

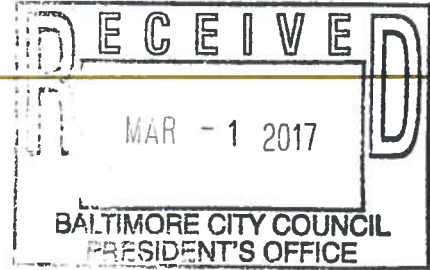
CITY OF BALTIMORE

CATHERINE E. PUGH, Mayor



DEPARTMENT OF LAW

101 City Hall
Baltimore, Maryland 21202



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 17-0006 – Real Estate Practices – Disclosures –
Industrial, Railroad and Truck Operations

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 17-0006 for form and legal sufficiency. The bill would modify the language in Ordinance 16-0581, which contains both the City's new Zoning Code ("Transform Baltimore") and other related provisions. It currently requires sellers of real property in certain Zoning Districts to provide the buyers of those properties with a particular disclosure prior to sale.

This bill would require the disclosure be given for any "industrial" property and also require the buyer's signature evidencing receipt of the disclosure. These two changes are the very changes the Law Department noted were problematic in City Council Bill 16-0765, which was introduced last term. These concerns were also raised when the disclosure concept was created by Ordinance 12-0053 (City Council Bill 12-0069). Amendments to this bill are required to address these issues. These amendments could be similar to those proposed for the previous bills on this subject or comparable amendments could be offered by the sponsor or others. The Law Department will work to make sure any amendments address the problematic issues.

When the Disclosure can be Required

As indicated in the Law Department's bill report on the disclosure concept when it was originally enacted, the City has the general police and welfare powers to legislate in this area. See City Charter, Art. II, §§(27), (47). The General Assembly has allowed the City "to prescribe, within the limits of the federal and state constitutions, reasonable regulations necessary to preserve the public order, health, safety, or morals." *Tighe v. Osborne*, 149 Md. 349, 356 (1925).

One limit on the government's regulatory power is the constitutional right to be free from burdens on private contracts. "Freedom of contract is subject to legislative regulation in the interest of public health, safety, morals or welfare. But such legislation must not be unreasonable, arbitrary, or capricious, and the **means selected must have a real and substantial relation to the object sought to be attained.**" *Maryland Bd. of Pharmacy v. Sav-A-Lot, Inc.*, 270 Md. 103, 119-120 (1973)(citation omitted)(emphasis added); see also *VNA Hospice v. Dep't*

Fav w/ Amend

of *Health & Mental Hygiene*, 406 Md. 584, 601 n.8 (2008). The current law avoids a general impairment of the right to freedom of contract because it is narrowly tailored to give notice for public welfare reasons of an objectively identifiable feature of the property, but its failure to be given does not impair the contract of sale.

This bill would expand the scope of the required notice to be for any “industrial” operations and remove the provision that tied those operations to a particular district. This change makes the bill susceptible to a claim that it impairs too great a number of transactions because it is not narrowly tailored to serve its public welfare goals.

Additionally, the term “industrial” is impermissibly vague because it does not give sellers of the property adequate notice of when the disclosure is required. The term “industrial” can mean a variety of uses: City Council Ordinance 16-0581 (“Transform Baltimore”) has several pages of definitions tied to the word “industrial” and six separate proposed industrial districts, including those dealing with office and bioscience uses. *See, e.g., A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 238-239 (1925)(courts have held a civil “provision invalid as contravening the due process of law clause of the Fifth Amendment, among others, because it required that the transactions named should conform to a rule or standard which was so vague and indefinite that no one could know what it was”)(citations omitted); *see also Johnson v. U.S.*, 135 S.Ct. 2551, 2570 (2015)(Thomas, J., concurring)(discussing how the Supreme “Court’s application of its vagueness doctrine has largely mirrored its application of substantive due process.”). Just because there may be “some conduct that clearly falls within the provision’s grasp” does not cure an otherwise vague law. *Id.* at 2561.

For these two reasons, the bill must be amended to clarify the scope of the term “industrial.” The clarifying language must put the seller on notice as to when the disclosure is required. The bill could be amended to tie the disclosure to a particular zoning district or require the disclosure within a certain distance from a railroad track or a truck route. Certainly, the language concerning where to find railroads and truck routes should be retained.

Signature Required

Additionally, this bill, like the previous City Council Bill 16-0765, would change the method of disclosure to require the buyer’s signature. It is unclear if the lack of a signature would allow those buyers who were not given the requisite disclosure to argue that such a failure constituted a substantial and material breach that “would permit the buyer to terminate the contract.” *Dennis v. Rockville*, 286 Md. 184, 190 (1979). Since “the right of private contract is no small part of the liberty of the citizen,” “the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare.” *Baltimore & O.S.W. Ry. Co. v. Voigt*, 176 U.S. 498, 505 (1900); *accord Maryland National Capital Park and Planning Commission v. Washington National Arena*, 282 Md. 588, 606 (1978); *Loughran Co. v. Lord Baltimore Candy and Tobacco Co.*, 178 Md. 38, 44 (1940). In explaining this right, Maryland Courts often quote the following:

Fearing the disruptive effect that invocation of the highly elusive public policy principle would likely exert on the stability of commercial and contractual relations, Maryland courts have been hesitant to strike down voluntary bargains on public policy grounds, doing so only in those cases where the challenged agreement is patently offensive to the public good, that is, where “the common sense of the entire community would . . . pronounce it” invalid. This reluctance on the part of the judiciary to nullify contractual arrangements on public policy grounds also serves to protect the public interest in having individuals exercise broad powers to structure their own affairs by making legally enforceable promises, a concept which lies at the heart of the freedom of contract principle.

Maryland National Capital Park and Planning Commission, 282 Md. at 606 (citations omitted).

To avoid this result, the bill should be amended to state clearly that failure to receive the disclosure does not impact any contract for sale. To accomplish this, the bill should change “the buyer’s signature” to “a signature” in line 21 on page 1 so that the signature evidences that a disclosure was given, not that it is a part of the enforceable promise between to privately contracting parties.

Preventing Retroactivity

Finally, the bill needs a third amendment to be clear that it does not operate retroactively in violation of the United State Constitution’s Contract Clause by requiring any sellers to give the notice required by the bill if an offer for sale of their property has already been accepted. *See, e.g., Board of Trustees of Employees’ Retirement System of City of Baltimore*, 317 Md. 72, 99 (1989). Suggested language would be: “this ordinance does not operate retroactively to require any current property sellers to give the notice created by this bill if an offer for sale of a property has already been accepted.”

Subject to the requisite amendments, the Law Department can approve the bill for form and legal sufficiency.

Very truly yours, *ecm*
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Hilary Ruley
Chief Solicitor

cc: David E. Ralph, Acting City Solicitor
Karen Stokes, Director, Mayor’s Office of Government Relations
Kyron Banks, Mayor’s Legislative Liaison
Elena DiPietro, Chief Solicitor, General Counsel Division
Victor Tervalá, Chief Solicitor
Jennifer Landis, Assistant Solicitor