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MAYOR

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SB 869

March 3, 2022

TO: Members of the Senate Education, Health, and Environmental Affairs Committee

FROM: Natasha Mehu, Director, Office of Government Relations

RE: SB 869 -Baltimore City - Small Box Discount Stores - Zoning Requirements and Community Agreements

POSITION: LETTER OF INFORMATION

Chair Pinsky, Vice Chair Kagan, and Members of the Committee, please be advised that the Baltimore City Administration (BCA) is submitting a letter of information on Senate Bill 869.

Senate Bill 869 requires the City to make small box stores conditional based on analysis of 1) economic harm to adjacent properties; 2) proximity to grocery stores or healthy food retailers and 3) impact on business diversity. The bill is prospective in that it addresses future locations for dollar stores, but does not address the perceived impacts of these stores already located in Baltimore neighborhoods. We understand the intent of the sponsor is to address the concentration of dollar stores and the problems associated with them in the City. We commend her intent and are committed to working with her to address those issues.

The BCA recognizes the controversial nature of dollar stores, and the detrimental impact they can have on urban communities. These impacts are nationally well-documented and a source of local concern, especially since dozens of dollar stores currently exist within Baltimore City. Controversy aside, Baltimore City dollar stores provide goods at affordable prices to many Baltimore neighborhoods and provide jobs for City residents. Many Baltimoreans choose to shop at dollar stores because they provide the only nearby options for critical goods and groceries and/or they offer goods at less expensive prices relative to traditional grocery stores.

The City zoning code already restricts certain uses to conditional use only -- big box stores for example -- and has situations where economic impact analysis is required (big box stores), or where the density of certain operations is restricted (liquor stores), so a bill for small box stores that use these strategies is not inconsistent with existing policy. However, efforts to address the concentration of dollar stores in Baltimore City need to carefully balance the benefits and detrimental impacts the stores have on our communities.

The BCA supports the use of independent, data-based analysis to support proposed changes in zoning, and in the particular case at hand, it would be extremely beneficial for an independent analysis of the economic harm of Dollar Stores on grocery stores and/or communities to be in place prior to imposing restrictions on them, so that the restrictions can be appropriately tailored to the harm they cause. As written, however, this bill does not call for such independent analysis and imposes very broad conditions that must be met to obtain a conditional use. While deferring to the local jurisdiction on these matters is appropriate, it handcuffs the City's ability to craft appropriate restrictions by pre-determining the specific conditions under which a store could be approved.

Moving forward without such an analysis on zoning and land use can lead to legal concerns and unintended consequences. Zoning and land use regulation changes often raise constitutional concerns over the reasonableness of the regulation – namely whether there is a real and substantial relation to the objects and purposes intended. State courts often note that regulation must have a real and substantial relation to the objects and purposes intended to be furthered, in view of existing conditions in the community and the physical characteristics of the area and particular tract of land involved. This type of arbitrary and capricious due process challenge has been successful in a wide variety of contexts and in regard to most types of zoning restrictions.

Equal Protection and Commerce Clause concerns are also often raised. Generally, under an equal protection analysis, so long as there is "some rational basis" for different treatment of similar land uses, a zoning classification or restriction will be upheld. Under the dormant Commerce Clause, a law cannot discriminate against companies that come from outside the town, city, or state, and the purpose behind the law cannot be to protect local merchants from unfair competition, or even to protect the local economy from out of state business competition, nor can it single out an unwanted retailer. Finally, "a zoning enabling act authorizes as the proper object of regulation only the use of the land itself and therefore, courts have held zoning controls on the details of an owner's operation are ultra vires. An important rationale in many cases applying this ultra vires principle is that established businesses should not, merely by being first in time, receive undue advantage from zoning.

As for unintended consequences, the bill seeks to separate one type of store from all others. The BCA would need to amend the zoning code to create a new land use definition, and then assign it to the various districts where it is to be permitted (or not). While we understand the desire is to target a specific group of retail brands, it's important to note that such changes will also affect other businesses of the same size, regardless of ownership. This would lead to the unintended consequence of non-targeted businesses being impacted by the bill. The proposed distance standards are also not without controversy. As they could have the effect of zoning out the land use functionally or entirely. There have been problems with establishing distance standards for other kinds of uses, such as adult entertainment establishments.

One of the proposed mechanisms to gain a conditional use – a required community agreement – is unprecedented in the City code. We are concerned about the legality, practicality, and fairness of this approach. Community associations and other community-based nonprofit incorporated entities can do this, but communities are not the same thing. Communities are often difficult to define and are composed of hundreds of individuals as well as places of worship, businesses, schools, and nonprofits. We are also concerned about this approach, if approved, being applied to future business types that certain communities may find objectionable now or in the future, e.g. fast-food restaurants, gas stations, or novel business models not yet in existence. The existing conditional use processes through BMZA and City Council provide multiple opportunities for

community input and, in some cases, may require a community agreement to be put in place, but to require one as a prerequisite to use causes us major concern.

Zoning is a broad set of rules, whereas a license can target a specific applicant that does not meet specific rules or requirements. We see attempts to use the zoning code for a wide variety of things because it's the most easily visible regulation, but most often it's the wrong tool for the job. A better, more precise tool for regulating target businesses may be the creation of a specific business license. The BCA is committed to working with the sponsor to address the issue in the most appropriate way possible.

Sincerely,

A handwritten signature in brown ink, appearing to read "Natasha Mehu", with a long, sweeping underline.

Natasha Mehu

Director

Mayor's Office of Government Relations (MOGR)