
CITY OF BALTIMORE

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Mayor



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September 28, 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 22-0285 – Abundant Housing Act

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 22-0285 for form and legal sufficiency. The bill would change the text of the City's Zoning Code (Article 32 of the Baltimore City Code) to create low- and high-density dwellings and provide where those dwellings would be permitted.

There are two legal issues with the bill that must be remedied with amendments.

First, the bill seeks to permit a land use based on the "census tract where the household median income is 200% of the area medium income" for a particular region. This is not proper zoning material because income is not a characteristic of the district, land or building. *See, e.g., Northwest Merchants Terminal v. O'Rourke*, 191 Md. 171, 190 (1948) ("The very essence of zoning is territorial division according to the character of the land and the buildings, their peculiar suitability for particular uses, and uniformity of use within the zone."); *accord Storck v. City of Baltimore*, 101 Md. 476, 61 A. 330, 333 (1905) (cited with approval in *Benner v. Tribbitt*, 190 Md. 6, 20 (1948)). "There is no magic in the word 'zoning,' but there is a wide difference between exercise of the police power in accordance with a comprehensive zoning plan, which imposes mutual restrictions and confers mutual benefits on property owners, and arbitrary permission to A and prohibition to B to use their own property." *Northwest Merchants Terminal*, 191 Md. at 190. The income of the area would be considered an arbitrary classification for land use. The Supreme Court has held that property owners cannot "determine the extent of use that other owners shall make of their lots." *Eubank v. City of Richmond*, 226 US 137, 143 (1912) (cited with approval in *Walker v. Board of County Com'rs of Talbot County*, 208 Md. 72, 87 (1955)). The language in this bill that permits uses based on income of one's neighbors would impermissibly determine the use of land. Thus, an amendment to remove the reference to the census tract is attached.

Second, the bill attempts to define approved uses of property as non-conforming. This would not be the proper characterization because a non-conforming use is defined as "all uses and structures incompatible with allowed uses and structures." City Code, Art. 32, § 18-101. Rather,

the term is generally for property “that before, and at the time of, the adoption of a new zoning ordinance, the property was being used in a then-lawful manner for a use that, by later legislation, became non-permitted.” *Trip Assocs., Inc. v. Mayor & City Council of Baltimore*, 392 Md. 563, 573 (2006). “As the Court of Special Appeals recognized, nonconforming uses are not favored.” *Id.* In fact, the point of zoning is to eliminate non-conforming uses over time. “The earnest aim and ultimate purpose of zoning was and is to reduce nonconformance to conformance as speedily as possible.” *Id.* 392 Md. at 574 (citing *Grant v. Mayor and City Council of Baltimore*, 293 Md. 301, 307 (1957)). An amendment to remove the language making these permitted uses non-conforming is attached. If there are certain characteristics of being non-conforming that are desired, those can be added.

The City Council must consider the following when evaluating changes to the text of the Zoning Code:

- (1) the amendment’s consistency with the City’s Comprehensive Master Plan;
- (2) whether the amendment would promote the public health, safety, and welfare;
- (3) the amendment’s consistency with the intent and general regulations of this Code;
- (4) whether the amendment would correct an error or omission, clarify existing requirements, or effect a change in policy; and
- (5) the extent to which the amendment would create nonconformities.

Baltimore City Code, Art. 32, § 5-508(c). The Council must find facts that support the five points above.

Additionally, any bill that authorizes a change in the text of the Zoning Code is a “legislative authorization,” which requires that certain procedures be followed in the bill’s passage, including a public hearing. Baltimore City Code, Art. 32, §§ 5-501; 5-507; 5-601(a). Certain notice requirements apply to the bill. Baltimore City Code, Art. 32, §§ 5-601(b)(1), (c), (e). The bill must be referred to certain City agencies, which are obligated to review the bill in a specified manner. Baltimore City Code, Art. 32, §§ 5-504, 5-506. Finally, certain limitations on the City Council’s ability to amend the bill apply. Baltimore City Code, Art. 32, §5-507(c).

Assuming all the procedural requirements are met and the bill is amended as provided, the Law Department can approve the amended bill for form and legal sufficiency.

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
Jeff Hochstetler, Chief Solicitor

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Michelle Toth, Assistant Solicitor

AMENDMENTS TO COUNCIL BILL 22-0285
(1st Reader Copy)

Proposed by: Law Dep't

Amendment No. 1 {remove reference to census}

On page 14, delete lines 10-14; on page 16, delete lines 6-10; on page 18 delete lines 15-19; on page 20, delete lines 14-18.

Amendment No. 2 {change legally non-conforming language}

On page 14 in line 29, page 16 in line 26, page 19 in line 5, and page 21 in line 3 delete "AND DEEMED LEGALLY NON-CONFORMING."