

CB33-2020

**Sayers, Margery**

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**From:** Jung, Deb  
**Sent:** Tuesday, June 2, 2020 1:35 PM  
**To:** Sayers, Margery  
**Subject:** FW: CB 33-20 - Retroactivity is Unconstitutional  
**Attachments:** RMI Memo.pdf

*Deb Jung*  
Council Chair, District 4  
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**From:** Aaron Greenfield <agreenfield@mmhaonline.org>  
**Sent:** Tuesday, May 19, 2020 12:53 PM  
**To:** Yungmann, David <dyungmann@howardcountymd.gov>; Jung, Deb <djung@howardcountymd.gov>;  
lwalsh@howardcountymd.gov; Jones, Opel <ojones@howardcountymd.gov>; Rigby, Christiana  
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**Cc:** Adam Skolnik <askolnik@mmhaonline.org>; Jessie Keller <jkeller@mmhaonline.org>  
**Subject:** CB 33-20 - Retroactivity is Unconstitutional

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Hello Chairwoman Jung and Members of the Council,

I understand that the Council will go into a closed session this afternoon to discuss CB 33-2020, the rent relief bill. In part, I assume this is to discuss the retroactivity with the Office of Law, which we are against. In preparation for this meeting, we wanted to make sure that you have the attached memo (based upon the recent Baltimore City legislation) and brief summary of case law below demonstrating that retroactivity would impair vested rights.

1. The right to receive rent is a **vested property right** under the Maryland Declaration of Rights- Muskin v SDAT 422 MD 544 ( 2011)
2. The MD Constitution’s standard regarding the validity of retroactive civil legislation is **whether vested rights are impaired by the legislation** Dua v Comcast 370 MD 604 ( 2002)
3. Retroactive civil statutes abrogating or impairing vested property rights ( including contractual rights) violate the Maryland Constitution- Dua
4. Per Muskin the right to receive rent and the reversionary interest in rented property are inseparable and together are one vested property right.

5. Raising rent after notice of and the agreement of the tenant to the increase becomes a part of the contract which is part and parcel of the landlord's vested property right.
6. Thus any statute that retroactively impairs or abrogates the already agreed to rent increase contract unconstitutionally impairs the LL's vested property right.

Please let me know if you have any questions.

Thanks,

Aaron

## MEMORANDUM

DATE: May 7, 2020  
TO: Kathy Howard  
FROM: Davy Prevas  
RE: Retrospective challenge to Mayor and City Council Bill 20-0526

### **Issue**

Whether Section 8-4(D)(2) of the proposed amendment to Mayor and City Council Bill 20-0526 violates a constitutional protection against *ex post facto* legislation.

### **Brief Answer**

The City Solicitor is incorrect in her finding that Section 8-4(D)(2) of Proposed Mayor and City Council Bill 20-0526 would not be unconstitutional *ex post facto* legislation. Here, the Solicitor relies on *Block v. Hirsh*, a United States Supreme Court case utilizing a rational basis analysis, to defend the bill. Because the Maryland Constitution is more protective than the federal constitution against legislation that retrospectively abrogates vested rights, *Block* should be treated merely as potentially persuasive authority. Maryland law requires an inquiry on whether a retrospectively-applied statute is found to abrogate vested rights or takes property without just compensation, not whether the statute has a rational basis. A court would draw authority instead from other Maryland cases interpreting the Maryland Declaration of Rights and Constitution to inquire on whether the law abrogates any vested rights. Under *Muskin v. State Dept. of Assessments*, the Court of Appeals held that the contractual right to receive ground rent is a vested right under Maryland law. It would likely follow that the contractual right to receive rent is a vested right under Maryland law as well, and that no legislation can retrospectively affect that right.

### **Facts**

The Baltimore City Council has introduced City Council Bill 20-0526 – Baltimore City COVID-19 Renter Relief Act. The bill would add language to Subtitle 8 (Rent Increases) of Article 13 (Housing and Urban Renewal) of the City Code. Under Section 8-4(D)(2) of the bill, any rental increases already agreed to or enacted before March 5, 2020 would be outlawed.<sup>1</sup>

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<sup>1</sup> Section 8-4(D)(2) of the bill states that a landlord must inform a tenant to disregard any notice of rental fee increase if: (1) the landlord provided the notice to the tenant prior to an emergency; and (2) the effective date of the increase would occur on or after the date the emergency began. The bill defines emergency as “the catastrophic health emergency declared by the Governor of Maryland on March 5, 2020.” The City Solicitor’s office has additionally recommended the addition of a maximum fine of \$1,000 for violating Section 8-5 of Article 13 of the City Code.

