BERNARD C. "JACK" YOUNG
MAYOR

Office of Government Relations
88 State Circle
Annapolis, Maryland 21401

SB 368

February 12, 2020

TO: Members of the Senate Judicial Proceedings Committee

FROM: Nicholas Blendy, Deputy Director of Government Relations

RE: Senate Bill 368 – Courts – Prohibited Indemnity and Defense Liability Agreements

POSITION: OPPOSE

Chair Smith, Vice Chair Waldstreicher, and Members of the Committee, please be advised that the Baltimore City Administration (BCA) **opposes** Senate Bill (SB) 368.

SB 368 amends current prohibitions against indemnity agreements in the Court and Judicial Proceedings Art. Sec. 5-401 by adding a paragraph that declares void and unenforceable provisions requiring design professionals to indemnify or hold harmless the promisee, the promisee's independent contractors, agents, employees or indemnitees or any other person against loss, damages or expenses unless the fault of the design professional or it's derivative parties is the proximate causes of the loss, damage or expense indemnified.

It also declares provisions requiring design professionals to defend a promisee and their independent contractors, agents, employees, or indemnitees against liability or claims for damages or expenses, including attorney's fees, alleged to be caused in whole or in part by the professional designer's own negligence or its derivative parties' negligence, whether the claim is alleged or brought in tort or contract, to be against public policy and void and unenforceable.

The BCA expends millions of dollars each year on construction projects and hires many "design professionals," such as architects and engineers. This bill expands current law making indemnification and hold harmless provisions void unless the City can prove that the design professional's negligence was the proximate cause of the damages. In addition, the bill declares all duty to defend provisions void and unenforceable. The

provisions of this bill are clearly contrary to "the public policy of freedom of contract" in Maryland. *Adloo v. H.T. Brown Real Estate, Inc.*, 344 Md. 254, 259 (1996).

In the typical case scenario, the City is the defendant because, as landowner, it owes a duty to the third party plaintiff who is the injured party. The City's contractor, the design professionals who are present or in control of the location, owe no duty to Plaintiff. Part of the consideration for the contract is the protection provided by the indemnification clause. The City's standard indemnity clause provides as follows:

> The Contractor shall indemnify, defend, and hold harmless the City, its elected/appointed officials, employees, agents, and volunteers from any and all claims, demands, suits, and actions, including attorneys' fees and court costs, connected therewith, brought against the City, its elected/appointed officials, employees, agents, and volunteers, arising as a result of any direct or indirect, willful, or negligent act or omission of the Contractor, its employees, agents, or volunteers, EXCEPT for activities caused by the sole negligent act or omission of the City, its elected/appointed officials, employees, agents, and volunteers arising out of this Contract.

Paragraphs 4 and 5 of the legislation render the City's indemnity clause void and unenforceable. The City would always bear the burden of defending plaintiff's claim and would have to sue the design professional and prove that the design professional's negligence was the proximate cause of plaintiff's injury. Instead of assisting counsel provided by the design professional's insurer in defense of the claim, we would have to prove plaintiff's case for them against design professional. The City would run the risk of alienating design professionals because we would have no alternative but to sue them. The design professionals possess the evidence and have operational control of the City's premises with ability to prevent negligent conditions and are uniquely positioned to assist in the defense of claims.

Paragraph 6 is somewhat unclear. It seems to suggest that there would remain some types of "enforceable" indemnity or hold harmless agreements. However, the previous provisions of the bill state that all such provisions are void and unenforceable, which seems apposite to the main thrust and purpose of the bill as a whole.

The BCA has significant concerns that SB 368 would: restrict the City's ability to contract; make the design professional and City antagonists in all third party claims; require that the City prove a plaintiff's case against the design professional; and relieve the party in the best position to defend the case of the obligation to defend and indemnify.

Put simply, if enacted, SB 368 would expose the City to liability that it is currently shielded from by indemnification provisions in its contracts.

We respectfully request an **unfavorable** report on Senate Bill 368.