

CITY OF BALTIMORE

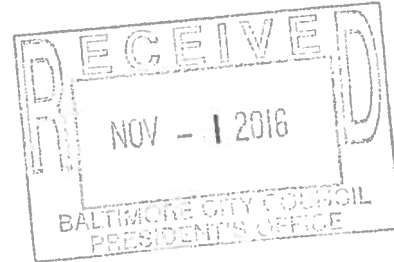
STEPHANIE RAWLINGS-BLAKE, Mayor



DEPARTMENT OF LAW

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

October 31, 2016



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

Re: City Council Bill 16-0765– Disclosure of Industrial and Railroad  
Operations –Stand Alone Disclosure Required

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 16-0765 for form and legal sufficiency. The bill would modify the language of Section 14-6 of the Consumer Protections Article of the City Code, to expand the type and method of disclosure required by a seller of real property that is near certain industrial and railroad operations.

The Law Department has three suggested amendments so that the bill is not void for vagueness, does not impermissibly impair the right of private parties to contract, nor violates the Contract Clause of the United States Constitution. Suggested amendments to accomplish these aims are attached.

Currently, the seller of real property must notify the potential buyer if the property is near an M-3 zone or a railroad operation. This requirement, enacted by Ordinance 12-0053 (City Council Bill 12-0069), is specific to a discernable feature (a railroad) or zone (M-3). This bill would broaden the disclosure to cover all “industrial” operations without clarifying that term. It would also require the buyer’s signature on a separate sheet of paper containing that disclosure.

As indicated in the Law Department’s bill report on the disclosure concept when it was originally enacted, the City has the general police and welfare powers to legislate in this area. See City Charter, Art. II, §§27, 47. The General Assembly has allowed the City “to prescribe, within the limits of the federal and state constitutions, reasonable regulations necessary to preserve the public order, health, safety, or morals.” *Tighe v. Osborne*, 149 Md. 349, 356 (1925).

One limit on the government’s regulatory power is the constitutional right to be free from burdens on private contracts. “Freedom of contract is subject to legislative regulation in the interest of public health, safety, morals or welfare. But such legislation must not be unreasonable, arbitrary, or capricious, and the **means selected must have a real and substantial relation to the object sought to be attained.**” *Maryland Bd. of Pharmacy v. Sav-A-Lot, Inc.*, 270 Md. 103, 119-120 (1973)(citation omitted)(emphasis added); see also *VNA Hospice v. Dep’t of Health & Mental Hygiene*, 406 Md. 584, 601 n.8 (2008). The current law avoids a general

*FAV w/ Anecd*

impairment of the right to freedom of contract because it is narrowly tailored to give notice for public welfare reasons of an objectively identifiable feature of the property and its failure to be given does not impair the contract of sale.

This bill would expand the scope of the required notice to be for any “industrial” operations and remove the provision that tied those operations to the M-3 district. This change makes the bill susceptible to a claim that it impairs too great a number of transactions because it is not narrowly tailored to serve its public welfare goals.

Additionally, the term “industrial” is impermissibly vague because it does not give sellers of the property adequate notice of when the disclosure is required. *See, e.g., A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 238-239 (1925)(courts have held a civil “provision invalid as contravening the due process of law clause of the Fifth Amendment, among others, because it required that the transactions named should conform to a rule or standard which was so vague and indefinite that no one could know what it was”)(citations omitted); *see also Johnson v. U.S.*, 135 S.Ct. 2551, 2570 (2015)(Thomas, J., concurring)(discussing how the Supreme “Court’s application of its vagueness doctrine has largely mirrored its application of substantive due process.”). Just because there may be “some conduct that clearly falls within the provision’s grasp” does not cure an otherwise vague law. *Id.* at 2561.

For these two reasons, the bill must be amended to clarify the scope of the term “industrial.” The clarifying language must put the seller on notice as to when the disclosure is required. Recall that property owners and buyers, perhaps from outside of Maryland or the United States of America, need never have seen the property to buy or sell it. Thus, there must be an objective standard to know when this paperwork is required. Just using the term “industrial” is insufficient as that term can mean a variety of uses: City Council Bill 12-0152 (“Transform Baltimore”) has several pages of definitions tied to the word “industrial” and six separate proposed industrial districts, including those dealing with office and bioscience uses. Suggested amendment language that ties the disclosure to a particular zoning district is attached.