On May 6, 2020, the Baltimore City Solicitor's office offered an opinion that the Section 8-4(D)(2) is a constitutional exercise of a State's rights during an emergency, and does not violate any bar on retrospective legislation.

### Analysis

Article 24 of the Maryland Declaration of Rights provides: "[N]o man ought to be taken or imprisoned or disseized of his freehold, liberties or privilege, . . . or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."<sup>2</sup> Maryland Constitution, Article III, §40, provides:

The General Assembly shall enact no Law authorizing private property to be taken for public use, without just compensation . . . being first paid or tendered to the party entitled to such compensation.<sup>3</sup>

These provisions "have been shown, through a long line of Maryland cases, to prohibit the retrospective reach of statutes that would result in the taking of vested property rights. *Muskin v. State Dep't of Assessments & Taxation*, 422 Md. 544, 556 (2011).

The Solicitor's office relies on *Block v. Hirsh*, a 1921 Supreme Court case to assert that a landlord's right to charge rent can be modified in an emergency. In *Block v. Hirsh*, a landlord argued that a Washington D.C. emergency statute allowing tenants to remain in their rental property beyond the expiration of the term of their lease so long as rent payments were continued was an unconstitutional taking of his property rights. The Court found that the statute's provisions were necessary to address housing issues resulting from a public emergency. The Court held that the statute was not unconstitutional because its requirements had a reasonable relation to the relief sought.

In *Dua v. Comcast Cable of Maryland*, the Court of Appeals of Maryland rejected the application of the rational basis test as the state constitutional standard of determining validity of a retroactive statute under Articles 19 and 24 of the Maryland Declaration of Rights and Article III, § 40, of the Maryland Constitution. The Court wrote: "The state constitutional standard for determining the validity of retroactive civil legislation is whether vested rights are impaired and *not* whether the state has a rational basis." 370 Md. 604, 623. The Court also stated that "[B]ecause of the numerous opinions by this Court dealing with the constitutionality of retroactive civil statutes, principles of stare decisis dictate the result . . . Thus in applying Article 24 of the Declaration of Rights and Article III, § 40, of the Maryland Constitution to the present cases, there is little reason to rely on non-binding out-of-state authority." *Id.* Given the holding in *Dua*, it is unlikely that a court would put any weight on the holding of *Block* as it applies to the

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<sup>2</sup> Article 24 of the Declaration of Rights expresses the same concept as 'due process of law in the Fourteenth Amendment' to the Constitution. *Ellis v. McKenzie*, 457 Md. 323, 333 (2018).

<sup>3</sup> Maryland Constitution, Article III, §40, expresses the same concepts as the Taking Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment. *Ellis v. McKenzie*, 457 Md. 323, 333 (2018).

Maryland's retroactive statute laws. The correct test would instead be whether the retrospective law *abrogate vested rights*.

A “vested right” is “something more than a mere expectation based on the anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of a property.” *Muskin v. State Dept. of Assessments and Taxation*, 422 Md. 544, 560. Contractual and property interests existing before the enactment of a statute, including reversionary interests in land and contractual rental interests have been found to be vested rights under Maryland law. *Muskin v. State Dep't of Assessments & Taxation*, 422 Md. 544, 560 (2011) (holding that “There can be no reasonable doubt that the reversionary interest to real property and the contractual right to receive ground rent are vested rights under Maryland law.”); *Harvey v. Sines*, 228 Md. App. 283, 137 (finding that a vested right includes that which is regarded as a property right under state property law); *Dua v. Comcast Cable of Maryland*, 370 Md. 604, 629 (2002) (holding “retrospective statutes abrogating vested property rights (including contractual rights) violate the Maryland Constitution.”). Following precedent, the right to receive rental payments on an existing lease would be a vested property right so long as an agreement is already made.<sup>4</sup>

