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May 29, 2025

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 25-0040 – Zoning – Uses – Retail: Small Box Establishment

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 25-0040 for form and legal sufficiency. The bill defines "Retail: Small Box Establishment" as a new zoning term, prohibits such establishments from being located within 2,640 feet—or half a mile—of one another, requires conditional use approval for such establishments by the Board of Municipal and Zoning Appeals in the C-1 through C-5 districts, and creates a lower threshold for discontinuance/abandonment of such establishments as nonconforming uses.

As explained below, several amendments are required to address the clearest legal problems with the bill. Although the Law Department can approve the bill for form and legal sufficiency with these amendments, there remain other vulnerabilities that should be considered in determining whether zoning regulations are the appropriate method to address the perceived harms posed by small box retail establishments.

The City's Zoning Authority

Under State law, the City, in promoting the health, safety, and general welfare of the community, may regulate: "(1) the height, number of stories, and size of buildings and other structures; (2) the percentage of a lot that may be occupied; (3) off-street parking; (4) the size of yards, courts, and other open spaces; (5) population density; and (6) the location and use of buildings, signs, structures, and land." Md. Code, Land Use ("LU") § 10-202.

In 2022, the General Assembly added Section 10-306 to the Land Use Article, which permits the City to "enact planning and zoning controls that: (1) establish a dispersal regulation that provides for a minimum distance between small box discount stores" and "(2) establish the development of a small box discount store as a conditional use," among other related provisions. LU § 10-306. Because the City's zoning authority already permits it to regulate the location and use of buildings, it is doubtful that Section 10-306 enlarges or otherwise impacts the City's zoning authority. As such, Section 10-306 is not an "enabling" statute in the normal sense, *i.e.*, it does not

give the City powers it did not previously have and therefore does not set forth the only permissible parameters within which the City may legislate on this topic. In other words, the City bill can—and does—differ from Section 10-306, so long as it complies with all other legal standards surrounding the City's zoning authority. However, as explained below, it is with regard to these other legal standards that aspects of Bill 25-0040 are problematic. Moreover, to the extent the state law itself contains some of these same problems, it does not otherwise provide a haven for the problematic aspects of the City's bill.

Ensuring Uniformity and Equal Protection in Zoning Classifications

The bill defines "Retail: Small Box Establishment" as a retail store that "is part of a chain with 10 or more locations in Baltimore City doing business under the same name, regardless of the type of ownership of the location; has a floor area of more than 5,000 square feet and less than 12,000 square feet; and offers for sale assorted inexpensive general goods in small units." The definition also contains several exclusions. It excludes: grocery stores; stores that contain pharmacies; fuel stations; stores where the majority of items sold are personal hygiene products or cosmetics; and stores that are primarily engaged in resale of used consumer goods.

The effect of this definition—and its exclusions—is to establish several distinctions between the retail stores the bill regulates and those that fall outside of its regulation. As explained below, this is problematic to the extent there is no rational basis for the disparate treatment of retail stores that are otherwise similarly situated.

The Mayor and City Council are required to adopt uniform zoning regulations for each class or kind of development throughout each district or zone. LU § 10-301. This requirement is closely related to constitutional guarantees of equal protection before the law. As Maryland's Supreme Court has recently explained:

> Maryland's uniformity statutes, the likes of which nearly all other states have adopted, reassure property owners that they will not be subject to arbitrary or invidious discrimination or government favoritism or coercion. Modern courts, including this one, understand uniformity as a state law counterpart to the constitutional equal protection prohibition against purely arbitrary zoning classifications and restrictions, and generally apply similar principles of review.

Prince George's Cnty. Council v. Concerned Citizens of Prince George's Cnty., 485 Md. 150, 179-81 (2023) (internal citations and quotation marks omitted).

A court would review the bill's distinctions between the stores it intends to regulate and those it does not under the so-called rational basis test. *See Sec. Mgmt. Corp. v. Baltimore Cnty.*, 104 Md. App. 234, 243 (1995) (where there is no "infringement of a fundamental right or discrimination against a suspect class, we review the Council's actions under the rational basis test"). Under the rational basis test, a law's disparate treatment of similarly situated parties may pass constitutional muster if that disparate treatment bears a rational relationship to legitimate government interests. *Id.* at 244.

