OFFICE OF THE COUNTY ATTORNEY

Isiah Leggett
County Executive

Marc P. Hansen
County Attorney

MEMORANDUM

July 18, 2012

TO: Isiah Leggett
County Executive

VIA: Marc P. Hansen MPH
County Attorney

FROM: Clifford L. Royalty CLR
Chief, Division of Zoning, Land Use, & Economic Development

RE: Zoning Text Amendment 12-07, Special Exceptions – Automobile Filling Station

You have requested our opinion as to whether ZTA 12-07 is legal. We have concluded that it is not.

Opinion

ZTA 12-07 is not a proper exercise of the District Council's authority. The ZTA is narrowly tailored to prohibit a single proposed business and is not rationally related to the furtherance of a legitimate governmental objective.

Background

On April 17, 2012, the District Council introduced ZTA 12-07. The ZTA proposes to amend the special exception standards for automobile filling stations to, in pertinent part, prohibit "a new automobile filling station designed to dispense more than 3.6 million gallons per year" from locating within "1,000 feet from any public or private school or any park, playground, hospital, or other public use, or any use categorized as a cultural, entertainment and recreation use."

The ZTA was accompanied by a memorandum dated April 13, 2012, from Council staff. In the memorandum, Council staff states that the "size and distance standards" proposed by the ZTA "would implement the Environmental Protection Agency's recommendation for school siting." The memorandum also notes that, under existing law, in reviewing a special exception

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application, the Board of Appeals must consider the impact on traffic movements at the site of a proposed automobile filling station.

On June 19, 2012, the Council conducted a public hearing on the ZTA. A focal point of the testimony was an automobile filling station that Costco proposes to build at Westfield Mall in Wheaton. There was much discussion of the ZTA's intended impact on the Costco station. There was also testimony that the ZTA would apply only to the proposed Costco station.

The Costco station was referenced elsewhere. By a memorandum dated July 5, 2012, the directors of the Department of Health and Human Services and of the Department of Environmental Protection responded to "the County Council's request for information . . . on the potential health risks associated with the proposed Costco gas station in Wheaton." The directors advised that they do not have the means or expertise to identify, and isolate, any adverse health effects caused by the Costco station.

On July 9, 2012, the Planning, Housing and Economic Development Committee took up the ZTA. For that session, Council staff prepared another memorandum, dated July 5, 2012, that discussed the regulation of automobile filling stations (or "gas stations"), in the County and in other jurisdictions. Expanding upon the theme of the April 13 memorandum, the July 5 memorandum noted that there is evidence that gas stations create health risks and concluded that there is a "rational basis for treating gas stations pumping more than 3.6 million gallons per year differently from other stations." But the memorandum also noted that there is a paucity of data documenting the health effects of gas stations and that the existing studies do not "relate their findings to the size of the gas station." Also, the memorandum acknowledged that the ZTA would adversely affect Costco's pending application for special exception approval of its automobile filling station.

Discussion

Due Process and Equal Protection

Article 24 of the Maryland Declaration of Rights and the 14th Amendment to the United States Constitution prohibit statutory classifications that are arbitrary or discriminatory. *See Kane v. Board of Appeals*, 390 Md. 145, 887 A.2d 1060 (2005). Article 24 states that

> no man ought to be . . . disseized of his freehold, liberties or privileges, or outlawed or exiled 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.

Md. Const. Declaration of Rights, art. 24.

Section I of the 14th Amendment contains both a due process clause and an equal protection clause. The due process clause provides that no state "shall . . . deprive any person of life, liberty, or property, without due process of the law." *U.S. Const. amend. XIV, § 1.* Article 24 is the "state constitutional compliment to the Fourteenth Amendment's Due Process Clause." *Roberts v. Total Health Care, Inc.*, 109 Md. App. 635, 643, 675 A.2d 995, 999, n. 8 (1996), *aff'd* 349 Md. 499, 709 A.2d 142 (1998).