Here, Section 8-4(D)(2) of Proposed Mayor and City Council Bill 20-0526 would retroactively bar rental increases that a landlord has already undertaken since the state emergency order took effect on March 5, 2020.<sup>5</sup> The bill requires that a landlord rescind any notice of rental fee increase if the increase notice was sent before effective emergency date and would take effect after the effective emergency date. This would undue already settled lease terms. Notices of rental increase are typically sent out to tenants 90 to 30 days before the expiration of the original lease term.<sup>6</sup> Tenants must also agree in writing to the rental increase. This is done either through the signing of a new lease form or through an acknowledgement to go along with an initial lease containing a rent increase clause. Once an acknowledgement is signed, a new lease is formed for that term. The new rental amount is thus vested in the new lease. Any interference with the agreement would be a violation of the landlords vested property and contractual right.

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<sup>4</sup> The holding in *Muskin* did not address whether the right to receive ground rent payments and the reversionary interest in a ground lease were vested separately. The court wrote that “[a contractual right to receive ground rent payments and the reversionary interest to re-enter the property in the event of a default] cannot be separated one from the other; together they are the essence of this unique property interest and as such, vested rights analysis must consider them together.” 422 Md. 544, 559-556 (2011).

<sup>5</sup> The Solicitor's Office concedes that the City Council intends that Section 8-4(D)(2) law be retroactive.

<sup>6</sup> There are no state regulations on a notice period for a residential rent increases and the notice period is usually spelled out in the original lease. However, Baltimore City Code, Housing and Urban Renewal, Article 13, § 8-3, presumes a notice of rent increase to be received by tenant no more than 60 days before expiration of the lease, unless the lease requires a longer notice period, but not more than 90 days. A typical rental increase notice would be agreed upon and signed up to three months before the increase takes place.

## **Conclusion**

The retrospective nature of Section 8-4(D)(2) would violate the vested rights of a landlord under the precedent of Maryland law. Unlike federal standards under the 5<sup>th</sup> and 14<sup>th</sup> amendments, Maryland analysis does not require inquire into the reasonableness of the legislative intent. The only standard to consider is whether the retrospective law violates a person's vested rights. Vested rights include a person's existing rights in property or under a contract. A lease agreement contains both property and contractual interests making it a vested right. A law retrospectively abolishing a right under a lease agreement is thus unconstitutional under Maryland Law. Already existing rental increase agreements cannot be abolished under Maryland Law without compensation.

## Sayers, Margery

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**From:** Jung, Deb  
**Sent:** Monday, June 1, 2020 12:32 PM  
**To:** Sayers, Margery  
**Subject:** FW: Bill No. 33-2020 - Rental Protection and Stability Act  
**Attachments:** BOMA Letter\_Howard County Council.pdf

*Deb Jung*

Council Chair, District 4  
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**From:** Jennifer Thornton <jthornton@stringfellowgroup.net>  
**Sent:** Tuesday, May 12, 2020 6:23 PM  
**To:** Walsh, Elizabeth <ewalsh@howardcountymd.gov>; Rigby, Christiana <crigby@howardcountymd.gov>; Jung, Deb <djung@howardcountymd.gov>  
**Cc:** Ball, Calvin B <cball@howardcountymd.gov>; Jones, Opel <ojones@howardcountymd.gov>; Yungmann, David <dyungmann@howardcountymd.gov>  
**Subject:** Bill No. 33-2020 - Rental Protection and Stability Act

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Dear Councilpersons Walsh, Jung and Rigby,

Please see the attached letter, sent on behalf of the Building Owners and Managers Association of Greater Baltimore (BOMA). Feel free to contact me directly with any questions or comments.

Sincerely,

Jennifer Thornton



Jennifer Thornton  
Executive Director  
Building Owners and Managers Association of  
Greater Baltimore, Inc.

