


FROM	NAME & TITLE	CHRIS RYER, DIRECTOR	CITY of BALTIMORE MEMO	
	AGENCY NAME & ADDRESS	DEPARTMENT OF PLANNING 8 TH FLOOR, 417 EAST FAYETTE STREET		
	SUBJECT	CITY COUNCIL BILL #23-0431 / ZONING – RETAIL: SMALL BOX DISCOUNT ESTABLISHMENTS		

TO

The Honorable President and
 Members of the City Council
 City Hall, Room 400
 100 North Holliday Street

DATE: January 29, 2024

At its regular meeting of January 25, 2024, the Planning Commission considered City Council Bill #23-0431, for the purpose of creating the Retail: Small Box Discount Establishment as a conditional use; establishing certain use standards for Retail: Small Box Discount Establishments; requiring approval of a Retail: Small Box Discount Establishment as a conditional use in certain commercial zoning districts by the Board of Municipal and Zoning Appeals; and generally relating to Retail: Small Box Discount Establishments.

In its consideration of this Bill, the Planning Commission reviewed the attached staff report, which recommended disapproval of City Council Bill #23-0431 and adopted the following resolutions, with eight members being present (eight in favor):

RESOLVED, That the Planning Commission concurs with the recommendation of its departmental staff, adopts the findings and equity analysis outlined in the staff report, with consideration for testimony and facts presented in the meeting, and recommends that City Council Bill #23-0431 be **disapproved** by the City Council.

If you have any questions, please contact Mr. Eric Tiso, Division Chief, Land Use and Urban Design Division at 410-396-8358.

CR/ewt

attachment

- cc: Ms. Nina Themelis, Mayor's Office
 The Honorable Eric Costello, Council Rep. to Planning Commission
 Mr. Colin Tarbert, BDC
 Ms. Rebecca Witt, BMZA
 Mr. Geoffrey Veale, Zoning Administration
 Ms. Stephanie Murdock, DHCD
 Ms. Elena DiPietro, Law Dept.
 Mr. Francis Burnszynski, PABC
 Mr. Liam Davis, DOT
 Ms. Natawna Austin, Council Services



Brandon M. Scott
Mayor

PLANNING COMMISSION

Sean D. Davis, Chair; Eric Stephenson, Vice Chair

STAFF REPORT



Chris Ryer
Director

January 25, 2023

REQUEST: City Council Bill #23-0431/ Zoning – Retail: Small Box Discount Establishments

For the purpose of creating the Retail: Small Box Discount Establishment as a conditional use; establishing certain use standards for Retail: Small Box Discount Establishments; requiring approval of a Retail: Small Box Discount Establishment as a conditional use in certain commercial zoning districts by the Board of Municipal and Zoning Appeals; and generally relating to Retail: Small Box Discount Establishments.

RECOMMENDATION: Disapproval

STAFF: Eric Tiso and Martin French

PETITIONERS: Councilmembers Middleton and Ramos

OWNERS: Multiple – potentially all owners of retail establishment structures containing more than 5,000 square feet and less than 12,000 square feet of floor area available for use as a *Retail: Small Box Discount Establishment*.

GENERAL AREA: This bill would apply to all parts of the City of Baltimore within C-1 through C-5 commercial zoning districts and subdistricts.

HISTORY

The Zoning Code (Article 32 of the Baltimore City Code) was adopted by Ord. #16-581 and #17-015, which became effective on June 5, 2017. The Zoning Code was last amended by Ordinance #22-181 effective February 8, 2023. The current version of the Zoning Code was published on June 2, 2023.

ANALYSIS

Background: Staff understands that this bill is a follow-on action from amendments to Md. Code, Land Use §10-306, made in 2022, that was intended to help better control dollar stores. Staff notes that the changes to the Maryland Land Use Code further empowered the City to amend its own zoning code for that purpose, but did not make any changes directly.

Bill Effects:

New Use Category: This bill would create a new land use category, *Retail: Small Box Discount Establishment*, by establishing a new definition. That new use would be permitted as a conditional use in all Commercial Zoning Districts in Baltimore.

