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February 16, 2023

The Honorable Marlon Amprey
Maryland General Assembly
315 House Office Building
Annapolis, Maryland 21401
Via email

Re: *House Bill 474, "Sale of Residential Real Property - Offers to Purchase and Transfer Tax"*

Dear Delegate Amprey:

You asked whether House Bill 474 raises any constitutional issues. The bill limits residential home sales to specified persons for the first 30 days after the property is offered for sale. The bill also raises the transfer tax for specified entities. As explained below, it is my view that the bill is constitutional.

I first considered whether the following provision is an unlawful restraint on alienation, which is a restriction on the transfer or conveyance of property.

- (B) (1) THIS SECTION APPLIES ONLY TO THE SALE OF IMPROVED, SINGLE-HOME RESIDENTIAL REAL PROPERTY.
(2) THIS SECTION DOES NOT APPLY TO A SALE IN AN ACTION TO FORECLOSE A MORTGAGE, A DEED OF TRUST, OR ANY OTHER LIEN.

- (C) DURING THE FIRST 30 DAYS AFTER A PERSON OFFERS A PROPERTY SUBJECT TO THIS SECTION FOR SALE TO A THIRD PARTY, THE PERSON MAY ACCEPT ONLY AN OFFER TO PURCHASE THE PROPERTY MADE BY AN INDIVIDUAL, A COMMUNITY DEVELOPMENT ORGANIZATION, A NONPROFIT ORGANIZATION, OR A REAL ESTATE ENTERPRISE THAT OWNS AN INTEREST IN LESS THAN 10% OF ALL RESIDENTIAL REAL PROPERTY LOCATED WITHIN THE COUNTY IN WHICH THE PROPERTY IS LOCATED.

The Court of Appeals has adopted the common law rule that an unreasonable restraint on the property owner's ability to transfer the property is invalid, unenforceable, and void as a matter of law. *R.H. Macy & Co. v. May Dept. Stores Co.*, 337 Md 323, 325 (1995). Nevertheless, the common law does not prohibit the General Assembly from imposing limits. *See, e.g., Williams v. First Fed. Sav. & Loan Ass'n of Arlington*, 651 F.2d 910, 924 (4th Cir. 1981) (concluding that due-on-sale clause, even if it can be said to create a restraint on alienation, has been "validated by the Virginia legislature"); *Fernandez v. American Sav. & Loan Assn.*, 159 Cal. App. 3d 667, 673 (Ct. App. 1984) ("We are likewise cognizant of the Legislature's power to override the general prohibition against restraints on alienation ... by granting a particular agency statutory authority to restrain alienation in ways an ordinary lender may not."). It is well established that the General Assembly has plenary power to enact any law for any purpose of civil government, subject only to the limitations of the State and federal constitutions. *Richards Furniture Corp. v. Board of County Commissioners*, 233 Md. 249, 257 (1963); *Maryland Committee v. Tawes*, 228 Md. 412, 439 (1962). Thus, there is a strong argument that the General Assembly is within its power to limit home sales to specified persons for the first 30 days.

Moreover, even if a reviewing court were to apply the reasonableness test, based on the information you provided in support of the bill, the proposal would pass the test. The factors used to find reasonableness include that "the one imposing the restraint has some interest in land which he is seeking to protect by the enforcement of the restraint; the restraint is limited in duration; the enforcement of the restraint accomplishes a worthwhile purpose; [and]... the number of persons to whom alienation is prohibited is small." *R.H. Macy*, 337 Md. at 332.

Your research showed that one out of six homes are being purchased by investors.

Large investor purchases of single-family homes and conversion into rental properties speeds the transition of neighborhoods from homeownership to rental and drives up home prices for lower cost homes, making it harder for aspiring first-time and first-generation home buyers, among others, to buy a home. At the same, these purchases are unlikely to meaningfully boost supply in the lower-cost portions of the rental market, as investors charge more for rent to recoup higher purchase costs.

Lily Katz and Sheharyar Bokhari, "Investor Home Purchases Hit Record, Surpassing Pre-Pandemic Levels," *Redfin News* (July 22, 2021). Thus, your bill seeks to make more homes available to individuals, families, and non-profit organizations. Additionally, the bill has a limited duration of 30 days.

I next considered whether the provision is an unconstitutional impairment of a vested property right. In *Muskin v. State Dept. of Assessments & Taxation*, the Court made clear that “[t]ogether, Maryland's Declaration of Rights and Constitution prohibit the retrospective reach of statutes that would have the effect of abrogating vested rights.” 422 Md. 544, 555 (2011). In *Muskin*, the Court considered the constitutionality of legislation that required ground rent owners to register by a certain date and if an owner failed to do so, SDAT would divest the reversionary interest of the ground rent owner and cancel the owner’s right to receive future ground rent from the leaseholder. The Court held that the settled expectations of ground rent owners does not lie solely in future rents, but rather “[g]round rent owners rely reasonably on the future income from ground rents or the ability to sell the fee simple interest on the open market or in the future, if necessary.” *Id.* at 558. Accordingly, the Court declared that extinguishment of the ground rent owner’s property right violated the constitutional prohibition on taking of private property without just compensation.

