#  September 28, 2020

The Honorable President

Members of the City Council

c/o Natawna Austin, Executive Secretary

409 City Hall

Baltimore, MD 21202

RE: City Council Bill 20-0592 – Office to End Homelessness- Establishment, Administration and Permanent Housing Voucher Program

Dear President and Members

##  You have requested the advice of the Law Department regarding City Council Bill 20-0592. City Council Bill 592 creates the Office to End Homelessness (“Office”) and provides for the administration of the Office. The bill also establishes the Permanent Housing Voucher Program which will be administered by the Office pursuant to the procedures in the bill.

**Power of the City Council to Create an “Office”**

##  Section 1(a) of Article VII of the Baltimore City Charter provides that “the executive power of the City is vested in the Mayor, the departments, commissions and boards provided for in this article and the special officers, departments, commissions and boards that may be created by law.” Charter, Art. VII, §1(a). Section 2(a) of Article VII allows for ordinances to give additional duties to “a department, officer, commission, board or other municipal agency” so long as those duties are “consistent with the Charter and subject to the supervision of a superior municipal officer or agency.” Clearly, the City Council may by ordinance create a department or office.

##  In addition, under Art. IV, Sec. 4 the Mayor is deemed the “chief executive officer of the City [and] shall see that ordinances and resolutions are duly and faithfully executed, and shall have general supervision over all municipal officers and agencies” and “subject to more specific provisions of the Charter, the Mayor shall have general responsibility for the economic development of the City.” This gives the Mayor’s Office the ability to provide for certain programs subject to the Charter/s grants of power to departments.

##  With respect to the legislative authority of the City Council, the Md. Constitution, Art. XI, Sec. 3 provides that “from and after the adoption of a charter by the City of Baltimore, or any County of this State, as hereinbefore provided, the Mayor of Baltimore and City Council of the City of Baltimore or the County Council of said County, subject to the Constitution and Public General Laws of this State, shall have full power to enact local laws of said City or County including the power to repeal or amend local laws of said City or County enacted by the General Assembly, upon all matters covered by the express powers granted ….”

 From these provisions, it can be gleaned that a department, board or commission may be created by laws other than the Charter but in order for the City Council to do this by ordinance, the power to provide for the purpose of the office must also be within the express powers of the Mayor and City Council granted to it by the General Assembly or granted by public general law. There is no specific authority in the City’s Express Powers i.e. Art. II of the Charter or in public general law to provide for the purpose of the Office which is providing permanent housing vouchers to eligible City residents. This may be because State and federal law already provide for the operation of housing voucher programs and other housing initiatives and provide for the allocation of funds and the use of funds for that purpose.

 State law provides for the creation of local housing authorities. Md. Ann. Code Housing and Comm. Dev. Art. Div.II. Sec. 12-401 states that it is State policy that an authority:

(1) shall manage and operate its housing projects efficiently to enable it to fix the rent for housing units at the lowest rates consistent with its providing decent, safe, and sanitary housing units and meeting the financial needs under subsection (b) of this section; but (2) may not operate for profit or as a source of revenue to the political subdivision.

 Except as provided in [§ 12-208](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1082550&cite=MDHOCDS12-208&originatingDoc=N596BEFA0A6CC11E0A28690A8A15311AF&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Category)) of this subtitle, in each political subdivision, there is a public body corporate and politic known as the “housing authority” of the political subdivision or as otherwise designated in the articles of organization. Sec. 12-201. Title 15 of the Housing and Comm. Dev. Art. establishes the Baltimore City Housing Authority (HABC). The Housing Authority of Baltimore City is a public body corporate and politic that:

(1) exercises public and essential governmental functions; and

(2) has all the powers necessary or convenient to carry out the purposes of this Division II.

 In addition to the broad grant of power to housing authorities in Subtitle 12, Sec. 15-102 grants certain specific powers to the HABC. Those powers include the power to “make rent subsidy payments to or for persons of eligible income.” Id. In addition an Authority may also make rent subsidy payments to or on behalf of persons of eligible income and rent out houses, accommodations, lands, buildings, structures, or facilities in a housing project. Sec. 12-502(d).

 State law only references voucher programs for Baltimore City in the context of HABC. The City Code provisions regarding the Department of Housing and Community Development do not contain comprehensive provisions for rent subsidy programs and the HCD website refers residents to HABC for voucher programs information. <https://dhcd.baltimorecity.gov/nd/affordable-housing>. In fact, the stated purpose of the State law is to “authorize each authority to do all that is necessary or desirable to secure the financial aid or cooperation of political subdivisions, State government, or federal government to help the authority undertake, construct, maintain, or operate a housing project.” Sec. 12-103.

