

CITY OF BALTIMORE

SHEILA DIXON, Mayor



DEPARTMENT OF LAW

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June 3, 2009

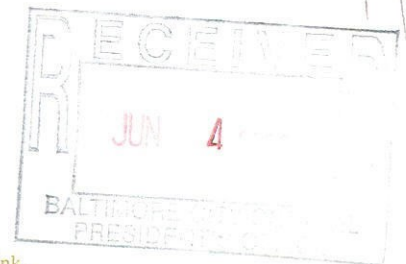
The Honorable President and
Members of the Baltimore
City Council
c/o Karen Randle, Executive Secretary
409 City Hall
Baltimore, MD 21202

RE: City Council Bill 09-0290 – Simulated Slot Machines-Zoning-Licensing and
Regulation-Admissions and Amusement Taxes

Dear President and Members:

You have requested the advice of the Law Department regarding City Council Bill 09-0290. City Council Bill 290 would amend the Zoning Code to increase the number of amusement devices allowed as an accessory use in the B-1, B-2, B-3, B-4, B-5, M-1, M-2 and M-3 districts as follows:

1. For the traditional entertainment uses listed in the existing Code provisions for all the effected zoning districts, the number of permitted amusements devices increases from no more than 5 to up to 10 which may include no more than 5 simulated slot machines. The bill also amends the list of traditional entertainment uses to include any business the offers Maryland State Lottery Game known as Keno. This will expand the types of establishments where amusement devices could legally be placed.
2. The same number of amusement devices indicated in Paragraph 1. would also be allowed in venues, when used in combination with other uses, that the Board finds, after a public hearing, to be entertainment, leisure or recreation oriented.
3. In locations that are not entertainment, leisure or recreation oriented, the bill changes the current law to allow 2 amusement devices used in combination with those uses, eliminates the requirement for a location permit under Art.15 of the City code and eliminates the limitations on the number of devices based on the net floor area of the venue.



Although the bill eliminates the location permit requirement in Section 6-207(2)(iii)(A) for devices to be placed in non entertainment, leisure or recreation venues in all the zoning districts mentioned in the bill, Article 15, Subtitle 3 will still operate to require location permits in any venues other than establishments that are entertainment, leisure, or recreation oriented, as listed in or determined by the Zoning Board under § 6-207, 7-209, or 13-610 of the Zoning Code; or (2) any amusement arcade or recreation center that is operated by the City.

Definition of Simulated Slot Machine

City Council Bill 290 establishes a definition for simulated slot machine in Article 15, Section 2-11(F). The definition states that simulated slot machine means “any amusement device equipped with a knock-off switch or knock-off button that enables an owner or custodian of the device to remove free plays or other game credits accumulated by a winning player.” Maryland law does provide that certain types of machines referred to as “slot machines” are illegal in the State. Criminal Law Article Section 12-301 defines “slot machine” as a machine, apparatus, or device that:

- (i) operates or can be made to operate by inserting, depositing, or placing with another person money, a token, or another object; and
 - (ii) through the element of chance, the reading of a game of chance, the delivery of a game of chance, or any other outcome unpredictable by the user, awards the user:
 - 1. money, a token, or other object that represents or that can be converted into money; or
 - 2. the right to receive money, a token, or another object that represents and can be converted into money;
- (2) “slot machine” includes:
- (i) a machine, apparatus, or device described in item (1) of this section that also sells, delivers, or awards merchandise, money, or some other tangible thing of value; and
 - (ii) a pinball machine or console machine that pays off in merchandise; and
- (3) “slot machine” does not include a machine, apparatus, or device that:
- (i) awards the user only free additional games or plays;
 - (ii) awards the user only noncash merchandise or noncash prizes of minimal value;
 - (iii) dispenses paper pull tab tip jar tickets or paper pull tab instant bingo tickets that must be opened manually by the user provided that the machine, apparatus, or device does not:
 - 1. read the tickets electronically;
 - 2. alert the user to a winning or losing ticket; or
 - 3. tabulate a player's winnings and losses....

