CITY OF BALTIMORE

BRANDON M. SCOTT
Mayor

DEPARTMENT OF LAW
JAMES L. SHEA, CITY SOLICITOR
100 N. HOLLIDAY STREET
SUITE 101, CITY HALL
BALTIMORE, MD 21202

April 11, 2022

The Honorable President and Members
of the Baltimore City Council
Attn: Executive Secretary
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Re: City Council Bill 22-0195 – Inclusionary Housing for Baltimore City

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 22-0195 for form and legal sufficiency. The bill would modify the current inclusionary housing program for Baltimore City by removing most of the Sections concerning the concepts of Major Public Subsidies, Significant Land Use Authorization and Significant Rezoning. The bill aims to impose inclusionary housing requirements without the need to show that the project has received any benefit from the City in money or land use permissions.

To eliminate the governmental benefit from inclusionary housing would subject the program to challenge as an unconstitutional taking. "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Governments from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2006); *Monogahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1893). An inclusionary housing law that puts all the burden for this social problem on landowners, instead of all citizens through traditional means like taxes, increases the likelihood that a court would find that the program is unconstitutional. Rather, governmental exactions on private land must be related to the land at issue and roughly proportional to the remedy sought. *See, e.g.*, DaRosa, Michelle, *When Are Affordable Housing Regulations a Unconstitutional Taking?*, 43 Willamette L. Rev. 453 (2007). In short, this bill removes cost offsets and incentives to developers, increasing the likelihood that it will be viewed as an unconstitutional regulatory taking.

When the City's affordable housing program was just beginning, the Law Department explained that:

> An important reason to provide density bonuses or other concessions to the developers is to preclude unconstitutional "regulatory takings" of the developers' property. Requiring a developer to provide affordable housing would constitute a regulatory taking if the requirement deprived the property owner of all economically viable use of his or her land. *See City of Annapolis v. Waterman*, 745 A.2d 1000, 1013 [357 Md. 484, 509] (2000) (explaining that "the Fifth Amendment is violated when [a] land-use regulation 'does not substantially advance legitimate state interests [essential nexus] or denies an owner economically viable use of his land'") (citation

omitted). Note that a regulatory taking would not occur simply because a developer has been deprived of the most profitable use of his or her land; the critical issue is that the developer must retain some reasonable economic use of the property. *See Steele v. Cape Corp.*, 677 A.2d 634, 649, [111 Md. App. 1, 31] (1996) (explaining that the owner must retain "reasonable economic use" of the land); *Maryland Aggregates Ass'n v. State*, 655 A.2d 886, 899[, 337 Md. 658, 683-84] (1995) ("[I]t is only where 'the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, [that] he has suffered a taking.'") (citation omitted).

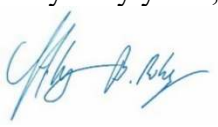
To minimize the likelihood of regulatory takings, the City should provide the developer with density bonuses or other concessions designed to enable the developer to recover his or her costs. *See, e.g.*, Jennifer M. Morgan, *Zoning for All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 Emory L.J. 359, 380 (1995) ("In order to ensure that economically viable use of the affected property is not prevented, a mandatory set-aside ordinance may offer the developer concessions in the form of relaxed zoning requirements.").

Even if the developer would retain reasonable economic use of the property, the set-aside requirement still might result in an unconstitutional "taking" if the developer already had obtained a "vested right" in the pre-existing zoning scheme. This would occur if, prior to enactment of the set-aside requirement, the developer had obtained a permit and undertaken development pursuant to the permit. *See Waterman*, 745 A.2d at 1016-17 ("In Maryland it is established that in order to obtain a "vested right" in the existing zoning use which will be constitutionally protected against a subsequent change in the zoning ordinance prohibiting or limiting that use, the owner must (1) obtain a permit or occupancy certificate where required by the applicable ordinance and (2) must proceed under that permit or certificate to exercise it on the land involved so that the neighborhood may be advised that the land is being devoted to that use.") (citation omitted).

In addition to these concerns, the bill must be amended to remove lines 8-10 on page 32 that attempts to double the maximum allowable fine as that would exceed the state-imposed limit for City fines. City Charter, Art. II, § (48).

For these reasons, without amendments to address these concerns, the Law Department cannot approve the bill for form and legal sufficiency. However, the Law Department has already begun working with agencies and councilmembers on appropriate changes.

Very truly yours,



Hilary Ruley
Chief Solicitor

cc: James L. Shea, City Solicitor
Nina Themelis, Mayor's Office of Government Relations
Elena DiPietro, Chief Solicitor, General Counsel Division
Ashlea Brown, Chief Solicitor
Victor Tervala, Chief Solicitor

AMENDMENTS TO COUNCIL BILL 22-0195
(1st Reader Copy)

Proposed by: Law Dep't

On page 32, delete lines 8-10.