

CITY OF BALTIMORE

BOARD OF ESTIMATES

Room 204, City Hall
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May 6, 2020

Honorable President and Members
of the City Council

Ladies and Gentlemen:

On May 6, 2020, the Board had before it for consideration the following pending City Council Bills:

19-0465 - An Ordinance concerning Port Covington District and Port Covington Community Benefits District Management Authority For the purpose of creating a community benefits district for Port Covington; specifying the boundaries of the district; creating a community benefits district management authority and providing for its rights, duties, and powers; providing for the selection and composition of the Authority's Board of Directors; designating the initial interim board of the authority and providing for the selection and approval of a full board, including authority to establish up to three classes of board memberships with certain approval rights granted to each class; creating the administrator for the authority and approving a potential administrator; mandating the financial responsibilities of the Authority and the City in conjunction with the operation of the district; providing for a supplemental tax to be collected for the Authority; authorizing the creation of separate classes and subclasses of property for the purpose of establishing different rates of supplemental tax; authorizing the creation of credits to facilitate a diverse residential mix; incorporating the assessment, collection and enforcement process for the supplemental tax within the procedures and processes already existing;

CITY COUNCIL BILLS: - cont'd

enhancing existing services; encouraging the creation of partnerships between and among the Authority, the City, the state, the federal government and other property owners not subject to the supplemental tax; establishing the Board of Estimates as the agency charged with reviewing and approving various matters relating to the district and the Authority; providing for the renewal, expiration, termination and approval of the District and the Authority; otherwise providing for the existence, operation and control of the District and the Authority; and providing for a special effective date.

Assuming the Board of Estimates has proposed the Authority for this district, this bill must "provide procedures for a special election" to approve this ordinance "which may be administered by write-in ballots" and "provide criteria for the eligibility of voters" for that special election. Charter, Art. II, §(63)(k).

This bill must also address all of the following:

- (1) specify the powers and functions within the limits of this section, which may be exercised and conducted by the Authority and the amount of taxes or charges which may be imposed on properties in the district.
- (2) specify the duration of the Authority and define the boundaries of the district.
- (3) provide for the imposition and collection of the taxes or charges and for disbursement of the revenue therefrom to the Authority. The financial plan of the Authority, including its annual budget and its tax rate and schedule of charges, shall be subject to approval by the Board of Estimates. Taxes and charges imposed under this paragraph may not exceed those proposed by the Authority.

CITY COUNCIL BILLS: - cont'd

- (4) determine the organization and method of initial appointment of officers and board members of the Authority. The majority of the members of the board shall be owners or representatives of owners of properties in the district that are subject to taxes or charges under this section. A voting member of the board must be eligible to vote in the election under subsection (j) {subsection (k)} of this section.
- (5) determine what classes of property in the district owned by public service companies as defined in Article 78 of the Annotated Code of Maryland {now, Public Utility Companies Article} shall be subject to or exempt from taxes or charges under this section.

Charter, Art. II, §(63)(c). This bill provides for all of these things.

There are certain functions that a Community Benefits District and its management Authority may NOT be allowed to do:

- (1) exercise any police or general powers other than those authorized by State law and City ordinance;
- (2) pledge the full faith or credit of the City;
- (3) impose taxes or charges in excess of those approved by the Board of Estimates;
- (4) exercise the power of eminent domain;
- (5) extend its life without the approval of the City Council;
- (6) except as otherwise provided by law, engage in competition with the private sector;

CITY COUNCIL BILLS: - cont'd

- (7) except as otherwise provided in subsection (i) {subsection (j)} of this section, revert charges or taxes collected pursuant to this section to the General Fund of the City;
- (8) be an agency of the Mayor and City Council of Baltimore or the State of Maryland and its officers and employees may not act as agents or employees of the Mayor and City Council of Baltimore or the State of Maryland;
- (9) employ individuals who reside outside the City of Baltimore; and
- (10) except as required or appropriate to facilitate its normal operations, incur debt.

Charter, Art. II, §(63)(e).

There are several areas in which the language of the bill exceeds the legislative authority given to the Mayor and City Council by the General Assembly or otherwise is inadequate. Thus, amendments are needed to make the bill legally sufficient.

First, the language in Section 10-4(B)(1)(III) allowing for the Authority to lease property "for fees and the participation in revenues from such leasing" is not permitted under Section (63)(e)(6) of Article II of the City Charter that prohibits competition with the private sector, unless otherwise permitted by law. Clearly, the law that can permit the Authority to lease property cannot be the ordinance enacted by the City Council, as that would render the Charter's prohibition on private sector competition to be superfluous. See, e.g., *Thomas v. Police Commissioner of Baltimore City*, 211 Md. 357, 361 (1956) ("It is a hornbook rule of statutory construction that, in ascertaining the intention of the Legislature, all parts of a statute are to be read

CITY COUNCIL BILLS: - cont'd

together to find the intention as to any one part and that all parts are to be reconciled and harmonized if possible."). An amendment to remove lines 10-11 on page 4 is attached to this report.

