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CITY OF BALTIMORE

BERNARD C. "JACK" YOUNG  
Mayor



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December 18, 2019

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 19-0174R – Resolution – Informational Hearing – Anchor  
Institution’s PILOT Agreement for Real Property Taxes

Dear President and City Council Members:

The Law Department has been asked to review City Council Bill 19-0174R for form and legal sufficiency. The resolution requests that various City and private entities brief the City Council on the efficacy of the 2016 PILOT agreement with several non-profit anchor institutions in the City and the feasibility of, advisability of and options for reopening and renegotiating the agreement. At the outset, I would like to note that the title of the bill is somewhat misleading. It describes the PILOT agreement as “for Real Property Taxes.” PILOTS for real property taxes are authorized by State law and created pursuant to the requirements of to the State enabling law usually involving an agreement between the property owner and the City. In this case, however, the term is referencing an agreement with respect to local taxes and non-profit anchor institutions that provides for exemption from local excise taxes not real property taxes.

In 2010, the City and the Mayor could enter into an agreement that promised forbearance from taking action on tax legislation applicable to nonprofits. The Agreement proposed the following: “the City desires to enter into this Agreement and the Mayor desires to forbear for the term of the Agreement from “(1) modifying the differential for nonprofits for the Energy Tax and (2) increasing the telecommunications tax and seeking or approving any other new or increased assessments, fees or taxes on nonprofit participants to the Agreement.” In return, the nonprofit participants agreed to pay an annual assessment according to a schedule established in the Agreement. The 2010 agreement was due to expire in 2016. In order to continue with the arrangement, the parties entered into a similar agreement in 2016 for a 10-year term.

The law is so fundamental on this issue that there has been little change in the basic principle of law that “if a public corporation enters into a contract that barbers away or otherwise restricts the exercise of its legislative or police powers, then the contract in ultra vires and void ab initio.”: *Chesapeake Outdoor*

*Enterprises, Inc. v. MCCB*, 89 Md. App. 54(1990). This is considered an important corollary to the nondelegation principle. It mandates that a public corporation may not enter into a contract that purports to restrict the future exercise of its legislative authority. *Vermont Dept. of Public Service v. Mass. Mun. Wholesale Electric Co.*, 151 Vt. 73 (1988).

Maryland courts have considered this issue in a number of cases. In *Chesapeake Outdoor Enterprises*, the Court noted that “it is well established that if a public corporation enters into a contract that barter away or otherwise restricts the exercise of its legislative or police powers, then the contract is ultra vires and void ab initio. In addition, “an agreement that purports to contract away the City’s ability to enforce its own laws clearly violates this rule.” *Id.* Based on this rule, the Court found that an agreement between the City and the advertiser that provided that both parties would refrain from bringing actions against one another so long as both continued to comply with the agreement was void and unenforceable. In *People’s Counsel of Balt. Co. v. Beachwood*, 107 Md.App. 627(1995), the court discussed under what circumstances agreements with respect to zoning would amount to an illegal contracting away of governmental powers. The court noted that an agreement related to the zoning of a property made with the governmental body that holds ultimate authority for zoning decisions is nugatory because a municipality is not able to make agreements which inhibit the exercise of its police powers.

Although the restriction of legislative powers is analyzed using concepts similar to delegation, there are also additional considerations. The analysis does not rest solely on whether the power has a discretionary component or is ministerial or administrative. The focus in such cases includes whether the legislative or other powers of the sovereign being surrendered or contracted away involve essential attributes of sovereignty. These are powers conferred on a government for public purposes that cannot be bartered away thereby rendering the government unable to perform its public duties. 64 C.J.S. Municipal Corp. Sec.1180. A governmental entity may not agree to a contract provision that would limit the free exercise of its governmental powers such as eminent domain or condemnation, police power, legislative power or governmental powers. Certain legislative and governmental powers are conferred on government entities for public purposes and cannot be bartered away. 10 McQuillin Mun. Corp. Sec. 29:12.

Courts have recognized that the power to tax is considered an essential power of sovereignty. *Mayor of Birmingham v. Birmingham Water Works Co.*, 139 Ala. 531, 533, 36 So. 614, 615 (1904) (invalidating provision that foreclosed the imposition of a license tax in city’s 30-year water supply contract as an ultra vires delegation of a legislative power and stating that the “power to tax is . . . the strongest, most prevailing [sic] [pervading], of all the powers of government”) (quoting *Loan Ass’n v. Topeka*, 87 U.S. (20 Wall.) 655, 663 (1874)); *Lykes Bros. v. City of Plant City*, 354 So. 2d 878, 879 (Fla. 1978) (approving trial court’s holding “that a municipality lacks the power to contract away its taxing authority over property used for private purposes”); *Brown v. City of E. Point*, 246 Ga. 144, 146, 268 S.E.2d 912, 915 (1980) (holding that city had no obligation to appropriate funds to implement six-step pay raise authorized by a prior city council and stating that since the “power to tax and the appropriating process are the

lifeblood of any government,” actions that require increased appropriations or taxes must be given the “strictest scrutiny”); *City of Louisville v. Fiscal Court*, 623 S.W.2d 219, 224 (Ky. 1981) (invalidating contract between city and property owners who consented to annexation in exchange for city's agreement to tax their property at a reduced rate as void against public policy and stating that “[i]t is beyond cavil that the power to tax . . . is a governmental function.”

Pursuant to the analysis above, the PILOT agreement at issue in this Resolution could be found to be unenforceable because it is ultra vires and void ab initio.. The agreement provides in paragraph 3 that the “City and the Mayor acknowledge that they will not require nor seek to impose, nor will the Members be expected to offer, new taxes or assessments on the Members and furthermore, they {City and Mayor} will not sign any ordinances hat do so.... In other words, the Members will only be subject to additional tax obligations that derive from increases in their activity on currently taxed activities.” The agreement also provides that the Members will not be subject to any increases in energy or telecommunications taxes. If any new taxes or increases are imposed the, the assessments imposed on the Members shall be reduced by an amount commiserate with the tax increase.

By its terms, the 2016 Non-Profit Assessment Agreement clearly restricts the power of the Mayor and the City Council to enact tax legislation or impose fees on certain non-profit entities in the City. Those powers are clearly within their ultimate authority. Since the power to tax is an essential power of the sovereign, any attempt to contract it away cannot be enforced and would be considered void. “The Mayor and City Council are but trustees of the public; the tenure of their office impresses their ordinances with liability to change. They could not if they would, pass an irrevocable ordinance. The corporation cannot abridge its own legislative powers.” *State v. Graves*, 19 Md 351 (1863). Power conferred upon a city to contract respecting a particular matter does not confer power, by implication, so to contract with reference to it as to embarrass and interfere with its future control over the matter, as the public interests may require. Hence, all contracts which interfere with the legislative or governmental functions of the municipality are absolutely void.” McQuillin, Mun. Corp. Sec. 29:12 “To the extent that a governmental contract impinges on a municipality's ability to legislate freely, the contract is ultra vires and void.” McQuillin, Municipal Corporations Sec. 29:103.

The 2016 contract asks that the City Council and the Mayor not to impose new taxes on select non-profit institutions. This is unenforceable as it would amount to contracting away the legislative authority of both the City Council and the Mayor to tax. Such an agreement is ultra vires, void and unenforc8able.

Sincerely yours,



Elena R. DiPietro  
Chief Solicitor

cc: Andre M. Davis, City Solicitor  
Matthew Stegman, Mayor's Legislative Liaison  
Caylin Young, President's Legislative Liaison  
Ashlea Brown, Assistant Solicitor  
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