The floor area of retail space to which the proposed land use definition would apply is between 5,000 and 12,000 square feet (§1.312.(v)(1)(i) created in the bill). This definition's second part as proposed states:

“(ii) Offers for sale: (a) a combination and variety of convenience shopping goods and consumer shopping goods; and (b) the majority of the items in the store's inventory at a price not to exceed \$5.” (bill, p. 2, lines 11 through 15 inclusive)

The bill does not include any proposed definitions for “convenience shopping goods” or for “consumer shopping goods”. Without these definitions, the Zoning Administrator will have no basis for determining if a retail goods establishment with no alcoholic beverages sales is also a “retail small box discount establishment”.

Determining whether any retail goods establishment is offering items for sale at any given price, or within a given price range, requires a complexity and diligence of inspection that is not within the scope of traditional zoning inspection. Using that type of information derived from an inspection to determine if a majority of items for sale are within a certain price range (or as the bill states, below a certain retail price level) would require an inventory of the entire retail contents of a retail goods establishment on a regular basis.

The bill would establish a price of \$5 per item as the divider between a *Retail: Small Box Discount Establishment* and any other retail goods establishment that happens to have the equivalent amount of floor area. This number would likely need to be subject to revision based upon some index of inflation in order to remain relevant.

This definition also does not account for special retail sales promotions in which limited-time discounts could cause a retail goods establishment to be temporarily liable for reclassification as a *Retail: Small Box Discount Establishment*. The Zoning Administrator would need to become a full-time daily auditor of retail sales activities throughout all Commercial Zoning Districts in order to enforce this provision of the bill.

Planning staff notes that the current Zoning Code definition of *Retail: Big Box Establishment* does not attempt to differentiate such establishments from the more generic *Retail goods establishments* land use category by using criteria such as types of goods sold or prices of items offered for sale. Instead, a readily ascertainable floor area threshold is used for differentiation purposes (§1.312.(t)). Staff believes that a license mechanism would be the more appropriate tool to approve and control this type of use. Using a more general approach like the zoning code is not specific enough to a particular problem owner/operator.

Use Exclusions: The bill includes some exclusions in the new definition, which are intended to make the new definition apply to dollar stores, but not to other forms of businesses such as grocery stores, pharmacies and gas stations (now defined as a *Fuel station* in the zoning code). The exclusions appear as follows:

- (2) Exclusions.
- “Retail: Small Box Discount Establishment” does not include:
- (i) a grocery store;
 - (ii) a store that contains a pharmacy where prescription drugs are compounded, dispensed, or distributed;
 - (iii) a store that offers for sale gasoline, diesel fuel, or on-site electric charging capabilities for vehicles;
 - (iv) a retail store where the majority of the products sold are personal hygiene products or cosmetics; or
 - (v) a store that primarily engages in the resale of used consumer goods.

Staff understands the intent, but there may be a simple loop-hole, in that if a proposed dollar store offered a single electric vehicle charging station, it would escape this definition entirely.

Minimum distance: This bill would require that a retail small box discount establishment not be located within ½ mile of another such establishment (§14.336.1.(a) on page 3, lines 4 -6 of the bill). For existing retail small box discount establishments already located within ½ mile of one another, this would make both such retail small box discount establishments nonconforming uses. However, the categorization as a nonconforming use would only last as long as both such retail stores continued to operate in each’s existing location – once one closed, the surviving other retail small box discount establishment would no longer be nonconforming due to proximity to another of its kind of land use. But, should another retailer more than 12 months later wish to re-use the space vacated by a closed *Retail: Small Box Discount Establishment* as a different *Retail: Small Box Discount Establishment*, its application could be denied on the basis of creating a new nonconforming use – provided that the applicant was made to disclose in advance the intended inventory and pricing of that inventory and the Zoning Administrator was able to determine that the proposed new use of the location would in fact be a retail small box discount establishment. Thus, effective use of this proposed minimum distance criterion would require solution of the issues relating to definitions above. Separately, the ½ mile separation could be subject to variance, which could negate the effectiveness of this provision.

Community benefits agreement: The bill would require a community benefits agreement without specifying its content or minimum standards for labelling an agreement a “community benefits agreement.” Absent such definition, the Zoning Administrator would be obligated to recognize the validity of any document purporting to be a community benefits agreement. Planning staff isn’t sure how a definition of “community benefits agreement” could be added to the bill, or if it would constitute contract zoning. It would not be surprising that some of these agreements, once adopted by the City as part of a conditional use approval may run afoul of limits on permissible exactions (see *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013)). If there are allowable limitations under Article 32 – *Zoning* §§5-405 and 5-406, then they should just be included in the resolution as is typically done.

