

# Opinions, Advice, and Legislation Quarterly News

Office of the  
Maryland Attorney General



January - March 2007

## ADVICE LETTERS

### APPROPRIATIONS DURING SPECIAL SESSION

**Question:** May the General Assembly appropriate funds during a special session?

**Answer:** Yes. While Article III, §52 of the Maryland Constitution reserves to the Governor the initiative for appropriating funds, the General Assembly may take the initiative through the passage of a supplementary appropriation bill, which may be taken up during a regular session, after the Budget Bill is enacted, or during a special session. *See* Art. III, §52(8). A supplementary appropriation bill must be limited to a single work, object or purpose, must raise the revenue for its support by a tax, and is subject to the Governor's veto. In addition, during an emergency session, the General Assembly may enact emergency appropriations. Art. III, §52(14). Emergency appropriations may not exceed the projected revenues that have not already been appropriated, and there must be a factual basis for the emergency. While this Office has taken the view that an emergency appropriation is not subject to the restrictions that apply to supplementary appropriation bills, the Court of Appeals has not decided this issue. Thus, the prudent course of action is for the General Assembly at a special session to pass individual measures that each pertain to a single work, object, or purpose in accordance with Art. III, §52(8).

*Letter to  
Senator Richard S. Madaleno, Jr.  
March 16, 2007*

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### CHILD SEXUAL ABUSE – STATUTE OF LIMITATIONS

**Question:** Would it be constitutional to permit a victim of child sexual abuse, regardless of age, to file an action for damages resulting from that abuse before December 31, 2008, if the victim obtained

a certificate from his or her attorney and mental health practitioner that meets certain requirements?

**Answer:** Revival of such actions would not violate the federal constitution, but it is not clear how a Maryland appellate court would rule.

*Letter to  
Senator James Brochin  
March 1, 2007*

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### CORPORATIONS – HOME OWNERS ASSOCIATIONS

**Question:** Would it be legal for the Board of Directors of the Columbia Association to eliminate the Columbia Council, which currently has a role in the governance of the Association? Would elimination of the Council affect any individual Columbia Association Board member's ability to communicate and represent the residents of his or her village?

**Answer:** Under State law, the Columbia Association Charter may provide a mechanism for its own amendment. An amendment made in accordance with the Charter could alter the governance structure of the organization. Such a change by itself would not alter a Board member's ability under State law to communicate with the village residents who select that member for the Board in accordance with the Charter.

*Letter to  
Delegate Elizabeth Bobo  
March 14, 2007*

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### FIRST AMENDMENT – AUTOMATED DIALING SYSTEMS

**Question:** Is it constitutional to regulate the use of automated dialing systems to deliver

prerecorded political campaign messages to residential telephone numbers in the State?

**Answer:** Proposed legislation would change existing law in two respects: it would prohibit, subject to certain exemptions, the use of an automated dialing system with a prerecorded message to a residential telephone number that has been registered with the National Do-Not-Call Registry; and would add calls made to “promote a political campaign or any use relating to a political campaign” to the list of reasons for which a person may not use an automated dialing system.

The first change is a content-neutral extension of the law and is likely constitutional. The change serves the significant governmental interest of protecting residential privacy and is narrowly tailored to that end, because it leaves open alternative forms of communications, such as calls by live callers, door-to-door campaigning, bulk mailing, leafleting, and the use of posters and signs.

The second change is not content-neutral because it singles out political speech for separate treatment. While the protection of residential privacy is a compelling state interest, a court subjecting this part of the legislation to strict scrutiny could invalidate it. One possible cure for this problem is to extend the restriction to all calls without prior consent. [Note: the proposed legislation did not pass.]

*Letter to  
Delegate Dan K. Morhaim  
February 7, 2007*

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#### **GROUND RENTS – REGISTRY OF GROUND LEASES**

**Question:** House Bill 580/Senate Bill 622, enacted by the 2007 General Assembly, require the creation of a registry of ground leases and extinguishes a ground lease if it is not registered within its time limits. Does this provision unconstitutionally intrude upon a person’s protected property rights?