Next, the language in Section 10-4(B)(6) regarding assurances for payments of debts past the life of the Authority must be removed as it would be unable to offer assurances that extended beyond its own life, over which only the Mayor and City Council has control. Charter, Art. II, §(63)(h). The payment of funds by the Authority past the life of the Authority is inconsistent with the requirement that any funds unspent after the Authority dissolves must be returned to the Mayor and City Council of Baltimore. Charter, Art. II, §(63)(j). This would capture all of the Authority's funds, not just those raised by the Special Tax revenues. An amendment is attached to this report to remove this language. Alternatively, the language could be amended to clarify that the assurances must be provided by a person or entity other than the Authority.

The Authority would also have no power to "establish and enforce rules and regulations" for the use of public or private property within the district as that would amount to the exercise of police power that has specifically been denied to the Authority. Charter, Art. II, §(63)(e)(1). Even when the Mayor and City Council delegates regulatory authority to its agencies-which this Authority is clearly not under Section (63)(e)(8) of Article II of the City Charter- courts are clear that such authority must have legislative guidance. See, e.g., Maryland Theatrical Corp. v. Brennan, 180 Md. 377, 385 (1942) ("uncontrolled discretion of an administrative official...is not permitted under the police power."). An amendment is attached to this report to remove Section 10-4(B)(7).

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Additionally, the Charter explicitly forbids the Authority from assessing charges against properties that are tax exempt. Charter, Art. II, §(63)(d)(7). Thus, the language in Section 10-4(B)(8) that provides the Authority could impose such charges must be removed. An amendment is attached to this report.

The language used in Section 10-4(B)(11) is not an exact phrasing of what the City Charter requires concerning minority and women's business enterprises so the language should be changed to mirror the Charter's language. Charter, Art. II, §(63)(d)(10). An amendment to align the bill's language with the Charter's language is attached to this report.

This City Council bill, which when passed would be a local law, should not require an employee of an Authority to sign an affidavit as a condition of employment as that could be seen as compelled speech under the First Amendment to the United States Constitution. U.S. Constitution, amend. I; *Janus v. AFSCME*, 138 S.Ct. 2448, 2463 (2018) ("The First Amendment, made applicable to the States by the Fourteenth Amendment, forbids abridgment of the freedom of speech. We have held time and again that freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all."); accord *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) ("'Since all speech inherently involves choices of what to say and what to leave unsaid,'...one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say'" (citation omitted). More importantly, the requirement for the affidavit is not necessary as all other Community Benefits Districts enacted under the powers of Section (63) of Article II are subject to the same employment restraint in Section (63)(e)(9) of

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Article II of the City's Charter and none of their enabling ordinances require an affidavit. Charter, Art. II, §(63)(e)(9). Rather, the Charter simply requires that a Community Benefits District hire only those employees who live in the City and discharge those employees if and when they move outside of the City. Thus, the Law Department recommends deleting Section 10-5(B)(9) to avoid any First Amendment issues by placing a speech requirement in a City ordinance. An amendment to remove this language from the bill is attached.

Next, Section 10-5(B)(11) should be amended to remove the language ", or if more restrictive," from line 2 on page 7 so as to make clear that the Authority cannot exercise any powers that are withheld under the terms of the Charter or the ordinance, regardless of which one is more restrictive. In other words, even if a Charter provision withheld some power, and the ordinance further defined that restriction, both would be operative as the ordinance could never conflict with the Charter. Charter, Art. III, §11. This confusing language appears in other Community Benefits District ordinances but it remains unhelpful. An amendment to remove this language is attached. The bill could also be amended to remove all of Section 10-5(B)(11) as it is merely a statement of statutory construction that is not required.

In Section 10-6(C)(2) on page 7, line 21 of the bill, the word "each" should be inserted instead of the word "any" to be clear that each councilmember whose district falls within the Benefits District is to be a member of the Board of Directors. An amendment is included with this report.

