



February 28, 2025

Re: Request for an UNFAVORABLE report on SB 883

Dear Members of the Judicial Proceedings Committee:

I write at this time to urge the Judicial Proceedings Committee to give SB 883 an unfavorable report. If passed, SB 883 would statutorily establish non-consensual towing liens against decades of precedent. It will also, very likely, end up the subject of litigation in State or Federal Court (or both) – forcing the State of Maryland, every County in the State and, potentially, each towing company implementing it – to defend the legislation in Court. In reality, non-consensual towing liens *in Maryland*, are not only unconstitutional in virtually every instance, there is no rational, cost-effective way to establish and implement them here.

First, there is no question that non-consensual towing liens are not only illegal in Maryland, they are also inherently anti-consumer. Maryland’s appeals Courts have consistently held that no possessory lien exists with respect to a towed vehicle at common law. *See T.R. v. Lee*, 55 Md. App. 629 (1983); *Cade, t/a G&G Towing v. Montgomery County*, 83 Md. App. 419, 427 (1990). The Office of the Attorney General (“OAG”) also has determined that such liens are illegal. *See* 73 Md. Op. Atty. Gen. 349 (Md.A.G.), 1988 WL 482024. Indeed, as recently as last year, the OAG, in a letter to then-Delegate Sara Love, pointed out the difficulties with proposed legislation similar to the bill currently before the Senate. *See* OAG Letter dated April 5, 2024, attached.

The sound public policy behind these and other opinions is that permitting towing companies, especially unscrupulous ones, to exercise a lien, encourages them to tow more vehicles because payment, whether the tow is proper or not, is guaranteed. In short, the lien essentially takes away the right of all consumers to challenge the tow as unlawful or predatory. At the same time, it also has an effect on commerce because consumers do not want to return to where they believe their vehicles were improperly towed and held for ransom.

Second, SB 883 is unconstitutional. In *Huemmer v. Mayor & City Council of Ocean City*, 632 F.2d 371 (4th Cir. 1980), the Fourth Circuit held that for a statute to authorize a lien on a vehicle towed from private property, the statute must provide **both** notice and a hearing or it is “manifestly defective” from a due process perspective:

The ordinance was manifestly defective, in that recovery of a removed vehicle was absolutely conditioned on payment of towing and storage charges. No opportunity was presented for notice and a hearing to establish whether or not the initial removal of the vehicle was rightful or wrongful.

Id. at 372. Since SB 883 provides for neither notice nor a hearing, it is “manifestly

defective” and, therefore, unconstitutional.

Nobody (except perhaps lawyers who charge by the hour) benefits when the Legislature enacts an unconstitutional law. Such legislation spawns endless litigation over its validity until, finally, the Maryland Supreme Court, or a Federal Court, declares what everyone already knows – that the law does not pass constitutional muster. Unconstitutional laws – like SB 883 – must not be enacted.

Third, even if SB 883 is amended to include a notice provision and an opportunity for a hearing, it will come at a substantial cost across the board. Towing companies and/or parking lot owners will have to pay for signage in sufficient numbers and size to put the public on notice of the asserted possessory lien. They will also have to establish a system to notify the owners of the vehicles within “one working day of the tow.” *De Franks v. Mayor and City Council of Ocean City*, 777 F.2d 185, 187 (4th Cir. 1985).

And whatever governmental entity is designated and required to provide the hearing will be forced to undertake a substantial expense. Since the Fourth Circuit is clear that the hearing must take place “***within twenty-four hours after a request***” for a hearing, 777 F.2d at 187, and currently no county in Maryland has such a process in place to provide the expedited hearing, the costs in each county will be significant since Judges, administrators and office space are all required. For virtually every jurisdictions, the fiscal impact will be prohibitive.

Respectfully,

Richard S. Gordon

Attachment: OAG Letter dated April 5, 2024

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STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 5, 2024

The Honorable Sara Love
Maryland General Assembly
210 Lowe House Office Building
6 Bladen Street
Annapolis, Maryland 21401
Via email

***RE: Senate Bill 107 – Commercial Law – Statutory Liens – Motor Vehicles Towed
or Removed From Parking Lots***

Dear Delegate Love:

You have requested advice concerning the constitutionality of a proposed amendment to Senate Bill 107 (“Commercial Law – Statutory Liens – Motor Vehicles Towed or Removed From Parking Lots”). It is my view that the bill, even with the proposed amendment, presents a significant risk of leading to a violation of the Due Process Clause because it does not provide the opportunity for a prompt hearing so that a person can challenge the legality and factual basis of the tow.

Senate Bill 107

Senate Bill 107 establishes “a lien on a motor vehicle if the person tows or removes the motor vehicle from a privately owned parking lot under Title 21, Subtitle 10A of the Transportation Article” for charges incurred for towing, recovery, storage, or notice provided. Proposed Md. Code Ann., Comm. Law, § 16-202(e). You have asked our Office to consider the constitutionality

of the bill, including the proposed amended language shown below, which requires certain signage and conditions the lien on the tow being legal.

(E) (1) IF A CLEARLY VISIBLE SIGN IS POSTED AT A PRIVATELY OWNED PARKING LOT THAT EXPLICITLY NOTIFIES PARKERS THAT THEIR VEHICLE WILL BE SUBJECT TO A LIEN IF IT IS LEGALLY TOWED PURSUANT TO STATE AND LOCAL LAW FOR PARKING IMPROPERLY, A PERSON HAS A POSSESSORY LIEN ON A MOTOR VEHICLE IF THE PERSON LEGALLY TOWS OR REMOVES THE MOTOR VEHICLE FROM A PRIVATELY OWNED PARKING LOT UNDER TITLE 21, SUBTITLE 10A OF THE TRANSPORTATION ARTICLE, ON BEHALF OF THE PARKING LOT OWNER OR AGENT, FOR ANY REASONABLE CHARGE INCURRED FOR ANY:

- (I) TOWING;
- (II) RECOVERY;
- (III) STORAGE; OR
- (IV) NOTICE PROVIDED.