**Answer:** No. The extinguishment of a ground lease for failure to register is not unconstitutional.

The legislation furthers legitimate State interests in providing notice to owners, debtors and potential purchasers with respect to ownership of property. Under Supreme Court precedent, the 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.

*Letter to  
Delegate Maggie McIntosh  
February 5, 2007*

**Question:** SB 622/HB 580 also provide that a ground rent on residential property is extinguished if no demand for payment is made for more than three consecutive years. Is this provision constitutional?

**Answer:** Yes. The Court of Appeals has 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 a claim so long as a reasonable time is provided following the effective date of the legislation in which such claims can be asserted. The bill provides a period of at least ten months during which a landlord may assert his or her rights and avoid extinguishment. Statutes that require that some action be taken in order to preserve a property interest and provide one year or less in which to act have been upheld against constitutional challenges.

*Letter to  
Senator Brian E. Frosh  
March 5, 2007*

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#### **HEALTH CARE – PROPOSED TAKEOVER OF DIMENSIONS HEALTH CARE SYSTEM**

**Question:** Is legislation required for the proposed takeover of the Dimensions Health Care System by Doctors Community Hospital with the assistance of State and county funding for ten years?

**Answer:** The most prudent course of action would be to authorize, ratify and condition this proposal in State legislation, in view of the proposal’s public/private components, the multi-year commitment of State funds and the past practice of the General Assembly. Two private

entities – Doctors and Dimensions – would be participating and benefitting from the takeover. Thus, the scrutiny of the General Assembly by means of the legislative process would insure that State funding of the project would serve a public, not a private purpose. This has also been the past practice of the General Assembly in similar circumstances.

*Letter to*  
**Ralph S. Tyler, Chief Counsel**  
*Governor's Office of Legal Counsel*  
*March 30, 2007*

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### LIQUIFIED NATURAL GAS FACILITIES – LIABILITY

**Question:** Would possible legislation which would impose strict liability on LNG terminals for damage to surrounding properties resulting from leaks or explosions be constitutional?

**Answer:** Yes. Maryland courts have adopted the doctrine of strict liability where one carries on an abnormally dangerous activity. Storage of LNG is an abnormally dangerous activity; thus, LNG terminals are probably already subject to strict liability under State law. Moreover, the legislation does not violate equal protection and is not preempted by federal law. The legislation would address an industry with significant safety issues and therefore has a rational basis. Finally, there is no express preemption of legislation that would impose strict liability on such facilities; the federal government has not preempted the field of regulation; and there would be no conflict between federal and state law with respect to this area.

*Letter to*  
**Senator Norman R. Stone, Jr.**  
*February 27, 2007*

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### MARYLAND INSURANCE ADMINISTRATION – DE NOVO APPEAL

**Question:** Would it be constitutional for the General Assembly to authorize, as in Senate Bill 389 and House Bill 425 a *de novo* appeal of an administrative decision of the Maryland Insurance

Administration (MIA) regarding claims made against property and casualty insurers?

**Answer:** Yes. The bill does not allow the judiciary to usurp the functions of an Executive Branch agency or violate Separation of Powers, but simply requires, as a precondition to suit, that a complaint be filed with the MIA, where it can be adjudicated as a contested case before the agency. The Court of Appeals has sanctioned this procedure in the context of health claims arbitration. [Note: Senate Bill 389 passed and is Chapter 150, Laws of Maryland 2007.]

*Letter to*  
**Delegate Joseph F. Vallario, Jr.**  
*March 23, 2007*

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### OPEN MEETINGS – PUBLIC PARTICIPATION

**Question:** Does the public have the right to participate in public meetings?

**Answer:** No. Neither the Open Meetings Act nor any other statute grants to a member of the public the unqualified right to speak at all public meetings. The Open Meetings Act provides, subject to certain exceptions, that public business should be performed in an open and public manner, which includes the right of the public to attend open sessions of the public body. However, the Act does not permit the public any right to participate in the decision-making process of a public body.

