registration requirements in newspapers; and requires SDAT and the Comptroller to report to the General Assembly on other ways to publish the registration requirements

CURRENT LAW:

There is no central registry of ground leases.

CROSS FILE:

HB 580 (Delegate McIntosh and the Speaker (Administration), *et al.*) – ENV

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 of Actions - Registry of Ground Leases	Bill No.:	SB 622
Committee:	Judicial Proceedings	Hearing:	2/28/07
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 three 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. There is a onetime $20 fee for each ground lease registered. Any subsequent changes to the required information, notifications of past due ground rent, or a filing for ejectment or redemption of the ground lease must be provided to the Department and must be accompanied by $5 for each affected 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 SB 622.

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BALTIMORE COUNTY
- MARYLAND

JAMES T. SMITH, JR.
County Executive

FRANK J. PRINCIPE JR., *Government Affairs Director*
ERIN P. FAVAZZA, *State Affairs Director*
Legislative Liaison Office

Senate Bill 622

To:	**Senate Judicial Proceedings 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:	**Senator Gladden**
Position:	**SUPPORT**

Baltimore County **SUPPORTS** Senate Bill 622 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** SB 622 and requests a **FAVORABLE** report.

CONSTITUTIONAL ANALYSIS OF SENATE BILL 622

prepared by

Professor Byron L. Warnken
University of Baltimore School of Law

prepared for

The Ground Rent Owners Coalition

SUMMARY OF THE ANALYSIS

S.B. 622 is unconstitutional. By imposing an additional recording/registration requirement and a $20 fee on each ground rent, and then automatically and permanently extinguishing that reversionary ownership interest as a penalty for late registration, S.B. 622 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 S.B. 622, 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, a late registration (late by three years or six months depending on when the ground rent was created) results in the reversionary ownership interest being automatically and permanently extinguished against the ground rent owner and in favor of the lessee. This penalty, which is imposed solely because of a non-timely supplemental registration, is arbitrary, capricious, and has no rational basis.

S.B. 622, 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. This is not a "mere regulation," but is a "taking." Under Maryland's adverse possession law, it takes 20 years and a successful law suit to extinguish a real property

interest. However, under S.B. 622, the State would take the reversionary ownership interest, by automatically (no law suit or action needed) 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).

An opinion of the Attorney General suggests that this "taking" of the reversionary ownership interest, by 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 directly give that property interest to the lessee, for the lessee's private use, by eliminating the right of re-entry.

ANALYSIS

CONSTITUTIONALLY, S.B. 622 IS FATALLY FLAWED. S.B. 622 WOULD (1) REQUIRE A SECOND RECORDATION/REGISTRATION ONLY FOR GROUND RENT OWNERS; (2) IMPOSE A $20 REGISTRATION FEE ON EACH GROUND RENT, WHICH EXCEEDS 20% OF THE AVERAGE ANNUAL GROUND RENT; AND (3) AUTOMATICALLY AND PERMANENTLY EXTINGUISH THE REVERSIONARY OWNERSHIP INTEREST AS A PENALTY FOR LATE REGISTRATION (SIX MONTHS FOR FUTURE GROUND RENTS AND THREE YEARS FOR CURRENT GROUND RENTS). S.B. 622 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 real property interests, must be recorded in the land records. Recordation is the means by which all persons can determine the owner of any real property interest. Accordingly, all ground rents are now, and always have been, recorded in the land records. Nonetheless, the Maryland General Assembly would, through S.B. 622, 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 at least 20% of the average annual ground rent. If the registration, with the $20 registration fee, is not done timely, S.B. 622 would, after six months (three years for existing ground rents) cause the reversionary ownership interest to automatically and permanently be extinguished against the ground rent owner, in favor of the lessee.

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 S.B. 622, ground rents would have to be recorded a second time, with the second recording in the form of a registration, accompanied by a $20 fee, per ground rent. This is arbitrary, capricious, and has no rational basis because the fee equals at least 20% of the average annual ground rent. Moreover, if the registration is six months late (three years for current ground rents), that late filing would result in the reversionary ownership interest being automatically and permanently extinguished. The penalty, which is imposed solely on ground rent owners and solely because of 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.

S.B. 622, if enacted, would (1) impose a registration and financial requirement on all ground rents that does not exist for any other real property ownership interest, and (2) automatically and permanently extinguish that reversionary ownership interest 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. 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 real property interests must be recorded in the land records, the ability to determine the owner of this reversionary ownership interest is no easier or harder than determining the owner of any other real property interest. Thus, there is no rational basis for S.B. 622 to require that all real property interests be recorded in one place, but requiring that ground rent reversionary interests be recorded in two places.

