
CITY OF BALTIMORE

BERNARD C. “JACK” YOUNG
Mayor



DEPARTMENT OF LAW
DANA P. MOORE, ACTING CITY SOLICITOR
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SUITE 101, CITY HALL
BALTIMORE, MD 21202

May 6, 2020

The Honorable President and Members
of the Baltimore City Council
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Re: Mayor and City Council Bill 20-0526 – Baltimore City COVID-19 Renter Relief Act

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 20-0526 for form and legal sufficiency. The bill would add language to Subtitle 8 (Rent Increases) of Article 13 (Housing and Urban Renewal) of the City Code, which contains the existing City Code provisions that prevent certain rental fee increases in retaliation for housing code violations. The bill would prohibit a landlord from increasing a rental fee of an existing tenant if that increase would occur during an emergency, and prohibit charging any late fees during the emergency or within 90 days after it. The bill also attempts to require a landlord to cancel any notice of a future increase in rent sent prior to the enactment of this ordinance, if the rental increase will happen during the emergency.

General Authority

The City is authorized to enact rent control ordinances by virtue of its police powers and reasonable measures taken to limit increases in rent during a declaration of emergency will be upheld as long as the legislation is not in conflict with either the federal or Maryland Constitutions or a Maryland law. *Heubeck v. City of Baltimore*, 205 Md. 203, 206 (1954) (Baltimore City is authorized to enact rent control legislation during an emergency, but it cannot conflict with state law regarding evictions). However, as Maryland’s highest court explained over fifty years ago, local rent control laws cannot conflict with state laws.

State Preemption

On its face, there is no conflict in the language of this bill and any landlord tenant law enacted by the General Assembly, either codified in the Real Property Article of the Maryland Code or codified in the Baltimore City Public Local laws. Md. Code Real Prop. Art., §§ 8-101 – 8-604 (governing evictions, prohibited retaliatory actions like rent increases in response to a tenant complaint, notice of rent increase for renewals, demands for back rent, rent escrow, liability of tenant for rent, etc.); Public Local Laws of Baltimore City, Subtitle 9 (govern retaliatory rent increases, deaths of tenants, warrants of restitution and rent escrow). This is because there is no current state law governing rent increases during an emergency. Nor do any of the recent

Governor's Executive Orders cover rent increases or interest on late rent payments during this emergency. *See* Maryland Governor's Executive Order 20-04-03-01 (suspended evictions during the emergency for tenants suffering a loss of income due to the pandemic). Since none of these state laws expressly permit rent increases, the City would not be preempted by conflict or expressly preempted from implementing a rent freeze during the pandemic.

However, conflict and express preemption are only two of the three types of preemption possible; the other is field preemption. *See, e.g., Worton Creek Marina v. Claggett*, 381 Md. 499, 512 (2004) (citations omitted) (explaining preemption can occur by intended to occupy an entire topic, not merely by conflict or expressly). Field preemption would exist if a Court determines that the state intended to occupy the entire field of landlord/tenant laws during this emergency. Although there is no guarantee, a Court would probably not find field preemption because these state laws and the Governor's orders are silent as to rent increases and late fees during an emergency. Thus, there is no clear barrier to the City's exercise of its police power to enact a rental increase prohibition during this pandemic. *See, e.g., Montgomery Co. v. Complete Lawn Care, Inc.*, 240 Md. App. 664, 710 (2019) (holding that the state law sets a floor, not a ceiling, and local laws can go further in their restrictions (citing *Mayor and City Council of Baltimore v. Hart*, 395 Md. 394, 396-97 (2006) (upholding the City's more stringent standard for emergency vehicles))).

Federal Preemption

Parts of this bill could be considered preempted by federal law. The short amount of time between introduction of this bill and its hearing did not leave enough time to review the impact of this law against the backdrop of federal housing laws. However, it is clear that the provisions on interest in the bill are preempted as applied to federal housing by the federal CARES Act, which was signed into law on March 27, 2020. 134 Stat. 281 (2020). In addition to preventing a tenant from being served with an eviction notice before July 25, 2020, and requiring such notice to give the tenant 30 days to quit the property, the Act also prevents the landlord from charging late fees, penalties or any other charges for late payment of rent. *Id.* at 493, 494. Thus, wherever the federal law governs, this bill is preempted. Similarly, should the state decide to take up the topic of late fees, this law would then be superseded by those state laws. However, since the City's bill covers more renters than those covered by the federal CARES Act, the Law Department does not recommend an amendment to the language of the interest portion of the bill.

