

CITY OF BALTIMORE

STEPHANIE RAWLINGS-BLAKE, Mayor

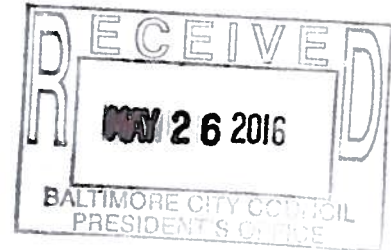


DEPARTMENT OF LAW

GEORGE A. NILSON, City Solicitor  
101 City Hall  
Baltimore, Maryland 21202

May 26, 2016

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



Re: City Council Bill 16-0672 - Board of Estimates – Local, Small and Disadvantaged Business Enterprise Program

Dear President and City Council Members:

The above bill proposes to amend the procurement provisions of the City Charter. It would allow programs to be established by ordinance that grant purchasing preferences to local, small or disadvantaged businesses.

At the outset, the Law Department notes that local legislation to assist local, small or disadvantaged businesses is an exercise of the police power. *Barbier v. Connolly*, 113 U.S. 27, 31 (“[T]he power of the state, sometimes termed its police power, [exists] to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.”). The exercise of the police power is well within the scope of powers delegated to the Mayor and City Council. See City Charter, Art. II, § 27. But, as the court in *Tighe v. Osborne* pointed out, “the police power, even as thus defined, vague and vast as it is, has its limitations, and it cannot justify any act which violates the prohibitions, express or implied, of the state or federal Constitutions.” *Tighe v. Osborne*, 131 A. 801, 803-04 (Md. 1925). It is this constitutional limitation on the police power that raises concerns with the proposed bill.

As it stands today, the City Charter grants the Board of Estimates (“BOE”) the power to “formulate and execute the fiscal policy of the City.” City Charter, Art. VI, § 2. Within the scope of this authority, procurement matters are specifically delegated to the BOE, except as otherwise established in the City Charter. See § 11. The legal concern here is that while a charter amendment is a necessary condition for establishing these spending programs by legislation, it is not a sufficient condition by itself. More than just a charter amendment is required before this exercise of the police power can be deemed constitutional.

Our constitutional concerns, however, apply only to spending programs to support local businesses. Legislation to assist small and disadvantaged businesses may be perfectly lawful and, in most cases, cause no interference with constitutional rights. Given this fact, the Law Department could approve Council Bill 16-0672 if the term “local” is deleted from the bill. We point out that, even if the term “local” is deleted, local businesses likely will benefit from a



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preference program aimed at small or disadvantaged businesses because many local businesses can be classified as small or disadvantaged.

On the other hand, if the Mayor and City Council wish to retain the current language, we remind its members what this Department has said repeatedly: Any local legislation providing preferences based on residence is likely to be struck down by a federal court if challenged under the Privileges and Immunities Clause. *See, e.g., Merit Const. Alliance v. City of Quincy*, 759 F.3d 122 (C.A.1 (Mass.),2014) (no “constitutionally adequate justification [exists] for treating residents and nonresidents differently in connection with the construction of its public works projects.”). According to the U.S. Supreme Court, the only way preferences based on residence can be lawful is to prove, to a court’s satisfaction, that 1) the discrimination against nonresidents is justified by a “substantial reason” and 2) that nonresidents “constitute a peculiar source of the evil at which the statute is aimed.” *United Bldg. and Const. Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden*, 465 U.S. 208, 222 (1984).

With this standard in mind, the Law Department would approve the proposed charter amendment for form and legal sufficiency if either of the following amendments is adopted:


(1) Page 2, line 3, delete “local.”

OR

(2) Page 2, line 2, insert “(A)” before the sentence and on line 6, insert the following:

(B) The authority granted in Paragraph (A) concerning local businesses may be exercised only when statistical evidence exists that convincingly shows a legislative preference based on residence may be constitutionally justified.

Sincerely yours,



Victor K. Terval  
Chief Solicitor

cc: George Nilson, City Solicitor  
Angela C. Gibson, Mayor’s Legislative Liaison  
Elena DiPietro, Chief, Opinions & Advice  
Hilary Ruley, Chief Solicitor  
Jennifer Landis, Assistant Solicitor