

CITY OF BALTIMORE

STEPHANIE RAWLINGS-BLAKE, Mayor



DEPARTMENT OF LAW

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

May 13, 2010

Honorable President and Members
of the City Council of Baltimore
Room 409, City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Attn: Karen Randle
Executive Secretary

Re: City Council Bill 10-0503 – Taxes – Outdoor Advertising Excise Tax

Dear President and City Council Members:

You have requested the advice of the Law Department regarding City Council Bill 10-0503. City Council Bill 503 imposes a tax on the privilege of exhibiting outdoor advertising displays in the City. The bill provides for the administration and collection of the tax; defines certain terms, imposes certain penalties and includes a severability clause.

The Bill

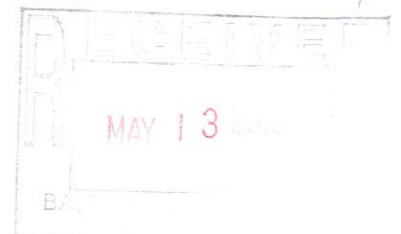
The bill adds subtitle 29 to Article 28 (Taxes) of the City Code. It defines “advertising host” as “a person who makes a space available for the exhibition of an outdoor advertising display.” The bill defines “outdoor advertising display” as “an outdoor display of a 50 square foot or larger image or message that directs attention to a business, commodity, service, event, or other activity that is: (I) sold, offered, or conducted somewhere other than on the premises on which the display is made and (II) sold, offered, or conducted on the premises only incidentally if at all.” This definition is similar to the definition of “general advertising sign” found in Title 11 of the Zoning Code.¹

Government entities and instrumentalities and units of government are excluded from the

¹ “General advertising sign” means any billboard, posterboard, or other sign that directs attention to a business, commodity, service, event, or other activity that is:

(i) sold, offered, or conducted somewhere other than on the premises on which the sign is located or to which it is affixed; and

(ii) sold, offered, or conducted on the premises only incidentally if at all.



bill's definition of "person" and thus excluded from the bill's provisions. Bill 503 imposes an annual tax of "\$5 per square foot of advertising imagery." A "square foot of advertising imagery" is defined as either a square foot of space occupied by a "fixed" display or for displays that alternate images every 15 minutes or less, "1 square foot per distinct image displayed every 15 minutes in each square foot of space occupied by the outdoor advertising display." If the advertising space is used for multiple displays within one year, the host must pay the amount of tax based on the display "that would generate the highest tax liability" as if it had been displayed for the entire year. The bill allows for the Director of Finance or his designee to adopt rules and regulations to carry out the ordinance. The bill provides that each host must file a report with the Director on or before January 1 of every year. The report must include any information required by the Director and the number and size of spaces made available for outdoor advertising by the host, the location and size of each display exhibited by the host during the previous year, the number of distinct images shown every fifteen minutes in each display and the report must accompany the tax due for the year. If the host fails to pay the tax when it is due, a 1% interest accrues for each month or fraction of a month that the payment is in arrears as well as a penalty of 10% of the amount of the tax due. If a host fails to report, the Director may estimate the amount due and assess that amount. The estimated amount assessed must be mailed to the host's last known address and becomes due within 10 days from the date of the invoice. If a host ceases to "operate or do business" any tax owed becomes immediately due and within 3 days of the cessation of operations or business, that host must submit a report and remit the total amount of tax due. The bill then provides that "[t]he tax, interest and penalties imposed by this subtitle are a lien on all property, real and personal, of any advertising host liable for their payment." Violations of the subtitle or any rule or regulation promulgated under it constitute a misdemeanor and upon conviction the host is subject to a fine not exceeding \$1000 or prison for no more than 12 months or both fine and imprisonment.

Law Department Recommendations

First, the definition of advertising host is unclear and subject to misinterpretation. The Law Department recommends "a person who owns the advertising space and collects fees for its use for displaying advertising." Second, the calculation of the tax imposed on displays that have alternating images is confusing and needs clarification. Third, if a host fails to submit a report and the Director mails an estimated amount of tax due to the host's last known address, the bill provides that the payment is due within 10 days of the date of the invoice. The Law Department recommends extending this period of time to at least 15 days to ensure that the host has a reasonable amount of time to receive the notice by mail and act. Fourth, the bill requires that a host pay tax owed within 3 days of cessation of operations or business. This could present problems in enforcement, because the exact day one ceases business or operations could be subject to multiple interpretations. The Law Department is unclear regarding the intent of this section, but can assist at the hearing in drafting amendments. Does the bill assume that the "advertising host" is going out of the business of advertising in general, or some other business unrelated to the displays he owns and operates? The bill defines "advertising host" to include any person who makes a space available for advertising, so a host could operate any kind of business. Finally, language must be added to the section making the taxes, interest and penalties a lien on real and personal property. The bill must be amended to protect innocent purchasers who have no notice of the lien on personal property (see attached amendments).

Constitutionality

As with many constitutional principles, the laws governing First Amendment restrictions on advertising have been criticized as vague, confusing and subjective. See *Metromedia v. City of San Diego*, 453 U.S. 490, 569 (1981) (Justice Rehnquist, dissenting, “it is a genuine misfortune to have the Court’s treatment of the subject to be a virtual Tower of Babel, from which no definitive principles can clearly be drawn.”). This makes it challenging to predict with absolute certainty the constitutionality of Bill 503.