Constitutional Challenges

This bill should survive a constitutional challenge because similar legislation has survived various federal constitutional attacks including Due Process, Equal Protection, Contracts Clause and takings challenges. *See, e.g., Tyler v. City of College Park*, 415 Md. 475, 509 (2010) (rent control ordinance upheld in face of Equal Protection challenge); *Westchester West v. Montgomery Co.*, 276 Md. 448, 460 (1975) (price control measures like rent control are unconstitutional only if they are arbitrary, discriminatory or irrelevant to the policy goals of the legislature); *Block v. Hirsh*, 256 U.S. 135, 157-58 (1921) (temporary rent control measure of District of Columbia upheld during emergency against Due Process, Contracts Clause and takings challenges).

Enforcement

The bill does not contain any language about enforcement. There is a provision in the current Subtitle 8 of Article 13 that a “tenant may seek relief from an appropriate court to restrain or enjoin any violation of the provisions of this law.” City Code, Art. 13, § 8-5. This Section appears to have been enacted in 1981. Since that time, the Maryland Courts have made clear that without specific authorization by the General Assembly, local governments have no right to create a private cause of action. *See McCrory Corp. v. Fowler*, 319 Md. 12, 20 (1990) (“In Maryland, the creation of new causes of action in the courts has traditionally been done either by the General Assembly or by [the Maryland Court of Appeals] under its authority to modify the common law of this State.”); *accord Baker v. Montgomery County*, 201 Md.App. 642 (2011); *Shabazz v. Bob Evans Farms, Inc.*, 163 Md.App. 602, 636–37 (2005); *Edwards Sys. Tech. v. Corbin*, 379 Md. 278, 287–94 (2004); *H.P. White Lab., Inc. v. Blackburn*, 372 Md. 160, 167–71 (2002). In other words, it is not clear that tenants can go to Court to enforce this City law.

However, Section 8-5 of Article 13 may be deemed by a court to provide a tenant with a cause of action against the landlord for the original purpose for which it was enacted: retaliatory evictions and rental increases due to property defects. Since state law prevents the rental of residential properties that do not meet local building and housing code requirements, a court may interpret Section 8-5 of Article 13 of the City Code as being authorized by state law in accordance with the requirements of the cases cited above. Md. Code, Real Prop., § 8-211; Baltimore City Code of Public Local Laws, § 9-9(b).

There is no indication, however, that Section 8-5 of Article 13 of the City Code would be interpreted by a court to allow enforcement of the rental increase and interest provisions that are the subject of this bill. Therefore, the Law Department recommends an amendment to the bill to enforce this bill with an Environmental Control Board citation. Suggested draft language is attached to this bill report. The draft amendment is written to provide an Environmental Control Board citation at the maximum penalty of \$1,000 for any violation of Subtitle 8 of Article 13, not just the new language added in this bill. The Law Department does NOT recommend making the rental increase a crime because that would make Section 8-4(D)(2) violate the *ex post facto* prohibition of the United States Constitution by criminalizing an action that was done prior to the passage of this bill. *Calder v. Bull*, 3 U.S. 386, 390-91 (1798).

Retroactivity

Assuming that the enforcement mechanism chosen by the City Council is not criminal, a Court should not invalidate the intended retroactivity of Section 8-4(D)(2) of the bill, which would effectively bar rental increases that a landlord has already undertaken prior to the bill’s passage. *See, e.g., Waters v. Montgomery Co.*, 337 Md. 15, 28-29 (1994). Maryland Courts follow a three step analysis to determine if a law is *ex post facto*: 1) legislature intended retroactivity, 2) the legislature had the power to enact the ordinance, 3) the retroactive application of the statute or ordinance would interfere with vested rights. Here, the City Council clearly intends that this law be retroactive and seeks to bar any rental increase that would go into effect during the emergency, even if the landlord had given notice of that increase prior to the enactment of this law. Assuming the City has the power to enact rent control laws, then the question becomes whether the

retroactivity impacts the landlord's vested right. *Id.* Since the Supreme Court has held that a landlord's right to charge rent can be modified in an emergency, the law will likely survive an *ex post facto* challenge, so long as the enforcement mechanism is not criminal. *Block*, 256 U.S. at 157 ("the right of the owner to do what he will with his own and to make what contracts he pleases are cut down. But if the public interest be established the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulation has been settled.") (citations omitted).