When a statute is challenged under Article 24 and the 14th Amendment the courts consider whether the statute, "as an exercise of the state's police power, provides a real and substantial relation to the public health, morals, safety, and welfare of the citizens of this state." *Maryland Board of Pharmacy v. Sav-A-Lot,* 270 Md. 103, 106, 311 A.2d 242, 244 (1973). The courts acknowledge that the "wisdom or expediency of a law adopted in the exercise of the police power of the state . . . will not be held void if there are any considerations relating to the public welfare by which it can be supported." *Id.* But the courts have cautioned that "if a statute purporting to have been enacted to protect the public morals or the public safety has no real or substantial relation to those objects or is a palpable invasion of rights secured by fundamental law, it is our duty to so adjudge and thereby give effect to the Constitution." 270 Md. at 106-107, 311 A.2d at 244. Thus,

> in restricting individual rights by exercise of the police power neither a municipal corporation nor the state legislature itself can deprive an individual of property rights by a plebiscite of neighbors or for their benefit. Such action is arbitrary and unlawful, i.e., contrary to Art. 23 of the Declaration of Rights[1] . . . .

Benner v. Tribbit, 190 Md 6, 20, 57 A.2d 346, 353 (1948).

In a zoning context, the Court of Appeals has stated that

> there is a wide difference between exercise of the police power in accordance with a comprehensive zoning plan, which imposes mutual restrictions and confers mutual benefits on property owners, and arbitrary permission to A and prohibition to B to use their own property, at the pleasure of neighbors or at the whim of legislative or administrative agencies.

Id.

As is noted above, Section I of the 14th Amendment contains an equal protection clause. That clause ensures that no state "shall . . . deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const. amend. XIV, § 1.* "Although the Maryland Constitution

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[1] Former Article 23 of the Declaration of Rights is now Article 24.

does not contain an express guarantee of equal protection of the laws, it is well established that Article 24 embodies the same equal protection concepts found in the Fourteenth Amendment to the U.S. Constitution." *Verzi v. Baltimore County*, 333 Md. 411, 417, 635 A.2d 967, 970-971 (1994).

Court review of equal protection claims is analogous to that applied to due process claims. The Maryland courts have "traditionally accorded legislative determinations a strong presumption of constitutionality." *Verzi*, 333 Md. at 419, 635 A.2d at 971 (quoting *State Board of Barber Examiners v. Kuhn,* 270 Md. 496, 507, 312 A.2d 216, 222 (1973)). But "if a statute purporting to have been enacted to protect the public health, morals, safety and welfare has no real or substantial relation to those objects or is a palpable invasion of rights secured by fundamental law, it is [the court's] duty to so adjudge and thereby give effect to the Constitution." *Maryland State Board of Barber Examiners v. Kuhn*, 270 Md. 496, 511, 312 A.2d 216, 225 (1973); *see also*, *Dasch v. Jackson*, 170 Md. 251, 183 A. 534 (1936). The "decisive question, then, is whether the means selected . . . bear a real and substantial relation to the object sought to be attained." 270 Md. at 512, 312 A.2d at 225. The Maryland Court of Appeals has quoted, favorably, the Supreme Court, to wit:

> The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Furthermore, some objectives -- such as a bare . . . desire to harm a politically unpopular group, -- are not legitimate state interests.

Kirsch v. Prince George's County, 331 Md. 89, 626 A.2d 372 (1993) (quoting *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 446-447 (1985) (internal citations omitted)).

Uniformity

The source of the County's zoning authority is the Regional District Act. *See Montgomery County v. Woodword & Lothrop, Inc.*, 280 Md. 686, 376 A.2d 483 (1977), *cert. denied* 434 U.S. 1067 (1978). Section 8-102 of the Regional District Act contains a "uniformity requirement" which states that "all regulations shall be uniform for each class or kind of building throughout any district or zone . . . ." The uniformity clause derives from a provision in a model zoning code that was intended "to give notice to property owners that there will be no improper discriminations." *Montgomery County v. Woodword & Lothrop, Inc.*, 280 Md. at 719, 376 A.2d at 501. "The uniformity requirement does not prohibit classification within a district, so long as [the classification] is reasonable and based upon the public policy to be served." *Montgomery County v. Woodword & Lothrop, Inc.,* 280 Md. at 720, 376 A.2d at 501.

Special Legislation

Article III, § 33 of the Maryland Constitution states:

> . . . And the General Assembly shall pass no special Law, for any case, for which provision has been made, by an existing General Law. The General Assembly, at its first Session after the adoption of this Constitution, shall pass General Laws, providing for the cases enumerated in this section, which are not already adequately provided for, and for all other cases, where a General Law can be made applicable.