Constitutional Analysis

It is my view that the bill, even with the proposed amended language, is at a substantial risk of being found unconstitutional if challenged because it does not provide an opportunity for a prompt post-deprivation hearing so that a person with an interest in the vehicle could test the factual and legal basis for the tow. Deprivation of even a temporary use of a vehicle implicates a constitutionally protected property interest and thus requires certain procedural due process protections. *Stypmann v. City & Cnty. of San Francisco*, 557 F.2d 1338, 1342-43 (9th Cir. 1977). “The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

Numerous federal courts have concluded that state or local laws allowing a vehicle to be towed without providing notice and an opportunity for a hearing within a short amount of time after the tow violate the Due Process Clause of the Fourteenth Amendment. For example, the United States Court of Appeals for the Fourth Circuit affirmed that an Ocean City towing ordinance “was manifestly defective” when vehicle recovery “was absolutely conditioned on payment of towing and storage charges” and “[n]o opportunity was presented for notice and a hearing to establish whether or not the initial removal of the vehicle was rightful or wrongful.” *Huemmer v. Mayor & City Council of Ocean City*, 632 F.2d 371, 372 (4th Cir. 1980). The Fourth Circuit later upheld the Ocean City towing ordinance after it added a new “provision requiring written notice to the owner of the vehicle, within one working day of the tow, of his entitlement to a hearing [within 24 hours of request] on the question of legality of the seizure.” *De Franks v. Mayor & City Council of Ocean City*, 777 F.2d 185, 187 (4th Cir. 1985).

Likewise, the United States Court of Appeals for the Ninth Circuit agreed that provisions of the California Vehicle Code “authorizing removal of privately owned vehicles from streets and highways without prior notice or opportunity for hearing” and another statute “establishing a possessory lien for towage and storage fees without a hearing before or after the lien attaches” were unconstitutional for the same reason. *Stypmann*, 557 F.2d at 1344-45. In reaching its conclusion, the Ninth Circuit court noted that the statute at issue did not provide for the release of the vehicles upon payment of a bond, that “no official participates in any way in assessing the storage charges or enforcing the lien,” “[t]he only hearing available under any other state procedure may be long deferred, and the burden of proof is placed upon the owner of the property seized rather than upon those who have seized it.” *Id.* at 1343. The court determined that a San Francisco ordinance providing a vehicle owner with a hearing within five days of providing notice was “clearly excessive” and other remedies through a “regular court action” would entail “considerable delay.” *Id.* at 1344, 1342, n. 19.

Maryland law already requires persons towing a vehicle to provide notice to certain persons, including the vehicle owner, within a certain amount of time after towing. Md. Code Ann., Transp. § 21-10A-04; *see also* Md. Code. Ann. Comm. Law § 16-203(b) (requiring notice to holders of security interests in the property). But neither the Transportation Article, nor Senate Bill 107, provides a prompt hearing opportunity or notice thereof. However, there are other procedural protections available to a property owner. Section 16-206(a) of the Commercial Law Article stays execution of a lien if the owner “disputes any part of the charge for which the lien is claimed” and “institute[s] appropriate judicial proceedings.” Md. Code. Ann. Comm. Law § 16-206(a). And if the owner “disputes any part of the charge for which the lien is claimed, he immediately may repossess his property by filing a corporate bond for double the amount of the charge claimed.” *Id.* § 16-206(b). It is possible that a court could find these protections are sufficient, but I think it is more likely they would not. Those provisions require an owner to file an action in court, and a hearing would likely not occur in a quick enough timeframe. Generally, hearings within one to two days of a request have been determined to be constitutional, while hearings after five days or more have been found to be unconstitutional. *See Towers v. City of Chicago*, 979 F. Supp. 708, 715, n.13 (N.D. Ill. 1997), *aff’d*, 173 F.3d 619 (7th Cir. 1999) (collecting cases). In addition, the provision allowing the owner to retake possession after filing a bond is also unlikely to save the statute. *See N. Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606 (1975) (holding that a garnishment statute was unconstitutional because it allowed a creditor to impound a bank account so that the owner could not use it until litigation of the debt was resolved unless the owner paid a bond). A court would likely conclude, as did the court in *Huemmer*, that the “failure to provide an opportunity to be heard at some meaningful time before the injury occasioned by the taking becomes final” is constitutionally deficient. *Huemmer v. Mayor & City Council of Ocean City*, 474 F. Supp. 704, 711 (D. Md. 1979), *aff’d in part, rev’d in part*, 632 F.2d 371 (4th Cir. 1980).

It is possible that, in a particular scenario, a local law that requires a hearing would apply and could provide adequate procedural due process, but that obviously would not insulate the statute from legal challenge in other scenarios. Accordingly, it is my view that Senate Bill 107

would be at risk of being found to be unconstitutional because the attachment of any lien is not conditioned upon the provision of constitutionally adequate notice and opportunity for a hearing within a short time after any tow.

I hope this information is helpful. Please let me know if you have further questions.

Sincerely,

A handwritten signature in dark ink, appearing to read "Natalie Bilbrough". The signature is fluid and cursive, with a large, stylized initial "N" and a long, sweeping underline.

Natalie R. Bilbrough
Assistant Attorney General