

CITY OF BALTIMORE

STEPHANIE RAWLINGS-BLAKE, Mayor



DEPARTMENT OF LAW

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

April 13, 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 12-0050 – Sales to Minors in Proximity of Liquor Stores

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 12-0050 for form and legal sufficiency. The bill prohibits persons in close proximity to a liquor store from selling any food, goods, wares, or merchandise to any person under the age of 21. It defines certain terms and imposes penalties for certain violations related to the prohibited sales.

Vagueness issues

The bill prohibits all sales to minors in "close proximity" to a liquor store. The phrase "close proximity" is defined in the bill on page 2, lines 22-24 to mean "(1) on the premises of a liquor store; or (2) adjacent to a liquor store with direct access to the liquor store." The second half of the definition is imprecise as to its application.

Black's Law Dictionary defines "adjacent" as meaning "lying near or close to; sometimes contiguous; neighboring." Thus, the bill will affect the sales in stores, or parts of stores, attached to liquor stores through a common doorway; but it also will affect sales on sidewalks, alleys, streets, and vacant lots that border or that are "close to" a liquor store. Due process requires ordinances to be "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Galloway v. State*, 365 Md. 599, 614 (2001). When legislation fails to meet this standard, it is void as a matter of law. *Id.*

The Law Department's view is that defining "close proximity" to include someplace that is "adjacent" to a liquor store puts the bill squarely in the reach of the Void-for-Vagueness Doctrine. We recommend that this language be deleted from the bill and substituted with language that more precisely defines the affected locations. An even stronger option, and a much safer one from a legal perspective, would be to confine the reach of the bill solely to sales made on the premises of a liquor store (as such stores are defined in the bill).

F/A



Other constitutional considerations

The bill regulates economic transactions by prohibiting certain sales to minors. Economic regulations, when attacked, often focus on rights granted under the Fourteenth Amendment's Equal Protection Clause. Another frequent claim is that an economic regulation may violate the Commerce Clause. In this instance neither attack likely would be successful.

Someone alleging a violation of Equal Protection must first show that the government treated it differently than other individuals or groups. If the government action neither discriminates based on a suspect classification nor impinges a fundamental right, the government must assert a legitimate purpose for treating the plaintiff differently from other similarly situated individuals or groups. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000). In such an event, the government need only show a rational basis for its action. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955). A plaintiff in this instance bears the burden of proving that the government's disparate treatment was so unrelated to the purpose of the legislation that it was irrational. *Park Shuttle N Fly, Inc. v. Norfolk Airport Authority*, 352 F. Supp. 2d 688, 697 (E.D. Va. 2004).

Council Bill 12-0050 discriminates against minors, but minors are not a suspect classification for which a higher level of scrutiny applies.¹ Nor can anyone plausibly argue buying non-alcoholic goods and merchandise at a store selling alcohol is a fundamental right. Thus, the City requires merely a rational basis to adopt the legislation, which is readily at hand. The legislation seeks to curtail the exposure of minors to a product that is associated with a host of societal ills.

A second line of possible attack - that the Commerce Clause is violated when restricting sales of minors in certain establishments - also appears without merit. The Supreme Court has developed two tests for determining whether the Commerce Clause is violated. When a plaintiff establishes that a statute, either on its face or in its practical effect, clearly discriminates against interstate commerce, then the statute is subject to heightened scrutiny. A state must show that it has a legitimate purpose for this discrimination and that it cannot achieve its ends through less discriminatory means. See *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1986)). If, on the other hand, the statute serves a legitimate state interest and burdens interstate commerce only incidentally, then challenges to it must establish that the burden on interstate commerce clearly outweighs the benefits sought by the government. *Id.*

In applying these rules to Council Bill 12-0050, the bill does not appear clearly discriminatory in regards to interstate commerce, either on its face or in its practical effects. The bill is not aimed at protecting local economic interests nor will its actual impact accomplish these ends. Minors would be prohibited from making purchases at or near liquor stores, but they would be free to buy their non-alcoholic goods at stores and locations that are not affected by the legislation. The overall reduction of sales in the City of such goods, we think, would be slight to non-existent and would have no appreciable impact on interstate commerce.

¹ The suspect categories include race, national origin, alienage, sex, or illegitimacy, or involves a deprivation of the fundamental rights of travel, voting, or raising one's family. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-41 (1985).

In effect, whatever impact the legislation may have on interstate commerce would be incidental. In the face of an incidental effect, the Supreme Court says the legislation must be tested as to whether the burden on interstate commerce, such as it is, outweighs the benefit of the legislation. We think the burden will not outweigh its benefit.

State Law

A preliminary survey of state alcoholic beverage laws indicates that several states (including Oklahoma, Washington, Texas, Alaska and Pennsylvania) have laws similar to Council Bill 12-0050, except that they prohibit a minor from entering an establishment that sells alcohol, rather than merely prohibiting any sales to minors in or near such establishments.² In 2010 a bill was introduced for Baltimore City in the Maryland General Assembly that would have adopted a law similar to the states mentioned above. It prohibited liquor licensees who hold certain classes of licenses from allowing persons under the age of 21 to enter their establishments. The bill was not adopted.

Unlike the State bill, Council Bill 12-0050 does not regulate activities involving a liquor license. Such regulation would conflict with State law that preempts the field. *Montgomery County v. Board of Supervisors of Elections*, 53 Md. App. 123, 126 (1982) (“We think it clear that the act [Article 2B of the Annotated Code of Maryland] makes manifest that the State, and the State alone, shall regulate and control, within Maryland, the sale, manufacture, distribution, storage, or transportation of alcoholic beverages.”) More to the point, the bill does not impact on the ability of any liquor licensee to sell the goods permitted to be sold under a liquor license. The bill does not regulate the sale of alcohol. Neither does the bill impact on the ability of any type of license holder to sell any manner of goods permitted to be sold pursuant to other laws. Rather, the bill restricts sales to minors, but only if a minor is on or near the premises of a liquor store. The minor, it should be noted, is free to buy a product in another location where the sale is not regulated by any law or ordinance.

The bill implicitly relies on the City’s police power to regulate sales to minors. The City Charter delegates police power to the Mayor and City Council to exercise by legislative act. According to the City Charter, the City’s power is as extensive as the State’s police power and can be exercised to the same extent it can be exercise by the State in regards to the City. City Charter. Art. II, § 27. Furthermore, the police power “includes the power to regulate private business to the extent necessary to protect the public health, safety, morals, and welfare.” *Prince George’s County v. Chillum-Adelphi Volunteer Fire Dept., Inc.*, 275 Md. 374, 382 (1975).

The exercise of the City’s legislative powers are restrained by Article XI-A of the Maryland Constitution, which makes invalid a “[a] local government ordinance which conflicts with a public general law enacted by the General Assembly....” *Coalition v. Annapolis Lodge*, 333 Md. 359, 379, 635 A.2d 412, 422 (1994) (citing MD Constitution, Art. XI-A § 1). The Law Department, however, finds no public general law which conflicts with the requirements of Council Bill 12-0050.

² In some cases a minor is defined as someone under 18, in others under 21.

If Council Bill 12-0050 is amended to eliminate the vagueness issues discussed above, the Law Department will approve the bill for form and legal sufficiency.

Very truly yours,


Victor K. Tervala
Assistant Solicitor

cc: George Nilson, City Solicitor
Angela C. Gibson, Mayor's Legislative Liaison
Elena DiPietro, Chief Solicitor
Hilary Ruley, Assistant Solicitor
Ashlea Brown, Assistant Solicitor