*Letter to*  
**Senator George C. Edwards**  
*February 5, 2007*

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### REGISTERED SEX OFFENDERS – UPDATING PHOTOGRAPH

**Question:** Is it constitutional, as proposed in House Bill 684, to require a registered sex offender to update his or her photograph within 72 hours after a substantial change of appearance?

**Answer:** Yes. A similar law was recently upheld by the U.S. Supreme Court. The proposal

serves the same purpose of alerting to the public to the risk of sex offenders in the community and of preventing evasion of the registration requirement through a registrant's disguise of his or her features. These interests outweigh the registrant's privacy interest. [Note: House Bill 684 did not pass.]

*Letter to  
Delegate Susan K. McComas  
March 20, 2007*

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#### **REGISTERED SEX OFFENDERS – RESIDENCE RESTRICTIONS**

**Question:** Is proposed legislation prohibiting an offender from residing within one mile of an elementary or secondary school or a park where children regularly gather constitutional? May the restrictions be retroactively applied?

**Answer:** Although the proposed legislation would make two-thirds of residential housing unavailable to those required to register for a term of life, the legislation may not be unconstitutional. A leading case from another federal circuit held that a limit of 2000 feet was rationally related to the legitimate state purpose of protecting children and therefore constitutional. The proposed legislation covers a greater distance and more closely resembles banishment, which raises Ex Post Facto and Eighth Amendment issues. While older cases indicate that banishment is within the power of the legislature to authorize, the retroactive application of the bill is more difficult to defend on constitutional grounds. [Note: these bills did not pass.]

*Letter to  
Delegate Dan K. Morhaim  
March 12, 2007*

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#### **STUDENTS – NON-RESIDENT TUITION**

**Question:** Would it violate federal law, to exempt certain alien students, as in House Bill 6, from paying the non-resident tuition rate?

**Answer:** Federal law provides that an alien who is not lawfully present in the U.S. is not eligible on the basis of residence for any postsecondary education benefit unless a U.S. citizen or national is eligible for the benefit without regard to whether the citizen or national is such a resident. See 8 U.S.C. §1623(a). The state of the law has not materially changed since this Office advised in 2003 that it is a close question whether the proposed legislation would violate the statute. The proposal does not rely on whether the student is a State resident at the time the application is made, and it does not grant resident status. On the other hand, qualification will almost always involve persons who were residents at some point. Because reasonable arguments can be made on both sides of the issue, it cannot be said that the proposed legislation is clearly invalid.

*Letter to  
Delegate Luiz Simmons  
March 2, 2007*

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#### **TOBACCO – PROTECTION AGAINST TOBACCO SMOKE – HOOKAH LOUNGES**

**Question:** Would a hookah lounge be permitted to operate under a bill (Senate Bill 91) designed to protect the public and employees from involuntary exposure to tobacco smoke in indoor areas open to the public?

**Answer:** Yes. A hookah is a waterpipe used to smoke tobacco. Although a hookah produces environmental tobacco smoke and a hookah lounge is an indoor area open to the public, the bill provides that the prohibitions do not apply to a business in which the primary activity is the sale of tobacco products and accessories. Thus, a hookah lounge would be exempt from the bill and a restaurant that offers hookahs on its menu in addition to food and drink may qualify for a waiver. [Note: Senate Bill 91 passed and is Chapter 501, Laws of Maryland 2007.]

*Letter to  
Senator Robert A. Zirkin  
March 27, 2007*

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Copies of opinions may be obtained from the Attorney General's website at [www.oag.state.md.us/opinions/index.htm](http://www.oag.state.md.us/opinions/index.htm). There is a direct link to each advice letter at the end of its description in the electronic version of this newsletter. You may also obtain a print copy of any item by contacting Kathy Izdebski by phone, (410) 576-6327, or e-mail, [opinions@oag.state.md.us](mailto:opinions@oag.state.md.us).