Here, the bill's definition of "Retail: Small Box Establishment" discriminates between retail stores solely on the basis of whether the store is part of a chain with ten or more locations. In other words, if there are two identical stores but one is part of a chain and the other is not, only the former would be regulated under the law. But whatever land use-related harms are allegedly caused by small box retail stores, the harm would be the same regardless whether the store is part of a chain. It is thus unlikely a court would view this distinction as bearing a rational basis to the City's legitimate zoning interests. *See Prince George's Cnty. Council*, 485 Md. at 181 ("Regulations that draw classifications between properties within a zone are, as a general matter, permissible" if they are "reasonable and based upon the public policy to be served").

This problem highlights the difficulty in using the City's zoning authority to address perceived public welfare concerns with a store's business model. "It is settled law in this State that the zoning ordinance is concerned with the *use* of property and not with *ownership thereof nor with the purposes of the owners or occupants*. . . . As a general matter, the prevention of competition is not a proper element of zoning." *Kreatchman v. Ramsburg*, 224 Md. 209, 220 (1961) (internal citations omitted) (emphasis added). By drawing the seemingly arbitrary distinction between similarly situated commercial properties (*i.e.*, chain versus non-chain), the bill appears to be aimed at regulating competition and favoring local businesses over national chain businesses within the same district, which the City may not do through its zoning powers. An amendment deleting the distinction based on chain status is attached.

It is worth pointing out that similar equal protection concerns could be raised by the bill's exclusions, too. For example, two retail stores may have the same physical footprint in a community and otherwise be similarly situated, but under the bill, one would be excluded based solely on the type of goods it primarily sells, be it used consumer goods or cosmetics. Or to take another example, two stores may otherwise meet the bill's definition of small box retail establishment based on business model and footprint, but one would be excluded from the bill's regulations simply because it adds a pharmacy or fuel pumps. A court may be hard pressed in any of these situations to discern a reasonable relationship between the City's legitimate zoning concerns and the arguably arbitrary classifications created by the bill's exclusions. Nonetheless, the exclusions do not raise the same level of concern as the distinction between chain and non-chain, so Law is not recommending deleting the exceptions.

In sum, if there are unique land-use related concerns posed by small box retail stores, then the City may use its zoning authority to ameliorate those concerns, but the authority must be applied equally to all similarly situated establishments unless there is a rational basis for disparate treatment.

<u>Void for Vagueness Concerns</u>

In addition to the problems with the definition of small box retail establishments raised above, the definition is also problematically vague. As a general matter, a statute must be sufficiently explicit both to inform those subject to it what conduct on their part will render them liable to its regulations, and to allow government officials to apply those regulations in a consistent manner. *See, e.g., Pizza di Joey, LLC v. Mayor of Baltimore*, 470 Md. 308, 360 (2020).

Here, a small box retail establishment is defined, in part, as a retail store that "offers for sale assorted inexpensive general goods in small units." There is no further definition or guidance as to what is considered "inexpensive" or what the threshold is for "small units." To avoid the potential impermissible vagueness of these terms, an amendment is attached that borrows from the state's definition of small box retail establishment in LU Section 10-306. Amendments are also attached to make the exclusions more precise; these amendments also borrow, as appropriate, from LU Section 10-306.

Disparate Standards for Abandonment

The same uniformity and equal protection requirements discussed above also prohibit the bill's attempt to create a lower abandonment threshold for small box retail establishments than other commercial establishments. In other words, a court would likely find no rational basis to apply different criteria to small box retail establishments than other commercial establishments for purposes of determining when a nonconforming use has been abandoned. An amendment deleting this provision is attached.

Dispersal Zoning

As a general matter, the City may use its zoning authority to control the location of commercial establishments by concentration and/or dispersal regulations to ameliorate legitimate land use impacts posed by those establishments. *See, e.g., Davenport v. City of Alexandria, Va*., 683 F.2d 853, 856 (4th Cir. 1982), *on reh'g*, 710 F.2d 148 (4th Cir. 1983) (*citing Young v. American Mini Theatres, Inc*., 427 U.S. 50, 62 (1975)) ("We have no doubt that the municipality may control the location of theatres as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they be dispersed throughout the city.").