Second, even for reversionary ownership interests that are properly recorded in the land records, if those property interests are not also "registered," in addition to be recorded, under S.B. 622, 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 real property interests, there are only two ways to lose such interests. One way to lose a real property is the failure to pay the real 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 an individual to obtain title, following delinquent taxes, and, after all of those steps, the owner still has the right of redemption.

The other way to lose a real property interest is through the extremely rare cause of action known as adverse possession. Even the failure to use one's property for 20 years, making it subject to adverse possession, does not, in and of itself, cause, on a self-executing basis, the extinguishment of the property interest. Instead, an individual must use the property continuously, adversely, and openly, as if the owner, for 20 years, and then file and win a law suit in adverse possession.

By contrast, S.B. 622 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, S.B. 622 would violate equal protection.

S.B. 622, 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 more than one-fifth of a year's gross income just to register. If an individual owned 3,500 reversionary ownership interests, the registration fees would total $70,000. Members of the Maryland General Assembly earn $43,500 annually. If, by analogy, each member were required to register, as a requirement to become 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 from existing ground rents. During testimony in the House of Delegates, a Baltimore City official estimated the first-year cost to be about $130,000, making the $3 million be a "windfall" for the City. 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 Court of Appeals 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.

If S.B. 622 imposes a fee, it is arbitrary, capricious, and bears no relationship to the need

for, of purpose of, that fee. In fact, S.B. 622 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 a vehicle goes unregistered for six months, the vehicle owner would automatically and permanently forfeit ownership of the vehicle. Both the fee itself and the penalty for non-compliance with the fee violate due process.

B. S.B. 622, when extinguishing the reversionary ownership interest, constitutes a "taking" of the reversionary ownership interest and is not a "mere regulation." An opinion of the Attorney General incorrectly suggests that the "taking" of the reversionary ownership interest, by way of automatic and permanent extinguishment of that interest, for the mere failure to register timely, is not a "taking," but is a "mere regulation." Not only is it a taking, it is an unconstitutional "taking" because it is a taking for a private purpose because it would directly take away the reversionary ownership interest from the ground rent owner and give that real property interest to the lessee for the lessee's private use. As such, the "taking" would violate the Fifth Amendment Takings Clause and art. III, § 40, of the Maryland Constitution.

There are about 160,000 ground rents in Baltimore City. A ground rent owner has a reversionary ownership interest in the real property, through the right of re-entry, in the event the lessee violates the lease. (There are nine procedural steps/protections, taking more than two years before the right of re-entry may be exercised.)[1] S.B. 622 would require a second

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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.

recording/registration of each ground rent, accompanied by a $20 fee, to supplement the already properly recorded reversionary ownership interest. If the $20 registration fee is more than six months late (three years for current ground rents), S.B. 622 would cause the reversionary ownership interest to become automatically and permanently extinguished.

The act of the Government taking the real property interest of the ground rent owner and giving it to the lessee is a "taking." Moreover, the fact that the taking would solely benefit the private interest of the lessee of that property, and would not be for a "public purpose," makes the taking unconstitutional under the Fifth Amendment Takings Clause and art. III, § 40, of the Maryland Constitution.

An opinion of the Attorney General incorrectly concludes 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 is a mere regulation. Although the opinion does not analyze any Maryland cases, it analyzes four Supreme Court cases, none of which support the conclusion reached.

The first case that the opinion of the Attorney General relied on is Texaco, Inc. v. Short, 454 U.S. 516 (1982). That case is distinguishable. First, in Texaco, the period for extinguishment was 20 years -- not six months to three years. 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. Unlike in Texaco, S.B. 622 would cause non-timely compliance, without actual knowledge or a remedy period, to result in the automatic and permanent extinguishment of the real property interest.

The opinion of 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

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(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.

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 that the opinion of the Attorney General relied on is Wilson v. Iseminger, 185 U.S. 55 (1902). That case is likewise distinguishable. In Wilson, there was a 21-year adverse possession period before the extinguishment of any real property right – not six months. The third case that the opinion of the Attorney General relied on 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 distinguishable.

The fourth case that the opinion of the Attorney General relied on 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 S.B. 622. 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 as a regulation and not a taking, recognizing that it must consider the "character" of the property interest at issue. In Locke, the property was non-residential, commercial property, in which the Government owned a fee title.

Five years earlier, in Donovan v. Dewey, 452 U.S. 594 (1980), the Supreme Court recognized that the mining industry (1) was commercial and not residential, and (2) was already subject to a sufficiently comprehensive and pervasive federal regulatory scheme. Id. at 600-03. Thus, the parties were likely to have entered into the relationship with knowledge that they were subject to regulation. Ground rents are not commercial and have never been subject to the extreme invasion proposed by S.B. 622.