Additionally, changes are required Section 10-6(C)(4) requiring a member of the Board be a representative "of the residents, when a residential project is developed in the District." This is unworkable because it is unclear at what point in the development such a member

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would be required on the Board. Similarly, it is unclear what is meant by a "residential project." Also, Section 10-6(C)(7) should be deleted because it is merely a suggestion and does not restrict or inform qualifications for membership. The language in Subsections (C)(4) and (C)(7) risk being interpreted as void for vagueness. 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, 2561 (2015) (just because there may be "some conduct that clearly falls within the provision's grasp" does not cure an otherwise vague law). An amendment to simply require one resident member is attached to this bill. Alternatively, the Mayor and City Council could simply eliminate resident membership in the Board or determine a set number of residents to be on the Board. The amendment also eliminates Section 10-6(C)(7), which although it is present in the Charles Village Community Benefits District language, is confusing as it is the only enumeration in Section 10-6(c) that is not a qualification for board membership.

Next, the language in Section 10-7(B) should be amended to remove the portion of the language that does not apply to every annual financial plan. The provisions for liability contemplated in Section 10-7(B) are already properly located in the uncodified Section 2 of the bill. An amendment is attached to the bill report.

The word "approve" in line 7 on page 9 should be changed to "implement" to align it with the Charter requirement that the Board of Estimates approves the Financial Plan and then the Authority is restricted from implementing any taxes or charges in excess of any approved amounts. Charter, Art II., §(63)(c)(3). Amendment language is attached to this report.

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Language is needed to clarify Section 10-8(A)(2)(II). If the intent is to exempt specific types of properties, then those must be enumerated. Charter, Art II., §(63)(c)(5). An amendment to this language is attached to this report but it should be modified as necessary to clarify the intent of this exemption section.

The Charter does not authorize a Community Benefit District to have different rates of Supplemental Tax. Charter, Art. II, §(63)(c)(3). Without such explicit authorization, the City may not pass an ordinance to allow for multiple rates. 91 Md. Op. Atty. Gen. 152, 155 (2006) ("A local government may not impose any type of charge, regardless of whether it is designated a tax or a fee, without the authorization of the General Assembly.") (citing the Maryland Declaration of Rights, Article 14). Rather, the Charter is clear that the Financial Plan for a District include "its tax rate and schedule of charges." Charter, Art. II, §(63)(c)(3) (emphasis added). While there may be multiple types of charges, there can only be one tax rate. The interpretation of "rate" in the context of taxes to mean only one rate, and not to include the plural "rates," has been established by Maryland Courts. See, e.g., Rosecroft Trotting and Pacing Assn., Inc. v. Prince George's County, 298 Md. 580, 593 (1984). An amendment to remove these sections is attached to this report.

Finally, an amendment is needed to clarify the voting eligibility in Section 10-15(B). If the owner of each tax parcel within the District is entitled to one vote per tax parcel, the language in Sections 10-15(B)(1)(I) could be read as superfluous and redundant. Moreover, it is unclear if the Public Service Companies owning ancillary assets are entitled to a vote because of the ownership of that asset regardless of whether that asset is located on a tax parcel it owns. An amendment is attached to this report that attempts to clarify the likely intended meaning of this Section.

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In addition to these required amendments, it is worth noting that Section 10-4(B)(3) proposes the Waterfront Partnership of Baltimore, Inc. as a possible administrator of the Authority. This is currently not possible as the Articles of Incorporation of the Waterfront Partnership of Baltimore, Inc. provide that it is geographically limited to the City's Harbor area. Until the Board of Directors of the Waterfront Partnership of Baltimore votes to amend its Articles of Incorporation, the Waterfront Partnership of Baltimore would not be able to administer an area outside of the City's Harbor.

It is also worth noting that while the bill references "all provisions of federal, state and local law limiting the liability of directors, employees, officers, agents and officials of governmental bodies," the Authority will not be such a body. As Maryland's highest Court has explained, it is a public corporation. *Floyd v. Mayor and City Council of Baltimore*, 407 Md. 461, 487-8 (2009). This mischaracterization, however, does not impact the application of the Local Government Tort Claims Act. *Id.*; Md. Code, Cts. & Jud. Proc., § 5-301(d)(13)

In considering this bill as a proposed new Community Benefits District, the City Council must do three things:

- (1) give consideration to the views of the property owners, the retail merchants, the property tenants, and the other members of the business and residential communities within the district;
- (2) make a determination that a district created under this section will reflect a diverse mix of business and residential properties; and
- (3) make a determination that a district created under this section will reflect a diverse economic, social, and racial mix.

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Although the bill provides in Section 10-1(B) that such things have been considered, it is best if, at the hearing, the committee considers the business and residential community views and makes the two determinations listed above.