On page 3, lines 11-12, the bill calls for “an agent of the community association of record for the proposed location” to be a party to a community benefits agreement. The only record that Planning staff are aware of is the Community Association Directory (CAD) hosted on the Department of Planning website. The CAD is a service offered by Planning to the residents of Baltimore. Registering or making a record of a community association in the CAD is not and has never been mandatory. Planning staff do not approve or disapprove of any information placed in the CAD, because it has never been a Planning Department function to validate the

existence of, or the appropriate physical or geographic boundaries of, any community association. Thus, it is entirely possible that a particular commercial site may be located within the purported boundaries of more than one community association. The bill does not indicate any method for determining how a “community association of record” would be validated for purposes of creation of a community benefits agreement. The bill also does not address the question of whether a commercial location within the physical or geographic boundaries self-reported in the CAD by more than one community association must be covered by separate community benefits agreements with each such association, or a blanket community benefits agreement with all community associations self-reporting inclusion of that commercial location within their boundaries. Some form of approval procedure for community organizations would need to be added to this bill, or elsewhere, that could be used by the Zoning Administrator in confirming the validity of a community benefits agreement.

Conditional use: The bill would amend Table 10-301 of the Zoning Code to add a line for *Retail: Small Box Discount Establishment* making it approvable as a Conditional Use approved by the Board of Municipal and Zoning Appeals (BMZA).

Dollar Store Report: The Planning Commission has in its files a copy of the November 2023 dollar store report produced by faculty and students at The Center for Human Nutrition in the Department of International Health at Johns Hopkins University. While that report is not directly connected to this bill, it was generated as a result of the State amendment and informs the current bill, so we will discuss it here.

The recommendations of the report include the suggested community benefits agreement included in this bill, and recommends that such agreements include the following:

- Regular inspection of store cleanliness and appearance.
- Sourcing food from local vendors and producers.
- Soliciting and incorporating community input on new store design to ensure the exterior appearance and façade aligns with the neighborhood strategic plan.
- Staffing standards.
- Dollar stores’ investment back into the neighborhood they serve.
- Store accessibility.

Staff believes that most of these concerns would be more appropriately addressed as part of a business license, as zoning authorizations do not get into the needed level of detail. Staff is also concerned that the proposed business operations concerns of the designs of the store, staffing levels, and community investments are not within the scope of what zoning can control, including retroactive application to uses already approved.

The report also mirrors to language from the recent State amendment, but goes farther than this bill by recommending a one-mile separation between *Retail: Small Box Discount Establishments*. Staff have created two exhibits showing what a half-mile or one-mile separation requirement might look like. Significant portions of all commercial districts would become unavailable to a new applicant in the half-mile scenario, and mostly prohibited in the one-mile scenario. While staff understands that this might be the exact intention of the sponsors and/or the report authors,

zoning out a use completely by operation of the requirements would open the City to a potential challenge. A licensing scheme would be more narrowly tailored, and would impose controls or prohibitions on problematic businesses, but would allow businesses that are well run to continue.

Equity:

- Impact:
 - It is unclear what effect this proposed Zoning Code amendment would have on residential communities near to Commercial Districts, or upon other business communities nearest the sites that are or could be locations for *Retail: Small Box Discount Establishments*. Given the need for more detail in some of the bill's provisions, impact would be likely dependent on what the final legislation would require or authorize.
 - In the short term the legislation would have little effect due to the existing presence of the retailers to be regulated by it. However, as normal commercial turn-over occurs in local retail centers, a revised version of this legislation could strongly influence whether new or replacement small box discount retail establishments would locate in certain portions of Baltimore (see discussion of separation requirements above).

- Engagement:
 - Some communities have been discussing their perceived need for this legislation for many years, as they have viewed presence of small box discount retailers as an indicator of lack of commercial value of their area and as indicative of some retailers' decisions not to invest in those communities in more than a shallow way. These perceptions are viewed as in turn discouraging other types of commercial activity that communities prefer or are actively seeking.

- Internal Operations:
 - The proposed legislation would not affect Planning Department activities or operations. However, some aspects of the bill if enacted could create a large demand for staff in Zoning Administration and Zoning Enforcement. Planning staff would defer to the BMZA and the Zoning Administrator for additional comment.

Notification: Notification of this action was sent to over 18,100 recipients via GovDelivery.

A handwritten signature in blue ink, consisting of a series of loops and a long horizontal stroke extending to the right.

Chris Ryer
Director