An instructive case is Ross v. City of Berkeley, 655 F. Supp. 820 (N.D. Cal. 1987), in which the Court found unconstitutional an ordinance that imposed city-wide commercial rent control. Although the Court resolved the case under the Contract Clause, it also held that the ordinance constituted a taking under the Fifth Amendment Takings Clause. The Court noted that the legal status was "upset in a severe and substantial manner" because the tenancy could be come endless and it would "effectively bar the [owners] from occupying the premises for the remainder of their lives." Id. at 829.

The Court indicated that it would have been one thing if the leasehold was entered with the parties aware that the properties were "sufficiently regulated," but they were not. In that

case, as with S.B. 622, the regulation came along well after the fact. The Court stated that "[t]he ordinance's severe, retroactive, and permanent nullification of [the] right to recover possession of their premises thereafter must be measured against 'the public purpose justifying its adoption' to determine the reasonableness of the legislation." Id. at 826. The Court quoted Loreto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), in which the Supreme Court stated: "[W]e cannot indulge the notion that a city may eviscerate a property owner's rights and shield its action from constitutional scrutiny by calling it [a mere regulation]." 655 F. Supp. at 838.

Ground rent owners are deemed to know that, under the law of adverse possession, it takes 20 years to extinguish a real property interest. However, all of a sudden, under S.B. 622, 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 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 S.B. 622 demonstrates that such a statute would constitute a "taking" within the meaning of the federal and state Constitutions. S.B. 622 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). It would constitute a "taking" for those ground rents that it would automatically and permanently extinguish solely because the properly recorded property interest is not subsequently timely "re-recorded," by way of registration, accompanied by a $20 fee. Because S.B. 622 would effectuate a "taking," by extinguishing ground rents, the constitutional analysis is triggered.

Once the constitutional analysis is triggered, the two remaining questions are (1) whether that taking is unconstitutional because it is for a private purpose and not a "public purpose," and

(2) whether it is for a "public purpose," and becomes constitutional only upon the payment of "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 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 S.B. 622 would be a private taking because that taking would not be for a "public purpose." Through S.B. 622, 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 real property interest to the lessee. In other words, through S.B. 622, 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 S.B. 622 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 S.B. 622 would be unconstitutional and should not be enacted.

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February 27, 2007

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GROUND RENT OWNERS COALITION
TESTIMONY IN **OPPOSITION TO** SB 622

GROUND RENTS - LIMITATION OF ACTIONS - REGISTRY OF GROUND RENTS

Offered Before The Senate Judicial Proceedings Committee

February 28, 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.

SPECIFIC AMENDMENTS OFFERED:

- Page 2, lines 24/25, delete "or a ground rent lease….." to end of sentence

- Page 3, line 10 through page 4 line 7, delete (this Section is punitive action against and existing property right known as ground rent. The only purpose for this provision would be to attempt to extinguish ground rents with no payment to the owner. It the purpose of registration is valid for other reasons than to take property without compensation, this is unnecessary).

- Page 5, line 2, delete "of landlords and"

- Page 5, line 3, and add "with the landlord information thereon." (to expand info on existing property page)

- Page 5, line 5, delete "lease" and insert "rent"

- Page 5, line 9/10, delete $20.00 "; delete "ground lease"; insert at line 10 "Landlord: If registered after January 2010:
  (i) if Landlord registers 1-20 ground rents the fee shall be $20.00;
  (ii) if Landlord registers 21/50 ground rents the fee shall be 40.00;

(iii) if Landlord registers 51-100 ground rents the fee shall be $75.00:
(iv) if Landlord registers 101-300 ground rents the fee shall be $200.00;
(v) If Landlord registers301 or more ground rents the fee shall be $500.00."

- Page 5, line 13, delete entire line and insert "the ground rent;"
- Page 5, line 15, delete and change paragraph numbers thereafter (unnecessary since owner information is already on SDAT property page)
- Page 5, line 17, insert after "sent" "if other than Landlord"
- Page 5, lines 20 through 22, delete (unnecessary)
- Page 5, line 23/24, delete (unnecessary)
- Page 6, line 1/2 , delete (unnecessary)
- Page 6, line 4, delete "lease" and insert "rent"
- Page 6. line 8,delete "$20."
- Page 6, line 9, delete "ground lease" and insert "Landlord, if required."
- Page 6, line 11, delete "lease" and insert "rent"
- Page 6, line 14, delete "tenant," (how should Landlord know?)
- Page 6, line 15/16, delete and change numbering thereafter
- Page 6, line 17, delete "lease" and insert "rent"
- Page 6, line 18, after "department" insert "reasonably"
- Page 6, lines 19/20, delete (unfair - other property owners do not pay to maintain SDAT records)
- Page 6, line 22, delete "(1)..." to end of line
- Page 6, line 23, delete "lease" and insert "rent
- Page 6, line 24, delete "2010" and insert "2015"