Here, however, the property owner’s interests are not extinguished nor physically taken. Moreover, the owner is not obligated to accept any offer during the first 30 days. While it may be remotely possible that an owner could show that a 30-day delay in a fully open sale so significantly impairs the owner’s right to sell it is a taking, it is very unlikely in my view.

Additionally, I considered whether the bill violates the equal protection rights of the entities precluded from making offers on single family homes for the first 30 days. A court considering the equal protection guarantees of the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights,¹ would apply a rational basis standard because the entities are not a suspect classification nor does the provision interfere with the exercise of a fundamental right. *See Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 547 (1983) (stating that statutes that do not interfere with the exercise of a fundamental right or employ a suspect classification “are valid if they bear a rational relation to a legitimate governmental purpose”).

A statute does not violate constitutional guarantees of equal protection merely because it treats property owners differently. To amount to a constitutional violation, the different treatment must be “without any reasonable basis and ... entirely arbitrary.” *Hooks v. Comptroller of Treasury*, 265 Md. 380, 389 (1972); *see also Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992) (explaining that “the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be

¹ The equal protection clause of the Fourteenth Amendment to the United States Constitution and the equal protection guarantee embodied in Article 24 of the Maryland Declaration of Rights are “*in pari materia* and generally apply in like manner and to the same extent,” though a violation of one is not necessarily a violation of the other. *Hornbeck v. Somerset Cty. Bd. of Educ.*, 295 Md. 597, 640, 458 A.2d 758, 781 (1983). Supreme Court decisions interpreting the federal constitutional provision have long been considered persuasive authority in cases involving Article 24. *Id.*

true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational”) (citations omitted).

For similar reasons, the higher transfer tax provision also does not violate the equal protection rights of the impacted real estate enterprises and their subsidiaries. “If on any imaginable factual basis, the ... legislature had a reason to distinguish between certain transactions, and thus to tax them somewhat differently, the classification will be upheld.” *Lane Const. Corp. v. Comptroller of Treasury*, 228 Md. 90, 97 (1962). The proposed higher transfer tax on transactions involving these entities would almost certainly withstand a challenge on equal protection grounds. *See, e.g., Nordheimer v. Montgomery Cty.*, 307 Md. 85 (1986) (county transfer tax applicable only to condominiums does not violate equal protection guarantees); *Vournas*, 53 Md. App. 243 (1982) (finding that a higher transfer tax rate imposed on transfers of certain farmland does not violate Fourteenth Amendment). A party challenging the tax would have the burden of showing that there is no reasonable basis for the classification.

Finally, I note that the higher transfer tax does not violate the uniformity requirement of Article 15 of the Maryland Declaration of Rights, which provides, in relevant part:

...that the General Assembly shall, by uniform rules, provide for the separate assessment, classification and sub-classification of land, improvements on land and personal property, as it may deem proper; and all taxes thereafter provided to be levied by the State for the support of the general State Government, and by the Counties and by the City of Baltimore for their respective purposes, shall be uniform within each class or sub-class of land, improvements on land and personal property which the respective taxing powers may have directed to be subjected to the tax levy

The uniformity requirement of Article 15 applies only to property taxes. *Weaver v. Prince George’s Cty.*, 281 Md. 349, 355 (1977); *Montgomery Cty. v. Waters Landing Ltd. P’ship*, 99 Md. App. 1, 18, *aff’d*, 337 Md. 15 (1994). As the transfer tax is an excise tax, not a property tax, it is not subject to the uniformity requirement of Article 15. *Vournas v. Montgomery Cty.*, 53 Md. App. 243, 250, *aff’d*, 300 Md. 123 (1984) (“The County transfer tax, as an excise tax, is not subject to the equality and uniformity requirements of Article 15 of the Maryland Declaration of Rights.”) (citing *Weaver v. Prince George’s County*, 281 Md. 349 (1977)); *see also Pittman v. Hous. Auth. of*

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Baltimore City, 180 Md. 457, 462–63 (1942) (“A tax imposed upon the recording of a deed, even though computable on the amount of the consideration, is not a tax on property but a privilege tax imposed upon the privilege of recording the deed.”).

For the foregoing reasons, it is my view that the proposed bill is constitutional.

Sincerely,

A handwritten signature in black ink, appearing to read "Sandra Benson Brantley". The signature is fluid and cursive, with a large, stylized initial "S" and "B".

Sandra Benson Brantley
Counsel to the General Assembly