In State v. 158 Gaming Devices, 304 Md. 404 (1985), the court was asked to determine whether certain seized amusement devices were illegal slot machines. Although the Court was

interpreting Art. 27, Section 264B and an earlier version of the definition of “slot machine,” the Revisor’s notes to Sec. 12-301 states that “this section is new language derived without substantive change from introductory paragraph of the former Art. 27, Sec. 264B, as it defined “slot machine.” The court in that case ruled that a “true amusement device which awards only free plays in not within the prohibition of Sec. 264B unless the device itself is adapted for gambling.” “A free play device, equipped with gambling features such as odds mechanisms, a meter for recording the number of free plays released or other recognized indicia of a gambling device” would be considered a machine adapted for gambling. *Id.* at 432. The Court concluded that the seized devices that were coin-activated, free-play devices that involved an element of chance and which were equipped with odds mechanisms or a meter for recording the number of free plays released or other established indicia of a gambling device are illegal slot machines. On the other hand, those free-play devices, not adapted or gambling, which award automatic free-plays only, and which contain nothing more than a knock-off switch are not slot machines under the statutory definition.” *Id.* at 436. Considering the language of 158 Gaming Devices and the language of Section 12-301(3) that states that “slot machine” does not include a machine the awards only free additional games and plays,” the definition of “simulated slot machine” in the bill would not be interpreted as allowing the placement of illegal slot machines.

Amusement Device Licensing

City Council Bill 290 also provides for a change to the licensing fee structure for amusement devices under Article 15 Sec.2-15. The Bill provides for an annual license fee of \$3000 for a simulated slot machine and \$180 for all other amusement devices. In general, license fees must be reasonably related to the cost of services furnished. *McQuillin, Municipal Corporations, Sec 26.39.* A license fee must be definite in amount or dependent on an established definite legal measure and not left to the discretion of officials. *Id.* at Sec. 26.40.

If a permit or license fee is imposed to regulate an activity, it can not exceed the cost of issuing the license, inspecting or providing other services related to the regulation of the activity. *Id.* at Sec. 26.41. Licensing or permit fees cannot be prohibitive or confiscatory. The power to regulate can not be interpreted as the power to prohibit unless this is a reasonable exercise of the existing police power. The fee can not be so excessive so as to prohibit or destroy a lawful business. It, however, is not invalid merely because it creates a hardship or might destroy a particular business. *Id.* at Sec. 26.43.

To determine if a fee is consistent with the cost of regulating, factors such as the costs of granting a license, the cost of investigating, inspecting and providing supervision can be considered. The fees need only be fair, approximate and reasonable. Absolute accuracy is not required. If revenue is actually produced that does not necessarily invalidate the fee as a regulatory measure. *Id.* at Sec. 26.46.

In Maryland, this issue has been addressed by the Courts and the Attorney General's Office. In Mayor and City Council of Ocean City v. Purnell-Jarvis, 86 Md. App. 586 (1991), a contractor challenged the amount of site plan review and permit fees charged by the City. The Court noted that, in general, if a fee is imposed as part of a regulatory scheme, the amount of the fee must be reasonable and have some definite relation to the purpose of that scheme. If the fee is not a regulatory measure but rather is for the purpose of raising revenue, it is a tax and its reasonableness is not based upon the amount necessary to enforce the regulation. In considering what is a reasonable regulatory fee, a local government can estimate the amount needed to fund a program prospectively but can not consider what is needed to pay deficits that have accrued in the past. The court ruled that the Tax Court erred in considering the intent of the City Council in determining the validity of fees. The proper test is whether the amount of money collected under the fee schedules is reasonable and not more than is necessary to issue building permits and site plan approvals. The case was remanded for reconsideration given the ruling of the Court of Special Appeals.

In Eastern Diversified Properties, Inc. v. Montgomery Co., 319 Md. 45 (1990), Montgomery County's development impact fee was challenged. The major issue in this case was whether the charge was a regulatory fee or a tax. Quoting Theatrical Corp. v. Brennan, 180 Md., 180 Md. 377 (1942), the Court explained that

“[W]hether a particular Act is primarily a revenue measure or a regulatory measure is important, because different rules of construction apply. A regulatory measure may produce revenue, but in such a case the amount must be reasonable and have some definite relation to the purpose of the Act. A revenue measure, on the other hand, may also provide for regulation, but if the raising of revenue is the primary purpose, the amount of the tax is not reviewable by the courts. There is no set rule by which it can be determined in which category a particular Act primarily belongs. In general, it may be said that when it appears from the Act itself that revenue is its main objective, and the amount of the tax supports that theory, the enactment is a revenue measure. ‘In general, where the fee is imposed for the purpose of regulation, and the statute requires compliance with certain conditions in addition to the payment of the prescribed sum, such sum is a license proper, imposed by virtue of the police power; but where it is exacted solely for revenue purposes and its payment give[s] the right to carry on the business without any further conditions, it is a tax’ 33 Am.Jur., Licenses, Paragraph 19, page 340.”