However, the City must have a rational basis for the bill's half-mile dispersal requirement and how that dispersal zone is related to the City's legitimate interests in controlling the land use impacts posed by small box retail establishments. *See, e.g., Pack Shack, Inc. v. Howard Cnty.*, 377 Md. 55, 92 (2003) (explaining that a locality must have some justification for the size of the exclusionary zone created). Unlike many dispersal zoning cases—which review a locality's dispersal zoning requirements applied to adult theaters—regulating small box establishments does not implicate a fundamental right, *e.g*., it does not implicate Second Amendment guarantees. Thus, although the City's chosen dispersal zone need not be specially tailored to achieve its objective, it still must be rationally related to that objective and cannot be arbitrarily or capriciously burdensome.

Additionally, to the extent such a large dispersal zone would, as applied, effectively ban national small box retail chains from operating in the City, the bill might be susceptible to a constitutional challenge on the grounds that it impermissibly burdens interstate commerce. *See, e.g., Island Silver and Spice, Inc. v. Islamorada*, 542 F.3d 844 (11th Cir. 2008) (finding that a locality's zoning limits on national formula chain big box retail stores had the practical effect of

precluding them from locating in the area and therefore burdened interstate commerce). Even though a statute might, on its face, allow targeted businesses to operate, it might become problematic as applied if it in fact precludes those businesses from operating. *See id.*

To determine whether such a regulation violates the Commerce Clause, courts apply one of two levels of analysis. First, if a regulation directly regulates or discriminates against interstate commerce, or has the effect of favoring local economic interests, the regulation must be shown to advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. *Id.* (*citing Brown–Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578–79 (1986) and *Bainbridge v. Turner*, 311 F.3d 1104, 1109 (11th Cir. 2002)). The recommended amendment to delete the distinction between chain and non-chain small box stores helps the bill avoid this level of concern under the Commerce Clause.

Second, if a regulation has only indirect effects on interstate commerce, courts examine whether the government's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. *Id.* (*citing Brown–Forman*, 476 U.S. at 579) (additional citations omitted). *See also, e.g., Wal-Mart Stores, Inc. v. City of Turlock,* 483 F. Supp. 2d 987, 1017 (E.D. Cal. 2006) (finding the putative benefits of a local ordinance banning certain "discount superstores"—*e.g.*, avoidance of traffic congestion, prevention of urban blight, minimization of air pollution, and preservation of land-use objectives as to location and character of economic zones within locality—were "not so outweighed by any burden on interstate commerce as to render the Ordinance unreasonable or irrational").

These possible vulnerabilities do not render the bill illegal on its face, but might be raised depending on the effects of the bill's application. In other words, whatever the harms posed by small box retail stores the City wishes to ameliorate, doing so through location limits may lead to a challenge that these limits burden commerce more than they provide any local benefit.

Additional Considerations

Although not required for legal sufficiency, consideration should be given to whether "Retail: Small Box Establishment" should be added to the list of uses that require a building permit for continuation upon transfer of ownership or operation in Section 105.1, Part II of the Building Code. Similar consideration should be given to whether the new category should be added to Table 16-406 (off-street parking requirements).

Procedural Requirements

The City Council must consider the following when evaluating changes to the text of the City's 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). If the Planning Commission Report does not evaluate these factors, the City Council must take care to evaluate them.

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 procedural requirements are followed and with the attached amendments, the Law Department can approve the bill for form and legal sufficiency.

Sincerely,

Jeffrey Hochstetler
Chief Solicitor

cc: Ebony Thompson, Acting City Solicitor
Ty'lor Schnella, Mayor's Office of Government Relations
Hilary Ruley, Chief Solicitor, General Counsel Division
Ashlea Brown, Chief Solicitor
Michelle Toth, Assistant Solicitor
Desireé Luckey, Assistant Solicitor

Law Amendments

Amendment 1

On page 2, delete lines 9 through 11 in their entirety. And on that same page, in line 14, delete "inexpensive" through "units" and insert "convenience and consumer shopping goods, the majority of which do not exceed $5 per item or its equivalent adjusted for inflation.".

Amendment 2

On page 2, in 17, after "store", delete the semi-colon and insert "whose primary business is selling food at retail to the general public for off-premises consumption, at least 20% of the gross receipts of which are derived from the retail sale of fresh produce, meats, and dairy products;". And on that same page, in line 20, after "station", delete the semi-colon and insert "as otherwise permitted under this Article;".

Amendment 3

On page 3, delete lines 7 through 30 in their entirety from the bill, and continuing on page 4, delete lines 1 through 18 in their entirety from the bill.