Additionally, this bill would change the method of disclosure to require the buyer’s signature. It is unclear if the lack of a signature would allow those buyers who were not given the requisite disclosure to argue that such a failure constituted a substantial and material breach that “would permit the buyer to terminate the contract.” *Dennis v. Rockville*, 286 Md. 184, 190 (1979). Since “the right of private contract is no small part of the liberty of the citizen,” “the usual and most important function of courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare.” *Baltimore & O.S.W. Ry. Co. v. Voigt*, 176 U.S. 498, 505 (1900); *accord Maryland National Capital Park and Planning Commission v. Washington National Arena*, 282 Md. 588, 606 (1978); *Loughran Co. v. Lord Baltimore Candy and Tobacco Co.*, 178 Md. 38, 44 (1940). In explaining this right, Maryland Courts often quote the following:

Fearing the disruptive effect that invocation of the highly elusive public policy principle would likely exert on the stability of commercial and contractual relations, Maryland courts have been hesitant to strike down voluntary bargains on public policy grounds, doing so only in those cases where the challenged agreement is patently offensive to the public good, that is, where "the common sense of the entire community would . . . pronounce it" invalid. This reluctance on the part of the judiciary to nullify contractual arrangements on public policy grounds also serves to protect the public interest in having individuals exercise broad powers to structure their own affairs by making legally enforceable promises, a concept which lies at the heart of the freedom of contract principle.

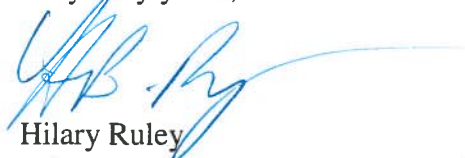
*Maryland National Capital Park and Planning Commission*, 282 Md. at 606 (citations omitted).

To avoid this result, the bill should be amended to state clearly that failure to receive the disclosure does not impact any contract for sale. Suggested amendment language is attached. It states that the signature is required to acknowledge the buyer's receipt of the disclosure.

Finally, the bill needs a third amendment to be clear that while it is effective thirty days after enactment, it does not operate retroactively in violation of the United State Constitution's Contract Clause by requiring any sellers to give the notice required by the bill if an offer for sale of their property has already been accepted. *See, e.g., Board of Trustees of Employees' Retirement System of City of Baltimore*, 317 Md. 72, 99 (1989). Suggested language for this amendment is also attached.

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

Very truly yours,



Hilary Ruley  
Chief Solicitor

cc: David Ralph, Acting City Solicitor  
Angela C. Gibson, Mayor's Legislative Liaison  
Elena DiPietro, Chief Solicitor, General Counsel Division  
Victor Terval, Chief Solicitor  
Jennifer Landis, Assistant Solicitor

**AMENDMENTS TO COUNCIL BILL 16-0765**  
(1<sup>st</sup> Reader Copy)

Proposed by: Law Dep't  
{To be offered to the Judiciary and Legislative Investigations Committee}

**Amendment No. 1**

On page 2, in lines 3 and 4, strike the brackets. On page 2, in line 4 insert "OR I-2 ZONING DISTRICT UNDER CITY COUNCIL BILL 12-0152" after "4". On page 2, in line 8, strike the second bracket and insert a bracket before the parenthesis. On that same page, in line 9, after "zones" insert: "OR I-2 ZONING DISTRICT UNDER CITY COUNCIL BILL 12-0152".

**Amendment No. 2**

On page 1, in lines 19 and 20, strike "THE BUYER'S SIGNATURE" and substitute "A SIGNATURE THAT ACKNOWLEDGES THE BUYER'S RECEIPT OF THE DISCLOSURE"

**Amendment No. 3**

On page 2, after line 13, insert:

SECTION 3. AND BE IT FURTHER ORDAINED, THAT THIS ORDINANCE DOES NOT OPERATE RETROACTIVELY TO REQUIRE ANY CURRENT PROPERTY SELLERS TO GIVE THE NOTICE CREATED BY THIS BILL IF AN OFFER FOR SALE OF A PROPERTY HAS ALREADY BEEN ACCEPTED.

On page 2, in line 14, strike "3" and substitute "4".