Applying the established criteria, the Court ruled that the development impact fee was a tax rather than a regulatory fee because its primary purpose was to raise revenue. The regulatory effect was incidental, there were no conditions imposed upon the developer when the fee was assessed and the funds generated were for public benefit not for the benefit of the property owner. Under the circumstances, the court found that the County's assessment of the fee was not intended to be regulatory. It bore no relation to the regulation of development but rather was

designed to raise revenue for road construction. After establishing that the charge was a tax, the court found that the County had no authority to impose such a tax.

The Maryland Attorney General's Office was asked to consider whether the City of Taneytown could enact development impact fees. See 89 Md. Op. Atty. Gen. 212. The opinion noted that "a regulatory measure may produce revenue, but in such a case the amount must be reasonable and have some definite relation to the purpose of the enactment. A revenue measure, on the other hand, may also provide regulation, but if the raising of revenue is the primary purpose, the amount of the tax is not reviewable by the courts." A fee is considered regulatory if the statute requires compliance with certain conditions in addition to the payment of the fee. In this case, the development impact fee did not relate to needs attributable to the development therefore the fee was in the nature of a tax. Taneytown did not have authority to enact such a tax.

The fee provided for in the bill for simulated slot machines is significant. In order to be considered a valid regulatory fee it must bear some relation to the cost of regulating amusement devices. Licensing of these devices is necessary to control the proliferation of machines that may be used for illegal gambling. Considering that the number of potential establishments that will require inspection for compliance with the licensing and zoning laws is significant as well and will require an increase in City resources to enforce and administer, the amount of the fee may not be inconsistent with the cost of regulation. In addition, if other provisions of the bill that exempt simulated slot machines from the amusement tax are enacted, there will be decrease the funding available to the City to provide for enforcement which further supports the reasonableness of the proposed fee. Alternative fee structures are also being discussed and will have to be evaluated for reasonableness when proposed.

Reward Provisions

The bill also provides for the promulgation of rules and regulations by the Director to provide for a reward for the reporting of unlicensed amusement devices. Rewards can be offered by governmental entities if necessary to preserve the safety and general welfare of the public. McQuillin, Municipal Corporations, Sec.11.06 In this case the purpose of the reward is to facilitate the discovery of unlicensed amusement devices. Such a system could also lead to the discovery of locations that contain devices in excess of the numbers allowed in the zoning code or the discovery of devices that have been altered in such a way as to become illegal slot machines.

The reward provision is of concern, however, because it suggests that that a reward can be paid at the will of the Director who promulgates the rules and regulations. In order to clarify the limits to this authority, a simple amendment is necessary to provide that any reward would be subject to the appropriation of funds approved by the Board of Estimates as required by Article VI of the Baltimore City Charter.

Exemption from Amusement Taxes

City Council Bill 290 proposes to exempt simulated slot machines from the amusement tax. It is clear that a local subdivision may enact exemptions to the admissions and amusement tax. In enacting exemptions, a subdivision must have a rational basis for the classification that it creates in order to avoid violating the constitutional guarantees of equal protection. The Office of the Attorney General of Maryland has been asked to interpret these provisions of the admission and amusement tax law on several occasions. In a March 16, 1978, Opinion of the Attorney, the question posed was whether a county could exempt certain non-profit organizations from the admission and amusement tax. The Attorney General's Office advised that from the broad grant of taxing authority given to the subdivisions in Article 81, Section 402 (predecessor to the Tax General Art., Title 4) it is necessarily inferred that the subdivisions have the power to enact exemptions from the admission tax. It should be noted that in enacting any exemptions, the subdivisions must have a rational basis for the classification that they establish so that the constitutional guarantees of equal protection are not violated.