Md. Const. art. III, § 33 (2002).

Although this prohibition on special legislation expressly applies to the General Assembly, it has been construed to apply to municipalities. *Mears v. Town of Oxford*, 52 Md. App. 407, 420, 449 A.2d 1165, 1174 (1981), *cert. denied*, 294 Md. 652 (1982).

In *Montague v. Maryland*, the court stated that the "object" of the prohibition is to

> prevent or restrict the passage of special, or what are commonly called *private* Acts, for the relief of particular named parties, or providing for individual cases. In former times, as is well known and the statute books disclose, Acts were frequently passed for the relief of named individuals, such as sureties upon official bonds, sheriffs, clerks, registers, collectors, and other public officers, releasing them absolutely, and sometimes conditionally from their debts and obligations to the State. The particular provision now invoked was aimed against the abuses growing out of such legislation, and its object was to restrain the passage of *such Acts*, and to prevent the release of debts and obligations in particular cases, and in favor of particular individuals unless recommended by the Governor or the Treasury officials.

54 Md. 481, 490 (1880); *see also, Potomac Sand and Gravel Company v. Governor of Maryland*, 266 Md. 358, 378, 293 A.2d 241, 251 (1972).

Lacking a "mechanical rule for deciding" special legislation cases, the courts have devised a list of relevant factors, though none is "conclusive." *Cities Service Company v. Governor*, 290 Md. 553, 567-570, 431 A.2d 663, 672-673 (1981). These factors include "whether 'the underlying purpose of the legislation is to benefit or burden a particular class member or members'; whether particular people or entities are identified in the statute; and what 'the substance and practical effect' of a statute is and not simply its form." *State v. Burning Tree Club*, 315 Md. 254, 274, 554 A.2d 366, 376, *cert. denied,* 493 U.S. 816 (1989) (internal citations omitted). The

prohibition on laws that provide for "individual cases" or benefit a "particular class" is not to be applied too literally. That prohibition does not invalidate a law "intended to serve a particular need, to meet some special evil, or to promote some public interest, for which the general law is inadequate . . . ." *Mears v. Town of Oxford*, 52 Md. App. 407, 419, 449 A.2d 1165, 1173 (quoting *Norris v. Mayor of Baltimore*, 172 Md. 667, 683, 192 A. 531 (1937)).

The ZTA is Unlawful

It is apparently undisputed that the ZTA would apply only to the Costco station and that it would prohibit that station. It also appears, to the detriment of the ZTA, that the ZTA was intended to prohibit the Costco station and cause its pending application for a special exception to be denied. The legislative record and the ZTA both support that conclusion.

As has been discussed, there is an undue focus in the legislative record on the proposed Costco gas station. The Council, apparently, asked for a review of the health effects of the Costco gas station (which is proposed for a commercial area where more than a few gas stations and automobile service facilities already exist). The size and siting standards proposed by the ZTA are suspiciously narrow. The ZTA is presumably intended to protect the public from the health risks and traffic congestion generated by larger gas stations. But there is a dearth of evidence that a station that is "designed to dispense more than 3.6 million gallons per year . . ." generates greater health risks, or traffic impacts, than any of the existing (or any future) gas stations (or automobile service facilities) in Montgomery County or in Wheaton. The Environmental Protection Agency's school siting guidelines do not advocate for, or support, a prohibition on gas stations, of any size, within 1,000 feet of places of assembly. If health risks and traffic are truly a concern, then the ZTA would broadly apply to all gas stations. And the "general law," meaning the existing special exception standards, is more than adequate to the task of addressing the concerns that allegedly underlie the ZTA. A court would find it particularly troubling that the ZTA is seemingly intended to deny Costco the opportunity to prove that its pending special exception meets the law.

In violation of the foregoing legal limits on the District Council's authority, the ZTA creates statutory classifications that are arbitrary and that are not substantially related to the public welfare. We do not believe that the ZTA would be upheld by a court of law.

Please contact us if you would like to discuss our opinion.

Cc: Kathleen Boucher, Assistant Chief Administrative Officer