 As far as federally funded voucher programs are concerned, the Mayor’s Office of Homeless Services (MOHS) is the designated lead agency for the Continuum of Care program and works on implementing federal, state and local policy and best practices. <https://homeless.baltimorecity.gov/about-1> and 24 CFR Part 578. Baltimore City Continuum of Care (CoC) is a collaborative body that promotes community-wide commitment to the goal of making homelessness rare, brief, and non-recurring in Baltimore City. The CoC is organized to carry out responsibilities assigned by the [Department of Housing and Urban Development's (HUD) CoC Program](https://www.hudexchange.info/programs/coc/) and coordinates available resources and stakeholders' efforts. <https://journeyhomebaltimore.org/baltimore-city-continuum-of-care/> and 24 CFR Part 578. Each year HUD competitively awards homeless services funding through the CoC Program. Continuum of Care Program funds may be used in most cases for projects under three program components: permanent housing, supportive services only, and HMIS. These funds are competitively awarded both at the local level and national level.  Over 75% of the annual CoC project funding to Baltimore City is allocated to permanent supportive housing programs, which provide permanent housing subsidies coupled with supportive services to people who are chronically homeless. Id.

 Between the State and federal laws giving authority to HABC and MOHS/CoC, there does not seem to be authority or opportunity for another voucher program. Not only is there a lack fo authority in the City Council to operate a voucher program, it would seem unlikely that such a program could obtain adequate funding to ensure the ability to sustain funding for vouchers over an extended period of time. In conclusion, although the City Council can in general create a department or office it may not do so if, there is not authority for the office perform the desired function.

**Source of Funding**

 Section 4-11 of the bill provides for program funding. That section states that the Program will be funded by an annual disbursement from the Affordable Housing Trust Fund of at least 1.3 million. This type of mandatory appropriation in a city council bill is not authorized for several reasons. First, The City Council has power to appropriate funds to a specific purpose in a bill. Appropriations can only be accomplished pursuant to the procedures in the Charter for the Ordinance of Estimates or a supplementary appropriation. See Art. VI, Sec. 2, 8 and 9.

 Furthermore, there is a mandate in the Charter for the disbursement of AHTF. Art. I, Sec.14(d)(5) gives the AHTF Comm. the authority to make “ recommendations, advise, and consult with the Department of Housing and Community Development regarding the establishment of essential policies, rules, and regulations relating to the implementation, expenditures, and ongoing operation of the trust fund.” Pursuant to this authority, the AHTF has in cooperation with HCD, made recommendations on spending priorities. There was no priority set to fund the Office to End Homelessness. The Office will have to apply to the AHTF for funding pursuant to the process set by the AHTF and ultimately approved by HCD.

**Additional Legal Issues**

 Section 4-19 of the bill provides that the Office may issue a request for proposals and subsequently contract with housing provider for project-based programs. Depending on the circumstances, the Office may be able to issue a request for proposals (RFP). The Office , however, contract with the housing provider. The Office is not a legal entity onto itself. The Mayor and City Council is the body that has the legal authority to enter into contracts. Most contracts would also require Board of Estimates approval.

 Section 4-22(A) purports to establish conditions under which housing assistance may be terminated. Section 4-22(B,) however, states that termination is reserved for the most severe and egregious violations of 4-22(A). This section is vague and subjective and does not give a person adequate notice of what would be a violation of the law and vests unguided discretion in the Office which amounts to an illegal delegation of legislative authority to the Office. The grounds for termination in (A) should be revised to state with clarity the circumstances under which termination of assistance payments would take place. For example, Sec. 4-222(A)(1) should be revised to designate what lease violations are considered serious and how many violations have to occur to trigger eviction and therefore qualify the situation for subsidy termination.

 Section 4-26 purports to delegate to a hearing officer authority to propose final decisions at various stages of a hearing on a violation. This is an improper delegation because it allows someone other than the executive director to exercise discretion with respect to decision-making under the law with no standards to guide that discretion. One option to remedy this issue would be to strike “or final” on page17, line 30 and on page 18 lines 1 thru 3 and strike line 4 in its entirety. A provision should then be added to give the Executive Director final decision-making authority after reviewing the recommendations of the hearing officer.

 In Sections 4-27, there is a statement that a hearing will be conducted in an informal manner. Sec. 4-28 goes on to say that formal rules of evidence and trial procedures do not apply. Sec. 4-28 (B), however, provides that “on a genuine issue of fact a party is entitled to call witnesses offer evidence cross-examine witnesses and provide arguments. Sec. 4-28(C) further states that the hearing officer may admit probative evidence, exclude evidence, recognize privilege or exclude evidence that is incompetent, irrelevant, immaterial or unduly repetitious. These sections are inconsistent with the provision that states that formal rules of evidence do not apply. Finally, in Sec. 4-29 regarding the making of a record of the proceedings, it is sufficient to say that the record shall consist of the transcript of the proceedings and the documents. Informal proceedings will not generate the information listed in Sec. 4-28(B).

 Section 5 of the bill provides that the current individual holding the position of Director of the MOHS when this ordinance is enacted shall assume the position of Executive Director of the Office. The City Council has no authority to compel an employee of an office within the Mayor’s Office to take on a different position. The Mayor’s Office of Homeless Services is not abolished and continues to operate pursuant to its federal mandate with respect to the CoC.

 Based on the foregoing analysis, the Law Department cannot approve the bill for form and legal sufficiency. Please do not hesitate to contact me if you have any questions.

 Sincerely yours,

 

 Elena R. DiPietro

 Chief Solicitor

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