In a later opinion, the Attorney General's Office clarified the equal protection issue. See 67 Md. Op. Atty. Gen. 372 (1982). The question asked in that opinion was whether a county could charge a lower admissions tax for professional hockey games than for other categories of admissions. In the analysis of the issue, the opinion stated, "the constitutional need for equal protection does not shackle the legislature. It has the widest discretion in classifying those who are to be regulated and taxed. Only if the grouping is without any reasonable basis, and so entirely arbitrary is it forbidden. Abstract symmetry or mathematical nicety are not requisites If any state of facts reasonably can be conceived that would sustain a classification, the existence of that state of facts as a basis for the passage of the law must be assumed. The burden is on him who assails a classification to show that it does not rest on any reasonable basis." Citations omitted. The opinion noted several examples, from various states, of admissions tax classifications that have been found to be constitutional. For example, under the now repealed Maryland State admissions tax, the court found that an admissions tax that taxed cabarets at a different rate from other places of amusement did not violate equal protection. In that case, the court noted that it is only when the attempted classification has no reasonable basis in the nature of the businesses classified and burdens are imposed unequally on taxpayers between whom there is no real difference that the courts will interfere. The Attorney General's Office advised that the county council must provide for justification of the tax classification possibly in the bill itself and through testimony at the hearing on the bill and other sources of information.

It is clear from the law and the interpretations of law by the Attorney General's Office that the City Council can provide for classifications among categories of admissions and charge different admission tax rates within those classifications. If, however, similarly situated entities are taxed differently, there must be a rational basis to support the disparate treatment. Exempting simulated slot machines from the amusement tax but not other amusement devices creates a classification

City Council Bill 09-0290

June 3, 2009

Page 7

that must have a rational basis to justify the different treatment of similarly situated activities. In this case, the justification could be that there are significantly more simulated slot machines in the City and it is difficult to determine what taxes are owed on the machines so it represents sounder fiscal policy to regulate via a licensing scheme. A licensing scheme provides for fees to cover the regulation of the machines. The existence of the machine can be more readily determined than the revenue from those machines upon which the amusement tax is based. In addition, it is the simulated slot machines that pose the danger of being altered so as to become illegal slot machines used for gambling. These devices therefore pose a greater danger of leading to illegal activity than other amusement devices. A statement regarding this justification should be included in the bill.

City Council Bill 09-0290 deals with the zoning and licensing requirements for the placement of amusement devices which is within the power of the City Council to regulate by ordinance. The bill should be amended to clarify that the rewards are subject to appropriation of funding and the justification for the exemption from the amusement tax should be included in the bill or at least in testimony at the hearing. Finally, the licensing fee must reflect the cost of regulating the activity. The Law Department defers to the Finance Department regarding these costs. The Law Department, therefore, approves City Council Bill 09-0290 for form and legal sufficiency.

Sincerely yours,



Elena R. DiPietro
Chief Solicitor

cc: Honorable Robert Curran
Angela Gibson, City Council Liaison
George A. Nilson, City Solicitor
Deepa Bhattacharyya, Assistant Solicitor
Hilary Ruley, Assistant Solicitor
Ashlea Brown, Assistant Solicitor

**Proposed Amendments
To City Council Bill 09-0290**

1. On Page 8 at the beginning of Line 10 insert “Subject to the appropriation of funds as approved by the Board of Estimates,”
2. Insert as an uncodified section at the end of the bill,

The exemption from the amusement tax for simulated slot machines is based on the finding that there are significantly more simulated slot machines in Baltimore City than other types of amusement devices. Regulation of the machines is necessary to ensure that no more than allowed are on any given premises and that they are not converted to illegal use. It is difficult to determine what taxes are owed on those machines so it represents sounder fiscal policy to regulate via a licensing scheme. A licensing scheme provides for fees to cover the regulation of the machines. The existence of the machines can be more readily determined than the revenue from those machines upon which the amusement tax is based. In addition, it is the simulated slot machines that pose the danger of being altered so as to become illegal slot machines used for gambling. These devices therefore pose a greater danger of leading to illegal activity than other amusement devices.