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May 12, 2020

VIA ELECTRONIC MAIL

The Honorable Liz Walsh ( [ewalsh@howardcountymd.gov](mailto:ewalsh@howardcountymd.gov) )  
The Honorable Christina Rigby ( [crigby@howardcountymd.gov](mailto:crigby@howardcountymd.gov) )  
The Honorable Deb Jung ( [djung@howardcountymd.gov](mailto:djung@howardcountymd.gov) )

RE: Bill No. 33-2020  
Rental Protection and Stability Act  
Section 17.1200 – Rent Increases During States of Emergency – Prohibited

Dear Councilpersons Walsh, Jung and Rigby,

My name is Kevin J. Bauer. I am a resident of Ellicott City, and in my professional capacity as a commercial property manager, I also serve as a Director of the Building Owners and Managers Association of Greater Baltimore (BOMA Baltimore) as well as Chair of the Legislative Committee for that organization.

BOMA is an international association of commercial property owners, developers and managers. BOMA Baltimore members own and manage a substantial majority of commercial and industrial properties throughout Central Maryland, including Howard County.

BOMA is sensitive to the desire of public officials throughout local governments in Maryland to assist their citizens during the COVID-19 crisis, including assistance for individuals who are struggling to pay rent.

You may be aware of legislation similar to bill number 33-2020 in nearby jurisdictions such as Anne Arundel County and also Baltimore City. In considering such legislation, these local governments have drawn a distinction between residential rental property and commercial rental property. We respectfully request that the Howard County Council understand that distinction and limit the application of Bill 33-2020 to residential leases only. It is our understanding that both Anne Arundel County and Baltimore City have taken this step.

Commercial leases are more varied in their terms than are residential leases, and they reflect the widely differing interests and resources of commercial tenants generally. BOMA Baltimore members are working every day with tenants to address the effect of Covid-19 on a case-by-case basis. Let me assure you that it is in the mutual interest of commercial tenants and their landlords to maintain their relationships, and preserve the ability of tenants to remain in possession of their rented premises. This is our collective goal.

Bill 33-2020 as drafted treats residential and commercial leases identically. In commercial real estate, one size does not fit all. Both tenants and landlords must be flexible and understanding

to achieve a mutually acceptable resolution of the problem. Such resolutions are different in each case. For these reasons, BOMA Baltimore strongly believes that Bill 33-2020 should apply only to residential leases.

In particular, we believe the phrase "AND RENTED COMMERCIAL SPACE OF ALL KINDS," found on page 2, line 25 of the subject legislation, should be removed from the scope of this bill. Furthermore, the language of the bill should clarify its application to residential leases only. Doing so would preserve the fundamental intended benefit of the legislation.

Accordingly, BOMA Baltimore requests that commercial leases be stricken from the application of the bill, by removal of the language above, and that the bill be otherwise clarified to apply only to residential leases.

Very truly yours,



Kevin J. Bauer  
Director and Legislative Committee Chair

cc: The Honorable Opel Jones ([ojones@howardcountymd.gov](mailto:ojones@howardcountymd.gov))  
The Honorable David Youngmann ([dyungmann@howardcountymd.gov](mailto:dyungmann@howardcountymd.gov))  
Jennifer Thornton, Executive Director, BOMA ([jthornton@stringfellowgroup.net](mailto:jthornton@stringfellowgroup.net))

## Sayers, Margery

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**From:** Jung, Deb  
**Sent:** Monday, June 1, 2020 11:18 AM  
**To:** Sayers, Margery  
**Subject:** FW: CB33-2020

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**From:** shawn mcdonald <[shawnrmdonald@hotmail.com](mailto:shawnrmdonald@hotmail.com)>  
**Sent:** Saturday, May 9, 2020 10:39 AM  
**To:** Walsh, Elizabeth <[ewalsh@howardcountymd.gov](mailto:ewalsh@howardcountymd.gov)>; Rigby, Christiana <[crigby@howardcountymd.gov](mailto:crigby@howardcountymd.gov)>;  
[djung@howardcountymd.gov](mailto:djung@howardcountymd.gov)  
**Subject:** CB33-2020

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Council Members,

Thank you for introducing CB33-2020. I would ask that you consider adding language to the bill making this retroactive to the beginning of the health emergency as all residents of Howard County who had lease end-term dates/renewals during the first two months of the pandemic should be afforded the same protection (and stress relief).

Sincerely,  
Shawn McDonald

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Columbia, MD 21044