

CITY OF BALTIMORE

STEPHANIE RAWLINGS-BLAKE, Mayor

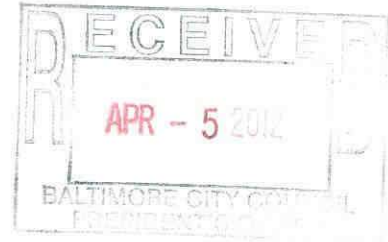


DEPARTMENT OF LAW

GEORGE A. NILSON, City Solicitor  
101 City Hall  
Baltimore, Maryland 21202

April 4, 2012

The Honorable President and Members  
of the Baltimore City Council  
Attn: Karen Randle, Executive Secretary  
Room 409, City Hall  
100 N. Holliday Street  
Baltimore, Maryland 21202



Re: City Council Bill 11-0004— Late-Night Commercial Operations –  
Licensing

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 11-0004.

The bill would add a Subtitle 9 on Late-Night Commercial Operations to Article 15 of the City Code. The subtitle would prohibit all non-government businesses in R, O-R, B-1 or B-2 districts (with four exceptions) from operating between midnight and 6am without first obtaining a late-night operations license.

The City has authority to license late-night commercial operations pursuant to Section 17 of Article II of the Baltimore City Charter, but there are Constitutional limitations on this power. The equal protection provisions of the Fourteenth Amendment require that any classifications for the purpose of licensing be reasonable and rationally related to a legitimate government purpose. *See Baltimore Gas and Elec. Co. v. Heintz*, 760 F.2d 1408, 1417 (4th Cir. 1985) (citing *Western & Southern L.I. Co. v. Board of Equalization*, 451 U.S. 648, 668 (1981) (classifications must reasonably promote the government's legitimate purpose to survive an Equal Protection challenge)). Although only businesses that operate late at night are being required to obtain a license, the scheme would likely be considered rationally related to a legitimate government purpose because it is designed to enable the City to cope with the additional burden on Police and other City agencies created by commercial establishments that remain open between midnight and 6am.

However, this bill does not give Finance any guidance or timeline for granting or denying a license; it only requires the license be denied if complaints are received or if a councilmember objects. But for these two instances requiring Finance to deny the license, Finance is given unfettered discretion to grant or deny at any time. As such, there is insufficient legislative guidance on when Finance must grant or deny the license. *See, e.g., Tighe v. Osborne*, 149 Md. 349, 359, 361 (1925) (discretion by administrative body must be “guided and restrained by rules and standards sufficient to protect the citizen against any arbitrary or unreasonable exercise

thereof.”)(citations omitted); accord *McQuillin* §26.64 (“arbitrary or absolute discretion to grant or deny a license, vested in an official or board, is in violation of the constitutional guaranties of due process and equal protection of the law, and also violates reasonableness pertaining to all ordinances.”).

Similarly, it is doubtful that a councilmember’s objection alone can be the sole reason a license is not issued. See, e.g., *Wo v. Hopkins*, 118 US 356, 372-73 (1886)(citing with approval *Mayor and City Council of Baltimore v. Radeke*, 49 Md. 217, 230-31 (1878)(holding that a single elected official in Baltimore City could not have the power to determine which businesses receive a license without any guidelines)).

This problem is not remedied by having Finance create rules and regulations to carry out the subtitle because an administrative agency cannot “create standards with respect to the granting or denial of a license.” *McQuillin* §26.63; *Andy’s Ice Cream v. City of Salisbury*, 125 Md. App. 125, 161 (1999) (“When the delegated activities have exceeded mere ministerial tasks, however, the delegation is unlawful.”)(citations omitted).

The bill must be amended to provide Finance with guidance and a timeline on when to grant a license. The appellate criteria given in Section 9-9(B) “Decision on a Hearing,” (concerning traffic and a security plan) can be the basis for the criteria Finance uses to review an initial license or at an initial hearing on the matter. See, e.g., *Burley v. Annapolis*, 182 Md. 307, 311 (1943)(“Where a statute or ordinance authorized the revocation of a license for causes enumerated, such license cannot be revoked on any ground other than the causes specified.”). Similarly, Section 9-9(C) should be changed to reflect that the reasonable conditions that may be imposed on the license are those concerning the same topics: traffic and security plans. The criteria must also be in place for any renewals and a licensee must have a hearing before the previously granted license is revoked. See *McQuillin*, §26.81.20 (“the right to carry on a lawful business is a property right, that can be taken from a licensee only by due process of law, which means, it has been held, only after a judicial hearing.”)(citing *Richardson v. Town of Eastover*, 922 F. 2d. 1152, 1159 (4<sup>th</sup> Cir. 1991)). This necessitates amending Section 9-10 to eliminate Finance’s ability to deny an application for renewal without a hearing.

Finance must also be given a timeline to grant or deny an application just as the BMZA has been given 15 days after a hearing to make an appellate ruling. This can be accomplished by amending Section 9-8.

The bill also must be amended to include another exception in Section 9-4(B) for video lottery terminals. State law allows such facilities to be open until 2am. See Md. Code, State Gov., §9-1A-23(a)(1). As such, these facilities should be exempted from this licensing scheme, just as the pharmacies, businesses with liquor licenses, establishments selling motor vehicle items and the provision of emergency medical or veterinary care have been exempted.

Additionally, some textual clarifications are necessary. First, the bill is not clear as to whether each location of a business must receive a separate license or whether an owner gets a license for all businesses owned.

Assuming the intent is to have each location licensed, the requisite clarification could be achieved by amending Section 9-1(C) to read: “‘Business’ means each address at which any commercial activity . . .”

Section 9-9 mentions the BMZA deciding the matter without a hearing. However, the bill has created no scheme for appeals without a public hearing.

See page 4, lines 28-30 (“the applicant may appeal to the BMZA for a public hearing on the application.”). Section 9-9(A) of the bill should be amended to read: “The Board must notify the applicant in writing of its decision to grant or deny the license within 15 days after conclusion of the hearing.”

Finally, in Section 9-18, the bill requires a licensee be given “an opportunity to be heard” before a license is denied, suspended or revoked, but does not give a body before which such a hearing will be held. The bill should be amended to clarify this point.

Subject to the amendments discussed herein, the Law Department can approve this bill for form and legal sufficiency.

Very truly yours,



Hilary Ruley  
Assistant Solicitor

cc: George Nilson, City Solicitor  
Angela C. Gibson, Mayor’s Legislative Liaison  
Elena DiPietro, Chief Solicitor  
Ashlea Brown, Assistant Solicitor  
Victor Tervalva, Assistant Solicitor