- Page 7, lines 1-14, delete
- Page 7, line 8, delete "lease" and insert "rent"
- Page 7, line 10, delete "(A)"
- Page 7, line 11 to end of section, delete entire subsection after "subtitle, and insert: "the Landlord may not receive any reimbursement for fees or expenses pursuant to Section 8-402.2 of this Article."
- Page 7, lines 14-22, delete (unnecessary and punitive – no rational basis)
- Page 7, line 27, delete "lease" and insert "rent"
- Page 7, line 29, insert after "adopt" "reasonable"

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OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

March 5, 2007

The Honorable Brian E. Frosh
2E Miller Senate Office Building
Annapolis, Maryland 21401-1991

Dear Senator Frosh:

You have asked for advice concerning Senate Bill 622, "Ground Rents - Limitation of Actions - Registry of Ground Leases."[1] Specifically, you have asked whether the limitation of action portion of the bill is constitutional. It is my view that it is.

Under current law, ground rent is extinguished if no demand for payment is made for more than twenty consecutive years. Real Property Article § 8-107. Once it is extinguished, a landlord may not set up any claim for the rent or the reversion in the property, or institute any suit, action or proceeding to recover the rent or the property. *Id.* This provision was upheld against constitutional challenge in *Safe Deposit and Trust Co. v. Marburg*, 110 Md. 410 (1909).

Senate Bill 622 would provide that, with respect to ground rents on residential property, a ground rent is extinguished if no demand for payment is made for more than three consecutive years. As with the existing provision, the landlord would be barred from setting up any claim for the rent or the reversion in the property and from instituting any suit, action or proceeding to recover the rent or the property. Thus, the effect of Senate Bill 622 would be to shorten the statute of limitations for a ground rent from twenty years to three years with respect to residential property. However, the bill does provide that the period is tolled if the landlord is under any disability when the three years expires and that the landlord has two years from the time that the disability is lifted to assert the landlord's rights. The bill further provides that a "ground lease may not be extinguished under this subsection before April 1, 2008."

The Court of Appeals has uniformly held that the Due Process clauses of the federal and State constitutions do not prohibit the imposition or shortening of a time bar for asserting claims so long as a reasonable period of time is provided following the effective date of the legislation in which such claims can be asserted. *Geisz v. Greater Baltimore Medical Center*, 313 Md. 301, 320 (1988); *Allen v. Dovell*, 193 Md. 359, 363-364 (1949); *Baumeister v. Silver*, 98 Md. 418, 427 (1904); *Garrison v. Hill*, 81 Md. 551, 557 (1895). As a rule, the Court has held that, in the absence of

[1] Senate Bill 622 and House Bill 580 are cross-filed versions of this bill.

legislative intent to the contrary, a new or shortened period of limitations would not be given retroactive effect, but would run from the effective date of the bill for cases arising prior to that date. *Rich v. City of Baltimore*, 265 Md. 647 (1972); *Kelch v. Keehn*, 183 Md. 140, 145 (1944); *Taggart v. Mills*, 180 Md. 302, 306 (1942); *Ireland v. Shipley*, 165 Md. 90, 99 (1933); *Manning v. Carruthers*, 83 Md. 1, 8 (1896). In fact, this rule was applied to the adoption of the initial twenty year period in § 8-107. *Safe Deposit Company v. Marburg*, 110 Md. 410 (1909).

Because Senate Bill 622 expressly provides that no ground leases are to be extinguished under its provisions before April 1, 2008, it is clear that it is not intended that the three years run from the effective date of the bill. However, the bill does provide a period of at least ten months during which a landlord may assert his or her rights and avoid extinguishment.[2] Statutes that require that some action be taken in order to preserve an interest in property and provide one year or less in which to act have been upheld against Due Process and Contract Clause challenge. *Ludington & Northern Ry. v. Epworth Assembly*, 468 N.W.2d 884, 890 (Mich.App. 1991) (One year to file notice of intention to preserve a right of termination); *Amana Soc. v. Colony Inn, Inc.*, 315 N.W.2d 101 (Iowa 1982) (One year to file claim to right of reversion); *Tesdell v. Hanes,* 82 N.W.2d 119 (Iowa 1957) (One year to file statement of the right or interest claimed); Wichelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957) (Nine months to file notice of interest in property). In light of these cases, I cannot say that ten months is not a reasonable time to give a landlord to demand payment of rent under a ground lease in order to preserve his or her interests.

For these reasons, it is my view that the limitation of actions in Senate Bill 622 is not unconstitutional.

Sincerely,

Kathryn M. Rowe
Assistant Attorney General

KMR/kmr
frosh23.wpd

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[2] This number is based on the fact that the last day for the Governor to sign bills is May 29, 2007. If the bill is signed earlier there will be more than ten months.