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February 10, 2021

The Honorable Luke Clippinger, Chairman
House Judiciary Committee
Room 101, House Office Building
Annapolis, Maryland 21401

RE: House Bill 719 - Commercial Tenants - Personal Liability Clauses – Enforceability - UNF

Dear Chairman Clippinger and Members of the Committee,

I am writing on behalf of the Building Owners and Managers Association of Maryland (BOMA), to respectfully request an unfavorable report on House Bill 719.

BOMA, through its nearly 300 members, represents owners and managers of all types of commercial property, comprising 143 million square feet of office space in Baltimore and Central Maryland. Our members' facilities support over 19,000 jobs and contribute \$2.5 billion to the Maryland economy each year.

Provisions in commercial leases imposing personal liability represent important security for landlords to guarantee the performance of tenants under such leases. Although not found in every commercial lease, these provisions often represent the difference for a landlord, in deciding to offer the leased premises to a prospective tenant or declining to do so. House Bill 719 would make the use of personal liability provisions impracticable.

There are a number of defects with House Bill 719, beginning with the question whether the proposed law would be constitutional in its application. The bill clearly changes the terms of all existing commercial leases coming within its scope. It would therefore apply retroactively, and would impair many existing lease agreements and also any personal guaranties of such leases.

Additionally, the term "commercial lease" as defined in the bill is so ambiguous that it may, in the judgement of a court, be found unconstitutionally vague and therefore unenforceable. We note that the definition found in lines 16-18 on page 1 of the bill includes the intention of the tenant to use the premises for a "nonresidential use" - without further definition of that term. This "intention" would apply whether or not the lease itself refers to such a use.

Also on page 1, the bill defines a "commercial tenant" and, in the definition of "personal liability clause" refers to an individual who is not a commercial tenant. The interaction of those two defined terms invites the question whether an individual who owns a corporation that will become a commercial tenant can personally guarantee performance under a lease. Although a logical reasons abound for a personal guarantee, such a practice would apparently make the personal liability clause unenforceable if House Bill 719 is enacted.

There are other defects with the language of Senate Bill 719 as well. Although the ostensible purpose of the bill is to protect individuals from obligations under commercial leases if they are unable to perform as a result of a declaration by the Governor of a state of emergency, the unenforceability provisions in the bill are not tied to that act. On page 2, lines 13-15, the triggering of an unenforceable personal liability clause occurs exclusively if the tenant's default took place between March 23, 2020 and September 30, 2020, irrespective of whether such default had any connection to the Governor's declaration of a state of emergency. There could be many reasons for a tenant's default which have nothing to do with the effects of the Governor's declaration, but the bill makes no distinction and applies the penalty against commercial landlords too broadly.

Furthermore, lines 16-18 on page 2 prohibit a commercial landlord from attempting to enforce a personal liability clause if the landlord "knows or reasonably should know" that the provision is unenforceable. This places the burden on the commercial landlord of making a legal judgement with regard to enforceability that the landlord is likely unqualified to render. Making this dilemma even more hazardous for the landlord, lines 19-21 on page 2 would subject the commercial landlord to payment of attorney's fees and court costs for seeking to enforce a personal liability clause in violation of the above language.

For these and other reasons, BOMA respectfully requests an unfavorable report on House Bill 719.

Very truly yours,

A handwritten signature in black ink that reads "Bryson Popham". The signature is written in a cursive, flowing style.

Bryson F. Popham

cc: Kevin Bauer
Joan Smith