NATIONAL ASSOCIATION OF ATTORNEYS GENERAL
750 FIRST STREET NE SUITE 1100
WASHINGTON, D.C. 20002
(202) 326-6054
(202) 349-1920
http://www.naag.org

LYNNE M. ROSS
Executive Director

September 22, 2006

The Honorable J. Dennis Hastert
Speaker of the House
United States House of Representatives

The Honorable Nancy Pelosi
House Minority Leader
United States House of Representatives

RE: H.R. 4772

The undersigned State Attorneys General are writing to express our strong opposition to H.R. 4772. This bill is substantially the same as H.R. 2372 and H.R. 1534, which many State Attorneys General opposed in their letters of September 27, 1999, and September 24, 1997. Copies of those letters are attached.

Like its predecessors, H.R. 4772 represents a significant federal intrusion into state and local administration of real property and land use laws, which are areas that have always been recognized as matters of intrinsic state and local concern. See, e.g., Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 402 (1979); BFP v. Resolution Trust Corp., 511 U.S. 531, 565 n.17 (1994). Although mainly cast as legislation that eases procedural hurdles in federal court, if enacted H.R. 4772 would have a powerful impact on land use planning by local governments and would "federalize" many disputes that are now being worked out at the state or local level.

H.R. 4772 facilitates and encourages the filing of lawsuits against local governments in federal court. It primarily does this in the same manner as the prior bills – by seeking to weaken one, and eliminate another requirement developed by the U.S. Supreme Court for determining whether a regulatory takings claim is ripe for adjudication. The high Court requires that, to bring a takings claim, landowners in federal court show that (1) the government has issued a final decision concerning the application of its regulations to the proposed use of the landowner's property; and (2) if the State has "an adequate procedure" for obtaining compensation, the landowner has used that procedure but nevertheless has been denied just compensation. *Williamson County Regional Planning Com.* v. Hamilton Bank, 473 U.S. 172, 186, 195 (1985).

The bill seeks to weaken the final decision requirement by arbitrarily providing that a single project application is always sufficient for determining the amount of development that

will be allowed on property. The current, more case-specific approach, however, is good policy. Although agencies are sometimes forced to reject projects that are harmful to the public, they are often able to approve more carefully-designed proposals. The Supreme Court has thus explained that "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 353 fn. 9 (1986). On the other hand, "a takings claim is likely to have ripened" where it either "becomes clear that [an] agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty." *Pallazzolo v. Rhode Island***,** 533 U.S. 606, 620 (2001). H.R. 4772, however, seeks to arbitrarily end the project review process, which would force local governments to defend themselves based on incomplete administrative records and before the regulatory process is complete.

In addition, H.R. 4772 promotes the use of federal rather than state courts by seeking to eliminate the requirement that persons first seek compensation in state courts. State courts, however, are ideal forums for resolving disputes involving state and local planning issues. As the Supreme Court recently reiterated: "state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations." *San Remo Hotel v. City and County of San Francisco*, 162 L.Ed. 2d 315, 339 (2005). These "strong policy considerations [that] favor local resolution of land-use disputes" (*Taylor Inv., Ltd. v. Upper Darby Township*, 983 F.2d 1285, 1291 (3d Cir. 1993)), however, would be undermined by eliminating the requirements set forth in cases such as *Williamson County*. The bill thus runs counter to the admonition of Justice Alito, made shortly before joining the Supreme Court, that the federal judiciary should avoid procedural rules under which it could be "cast in the role of a zoning board of appeals." *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392, 402 (2003) (internal citation and quotation marks omitted).

H.R. 4772 would cause more taking claims to be filed in general and would encourage them to be filed in federal court. The broadening of the final decision requirement would mean that more lawsuits would likely be filed because project proponents would no longer need to adequately explore alternatives that would both meet project objectives as well as local concerns. The elimination of the requirement that a landowner first seek compensation in state court would mean that taking claims could be filed directly in federal courts. And because H.R. 4772's "final decision" test would only apply in federal court, developers would have a much greater incentive to file in federal courts. Thus, it is no exaggeration to say that H.R. 4772 would increase taking litigation and "federalize" local land use disputes.

We therefore respectfully urge that you reject this bill.

Sincerely,

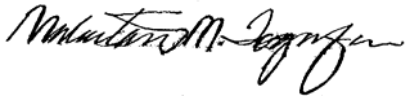
Bill Lockyer
Attorney General California

Sincerely,

Mark J. Bennett
Attorney General Hawaii

Troy King
Attorney General Alabama

David Marquez
Attorney General Alaska



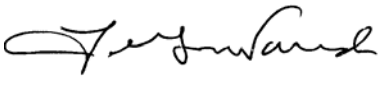
Malaetasi M. Togafu
Attorney General American Samoa

Terry Goddard
Attorney General Arizona

Richard Blumenthal
Attorney General Connecticut

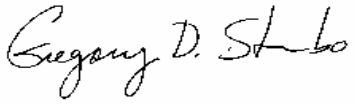
Carl C. Danberg
Attorney General Delaware

Robert Spagnoletti
Attorney General District of Columbia



Lawrence Wasden
Attorney General Idaho

Tom Miller
Attorney General Iowa

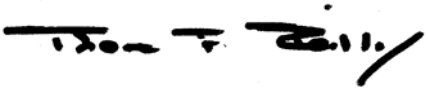


Greg Stumbo
Attorney General Kentucky

Charles Foti
Attorney General Louisiana

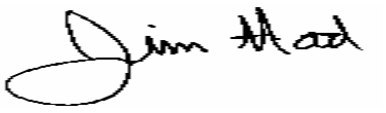
G. Steven Rowe
Attorney General Maine

J. Joseph Curran Jr.
Attorney General Maryland



Tom Reilly
Attorney General Massachusetts

Mike Cox
Attorney General Michigan



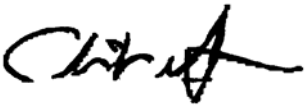
Jim Hood
Attorney General Mississippi

Mike McGrath
Attorney General Montana

George J. Chanos
Attorney General Nevada

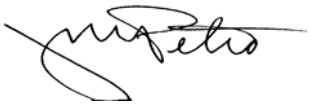
Anne Milgram
Acting Attorney General New Jersey

Patricia A. Madrid
Attorney General New Mexico



Eliot Spitzer
Attorney General New York

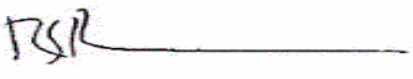
Matt Gregory
Attorney General Northern Mariana Islands



Jim Petro
Attorney General Ohio

W.A. Drew Edmondson
Attorney General Oklahoma

Hardy Myers
Attorney General Oregon



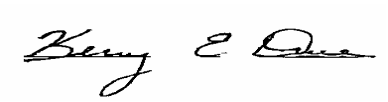
Roberto J. Sanchez-Ramos
Attorney General Puerto Rico

Patrick Lynch
Attorney General Rhode Island

Paul G. Summers
Attorney General Tennessee

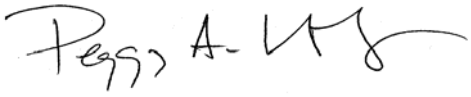
Mark Shurtleff
Attorney General Utah

William H. Sorrell
Attorney General Vermont



Kerry Drue
Attorney General Virgin Islands

Darrell V. McGraw Jr.
Attorney General West Virginia



Peg Lautenschlager
Attorney General Wisconsin

Pat Crank
Attorney General Wyoming

cc: Honorable John Boehner, House Majority Leader