However, precedent suggests that Bill 503 is not an unconstitutional tax on speech, because it is not based on the content of the displays and is not discriminatory with regard to any particular viewpoint. *Leathers v. Medlock*, 499 U.S. 439, 448 (holding that a generally applicable tax on certain speech is constitutional if it is content neutral and poses no threat of censorship of ideas). Generally speaking, a tax on commercial speech is constitutional if it does not aim to suppress ideas. See, *Nichols Media Group v. The Town of Babylon*, 365 F.Supp.2d 295, 313 (E.D. .Y. 2005) and *Combined Communications Corp. v. City of Bridgeton*, 939 S.W.2d 460 (E.D. Mo. 1997) (upholding a business license tax on billboards because it did not discriminate on the basis of ideas, citing *Leathers v. Medlock*, 499 U.S. 439 (1991)).

The Tax/Fee Distinction

The distinction between a regulatory fee or a tax is legally significant, because it controls whether the amount imposed must reasonably reflect the cost of regulation or whether the law must be authorized under the taxing authority of the City. Therefore, it is legally imperative that we clarify the nature of the bill. Despite the title and language of the bill, which deems it a “tax,” the bill contains many justifications in the recitals which make it appear to be regulatory in nature. It declares outdoor displays public nuisances and discusses their impact on the safety and welfare of the City. However, if raising revenue is the purpose of the law “... and its payment give[s] the right to carry on the business without any further conditions, it is a tax.” *Eastern Diversified Properties, Inc. v. Montgomery Co.*, 319 Md. 45 (1990) (quoting *Theatrical Corp. v. Brennan*, 180 Md. 377 (1942)). The bill seems to be a hybrid of the two. The law will raise revenue and the calculation and collection are typical of a tax, however, there is a regulatory purpose in mind. Namely, to discourage large billboards which have been declared by City Council to be distracting and undesirable for our city. Therefore, the sole purpose of the law is not to raise revenue. However, the Court in *Eastern Diversified* held that if the regulatory effect was incidental, and the primary purpose is to raise revenue, the law is a tax and its validity will depend on the taxing authority of the jurisdiction imposing it.

Since the law will generate revenue, and is labeled a “tax” it is imperative that we determine which type of tax it is, since that will determine whether it is within the City’s taxing authority. Bill 503 would be an excise tax, rather than a property tax, since it is assessed by reason of ownership alone, without regard to the value or the use of the subject property. *Weaver v. Prince George’s County*, 281 Md. 349 (1977). An excise tax is regarded as a tax on the enjoyment of a privilege, and

has generally been described “as any tax which is not directly on property or the rent or income of real estate.” M.L.E. Revenue §113, citing *Herman v. Mayor and City Council of Baltimore*, 189 Md. 191 (1947). Further support for this conclusion can be found in a recent Attorney General opinion which states “[w]hile a property tax is imposed upon one’s general ownership of property, an excise tax is one imposed ‘upon a particular use of property or the exercise of a single power over property incidental to ownership.’” 93 Md. Op. Atty. Gen. 12 (2008) (quoting *Bromley v. McCaughn*, 280 U.S. 124, 136 (1929)). Citing *Waters Landing Ltd. Partnership v. Montgomery County*, 337 Md. 15 (1994), the opinion applied a three part test to determine the nature of the tax. The test asks: what label did the legislative body give the tax? What is the practical effect and operation of the tax? What is the method of computing the tax? Applying the test, the Attorney General concluded that if a fee is not based on general ownership, and if it is “measured by the extent to which a privilege is exercised without consideration of value,” it is an excise tax. 93 Md. Op. Atty. Gen. 12 at *8.

Since Bill 503’s fee “is measured by the extent to which a privilege is exercised”, it falls within the “excise” classification and therefore, it would be within the City’s taxing power under Article II, Section 40 of the City Charter. However, we must be sure that it is not a “use” tax, which is a type of excise tax, because the City is expressly prohibited from imposing certain types of use taxes. Md. Code Ann., Tax-Gen. § 11-102 (c)(1) (limiting the authority of local governments to impose sales and use taxes). A use tax, which is characterized by case law as complimentary to the sales tax, is imposed on the power to use property that is acquired by a sale and is measured by purchase price. M.L.E. Revenue § 130. Bill 503 would not meet this definition, because it is not dependant on a sale and is not measured by purchase price.

City Council Bill 503 is consistent with the City’s taxing authority and subject to the above, the Law Department would approve the bill for form and legal sufficiency.

Sincerely yours,



Ashlea H. Brown
Assistant City Solicitor

cc: Angela Gibson, City Council Liaison, Mayor's Office
George Nilson, City Solicitor
Elena DiPietro, Chief Solicitor
Hilary Ruley, Assistant Solicitor
Terese Brown, Assistant Solicitor

**Amendments to Council Bill 10-503
(First Reader Copy)**

By: Law Department
{To be offered to the Taxation, Finance and Economic Development Committee}

Amendment No. 1

On page 2, in line 16-17, delete “makes a space available for the exhibition of an outdoor advertising display” and replace with “owns an advertising space and collects fees for its use for displaying outdoor advertising displays”

Amendment No. 2

On page 5, in line 17, delete “10” and insert “15”

Amendment No. 3

On page 5, line 28, after “payment.” add “Any such lien on personal property shall not be effective as against an innocent purchaser for value unless the personal property has been levied upon by an officer of a court.”

Further Amendments:

The Law Department can assist in clarifying the method of calculation of tax for displays utilizing alternating images as well as the cessation of business issue discussed in our report.