Duration of the Law

Next, the validity of this law depends on exigent circumstances which permit certain constitutional rights to be partially impaired, at least temporarily, due to the increased and significant government interest of protecting the public health during a pandemic. After enactment, the law would be in effect through the 121st day after the expiration of the emergency. There is authority which suggests that the authority of the City to enact this law depends on the emergency itself, and may not be enforceable once the emergency ceases. *Chastleton Corp. v. Sinclair*, 264 U.S. 543, 547-48 (1924). Thus, while there is no clear prohibition on having this law in effect for that length of time, it is important to note that a Court may not consider it to be valid past the end of the state of emergency.

Title of the Bill

The short title of the bill— Baltimore City COVID-19 Renter Relief Act— is arguably misleading as it suggests that the law relieves renters of their liability for rent. The Law Department recommends amending the title to reflect that the legislation prohibits rent increases, not liability for rent during the emergency. A suggested amendment is attached to this report.

Final Comments

There has been discussion in Annapolis of expanding an existing Governor's Order or creating a new one to include a freeze on residential rents, limits in residential rent increases, or prohibitions on late increases. If that happens, any terms of that Order that conflict with any City law will prevail. Furthermore, when the Governor issues transition direction, such as an Order specifying how evictions will take place after the emergency declaration has ended, anything in the City Code that is in conflict with that order will be superseded.

Subject to the foregoing comments, the Law Department can approve the bill for form and legal sufficiency.

Very truly yours,



A handwritten signature in blue ink, appearing to read "Ashlea Brown" followed by a flourish.

Ashlea Brown
Hilary Ruley

cc: Dana P. Moore, Acting City Solicitor
Matthew Stegman, Mayor's Office of Government Relations
Elena DiPietro, Chief Solicitor, General Counsel Division
Victor Tervalva, Chief Solicitor

AMENDMENTS TO COUNCIL BILL 20-0526
(1st Reader Copy)

Proposed by: Law Dep't

Amendment No. 1

On page 1, after line 8, insert:

ARTICLE 1 – MAYOR, CITY COUNCIL AND MUNICIPAL AGENCIES
SECTION 40-14(E)(1) (SUBTITLE 8)
BALTIMORE CITY CODE
(EDITION 2000)

On page 3, in lines 8 and 9, delete “the provisions of this law” and substitute “SECTIONS 8-2 AND 8-3 OF THIS SUBTITLE, IN ACCORDANCE WITH STATE LAW.”

On page 3, after line 9, insert:

“§ 8-7. ENFORCEMENT BY CITATION

(A) ANY VIOLATION OF THIS SUBTITLE MAY BE ENFORCED BY ISSUANCE OF AN ENVIRONMENTAL CITATION AS AUTHORIZED BY CITY CODE ARTICLE 1, SUBTITLE 40 {“ENVIRONMENTAL CONTROL BOARD”}.

(B) PROCESS NOT EXCLUSIVE. THE ISSUANCE OF AN ENVIRONMENTAL CITATION TO ENFORCE THIS SUBTITLE DOES NOT PRECLUDE PURSUING ANY OTHER CIVIL OR CRIMINAL REMEDY OR ENFORCEMENT ACTION AUTHORIZED BY LAW. SUBJECT TO A FINE OF \$1,000 PER DAY.

(C) SEPARATE OFFENSE. EACH DAY THAT A VIOLATION CONTINUES IS A SEPARATE OFFENSE.”

Baltimore City Code

Article 1. Mayor, City Council and Municipal Agencies

Subtitle 40. Environmental Control Board

(1) Article 13. Housing and Urban Renewal

Subtitle 4. Registration of Non-Owner-Occupied Dwellings.

...

§ 5-15. {Offenses there listed as cause for} Denial, suspension, or revocation of license \$750

SUBTITLE 8 RENT INCREASES \$1,000

All other provisions \$500

Amendment No. 2

On page 1, in line 2, delete "Renter" and substitute "RENT INCREASE"