Once established by the special election, the Authority is a public corporation with the power to "promote and market districts, provide supplemental security and maintenance services, provide amenities in public areas, provide park and recreational programs and functions." Charter, Art. II, §(63)(a)(2). The Authority may request additional powers from the Mayor and City Council via ordinance. The Authority's continued existence must be reauthorized every four years. 1997 Md. Laws ch. 655; 2000 Md. Laws ch. 89 (codified in City Code, Art. 14, §6-16); see also 2003 Md. Laws ch. 475.

AMENDMENTS TO COUNCIL BILL 19-0465

Proposed by: Law Dept.

{To be offered to the Housing and Urban Affairs Committee}

Amendment No. 1

On page 4, in lines 10 and 11, delete "(III) THE LEASING OF SPACE AND STRUCTURES FOR FEES AND THE PARTICIPATION IN REVENUE FROM SUCH LEASING."

Amendment No. 2

On page 4, in line 32, delete beginning with the comma through the period in line 34 and substitute a period.

Amendment No. 3

On page 5, delete lines 1 through 3.

CITY COUNCIL BILLS: - cont'd

Amendment No. 4

On page 5, delete beginning with the comma in line 8 through the end of line 11.

Amendment No. 5

On page 5, in lines 22 through 25, delete "NONETHELESS SHALL BE SUBJECT TO APPLICABLE ORDINANCES REGARDING CITY POLICY ON ENCOURAGING AND ACHIEVING GOALS FOR PARTICIPATION OF MINORITY AND WOMEN'S BUSINESS ENTERPRISES IN THE CONTRACTING ACTIVITIES" and substitute "SHALL BE SUBJECT TO CITY ORDINANCES AND CITY POLICY REQUIRING ACHIEVEMENT OF GOALS REGARDING MINORITY AND WOMEN'S BUSINESS ENTERPRISES"

Amendment No. 6

On page 6, delete lines 28 through 32.

Amendment No. 7

On page 7, in line 2, delete "EITHER," and delete ", IF MORE RESTRICTIVE,".

Amendment No. 8

On page 7, in line 21, delete "ANY" and replace with "EACH"

Amendment No. 9

On page 7, in line 25, delete "REPRESENTATIVE OF THE RESIDENTS" and replace with "RESIDENT" and in lines 25 and 26 on page 7, delete ", WHEN A RESIDENTIAL PROJECT IS DEVELOPED IN THE DISTRICT"; and delete lines 1 through 3 on page 8.

Amendment No. 10

On page 8, in line 32, delete "IF THE AUTHORITY IS" and delete lines 32 through 34 on the same page.

CITY COUNCIL BILLS: - cont'd

Amendment No. 11

On page 9, in line 7, substitute "IMPLEMENT" for "APPROVE."

Amendment No. 12

On page 9, in line 16 delete the colon; and on

the same page in line 17 delete "(I)" and ";" and insert a period at the end of line 17; and on the same page delete line 18.

Amendment No. 13

On page 10, delete lines 6 through 16.

Amendment No. 14

On page 15, delete lines 19 through 27 and substitute:

- (1) Each real property tax parcel is entitled to one vote to be exercised by the owner of that real property tax parcel.
- (2) Any Public Service Company that owns one or more fixtures or Ancillary Assets described in Section 10-8(D) is entitled to one vote regardless of how many fixtures or Assets are owned. This is in addition to, and not in substitution for, any votes that the Company is entitled to by virtue of Subsection (1), above.

THE LAW DEPARTMENT APPROVES THIS BILL FOR FORM AND LEGAL SUFFICIENCY SO LONG AS THE FOREGOING AMENDMENTS ARE INCLUDED.

ASSUMING IT IS ENACTED BY THE MAYOR AND CITY COUNCIL, IT DOES NOT BECOME LAW UNLESS AND UNTIL FIFTY-EIGHT PERCENT OF THE DISTRICT APPROVES IT IN A SPECIAL ELECTION.

ALL OTHER REPORTS RECEIVED WERE FAVORABLE.

CITY COUNCIL BILLS: - cont'd

20-0484 - A Resolution of the Mayor and City Council concerning Midtown Community Benefits District and Management Authority - Renewal Through June 30, 2024 for the purpose of renewing and continuing the Midtown Community Benefits District and Management Authority; providing for a special effective date; and generally relating to the activities and authority of the Midtown Community Benefits District and Management Authority.

ALL REPORTS RECEIVED WERE FAVORABLE.

After NOTING AND CONCURRING in all favorable reports received, the Board approved the aforementioned City Council Bills and referred them to the City Council with the recommendation that they be approved and passed by that Honorable Body.

The Mayor **ABSTAINED** from voting. The President **ABSTAINED** from voting.

Sincerely,

 MAY 06 2020

Joan M. Pratt
Secretary to the Board of Estimates