
CITY OF BALTIMORE

BERNARD C. “JACK” YOUNG
Mayor



DEPARTMENT OF LAW
DANA P. MOORE, ACTING CITY SOLICITOR
100 N. HOLLIDAY STREET
SUITE 101, CITY HALL
BALTIMORE, MD 21202

September 15, 2020

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

Re: City Council Bill 20-0570 –Railroad Rights-of-Way – Billboards

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 20-0570 for form and legal sufficiency. The bill would amend Section 17-406 of the Zoning Code text to expand the areas in which billboards can be permitted. Currently, a billboard may only be placed in an area of special signage control. If enacted, this law would allow billboards to also be present “within a railroad right-of-way or within a railroad facility that adjoins a railroad right-of-way.” It would not guarantee that a billboard could be present in any of those locations or absolve the billboard owner from getting property owner permission and complying with all other laws. It would merely change the zoning for that land.

An amendment to the bill is needed, however, to clarify the term “railroad right-of-way.” Maryland’s highest court has written: “In railroad parlance, ‘the term “right of way” has two meanings: in one sense it is “the strip of land upon which the track is laid”; in the other sense it is “the legal right to use such strip,” and in this sense it usually means the right of way easement.” *Chevy Chase Land Co. v. U.S.*, 355 Md. 110, 124 (1999); *accord* John O. Dyrud, *Railroad Rights Of Way - Types Of Interests Acquired - Maryland and Pennsylvania Railroad Co. v. Mercantile-Safe Deposit and Trust Co.*, 22 Md. L. Rev. 57, 59 (1962) (“In determining the nature of the estate held in land used as a right of way, one must look to the method of acquisition by the railroad.”). It would behoove the Council to amend this bill to provide a definition for “railroad right-of-way” to be clear on what land these billboards will be permitted. As written, this bill could be construed to apply only to those lands in which a particular railway has an easement and not a fee simple interest, which does not seem to make sense. This is particularly true where easements often come with use restrictions that may only permit railroad use and no others. *See, e.g. Chevy Chase Land Co.*, 355 Md. at 142. A suggested format for an amendment is attached whereby the Zoning Code would define a certain number of feet on either side of a railroad **track** in which these billboards are permitted. However, any amendment that clarifies the area to be used would be sufficient.

Additionally, it should be noted that this bill mandates that the billboards be visible and adjacent to an interstate highway. The Federal Lady Bird Johnson Highway Beautification Act prevents the full receipt of federal highway funds if a state has not “made provision for effective

control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising” that is within 660 feet of the road and visible from it. 23 USC § 131. In accordance with this federal mandate, Maryland has enacted Part IV of Subtitle 7 (Regulation of Outdoor Advertising) of Title 8 (Highways) of the Transportation Article of the Maryland Code to do such regulation in order to qualify for federal aid. Md. Code, Transp., § 8-725, *et. seq.* This implements a permit process for any sign displaying advertising along any federal-aid primary highway. Md. Code, Transp., § 8-729. The state process requires a license to be engaged in the outdoor advertising business. Md. Code, Transp., § 8-708. It also prohibits any sign adjacent to certain federal-aid primary highways unless they are more than 660 feet from that highway or in a commercial or industrial area. Md. Code, Transp., § 8-728. Railroads are NOT considered commercial or industrial use under this law. Md. Code, Transp., § 8-725(b)(1)(vi). Therefore, it is not clear if billboards contemplated by this law would receive state approval.

However, the entire scheme of state regulation mandated by the federal Highway Beautification act has been called into question by several recent cases after the Supreme Court’s decision in *Reed v. Town of Gilbert Arizona*, 135 S.Ct. 2218 (2015). *See, e.g., Thomas v. Bright*, 937 F. 3d 721, 737 (6th Cir. 2019) (holding Tennessee’s Billboard Act is unconstitutional, citing *Reed*); *Auspro Enterprises, LP v. Texas Department of Transportation*, 506 S.W.3d 688 (Tx. Ct App. 2016), review granted and judgment vacated by Texas Supreme Court as moot, 17-0041 (April 6, 2018) (prior to mooting, the appellate Court severed the content based advertising restrictions in part of the Texas Highway Beautification Act “as unconstitutional and content-based restrictions on speech” because of the holding in *Reed*). Thus, it is not clear that the federal law could be a bar to the placement of any sign near any highway because it may be that Maryland’s similar law is deemed unconstitutional. Even if it were upheld, however, the federal law does preempt local zoning law and would not be a bar to the zoning code’s change of the permitted uses for this land.

Although this textual change in the zoning code to permit additional billboards is otherwise legal, it has far-reaching consequences. Unlike the areas of special sign control that have dimension restrictions and criteria for digitization, billboards in these railroad areas would be free of almost any regulation. This would severely limit the City’s ability to claim that its billboard ban is legitimately based on safety and aesthetics as this would allow for the proliferation of billboards. As such, the ban would be underinclusive. *Central Radio v. City of Norfolk*, 811 F. 3d 625, 633-34 (4th Cir. 2016) (citing *Reed*, 135 S.Ct. at 2232). If challenged, the City could face a repeal of the entirety of the billboard ban that is codified in the restrictions of Section 17-406 of the Sign Code.

The City Council must consider the following when evaluating changes to the text of the City’s Zoning Code (Article 32 of the Baltimore City Code):

- (1) the amendment’s consistency with the City’s Comprehensive Master Plan;
- (2) whether the amendment would promote the public health, safety, and welfare;
- (3) the amendment’s consistency with the intent and general regulations of this Code;
- (4) whether the amendment would correct an error or omission, clarify existing requirements, or effect a change in policy; and
- (5) the extent to which the amendment would create nonconformities.

Baltimore City Code, Art. 32, § 5-508(c).

Additionally, any bill that authorizes a change in the text of the Zoning Code is a “legislative authorization,” which requires that certain procedures be followed in the bill’s passage, including a public hearing. Baltimore City Code, Art. 32, §§ 5-501; 5-507; 5-601(a). Certain notice requirements apply to the bill. Baltimore City Code, Art. 32, §§ 5-601(b)(1), (c), (e). The bill must be referred to certain City agencies, which are obligated to review the bill in a specified manner. Baltimore City Code, Art. 32, §§ 5-504, 5-506. Finally, certain limitations on the City Council’s ability to amend the bill apply. Baltimore City Code, Art. 32, §5-507(c).

Assuming all the procedural requirements are met and the bill is amended to clarify the one vague term, the Law Department can approve the bill for form and legal sufficiency.

Very truly yours,



Hilary Ruley
Chief Solicitor

cc: Dana P. Moore, Acting City Solicitor
Matthew Stegman, Mayor’s Office of Government Relations
Elena DiPietro, Chief Solicitor, General Counsel Division
Victor Tervalá, Chief Solicitor
Ashlea Brown, Assistant Solicitor

AMENDMENTS TO COUNCIL BILL 20-0570
(1st Reader Copy)

Proposed by: Law Dep't

Amendment No. 1 – defining “railroad right-of-way”

On page 1, in line 21, delete “*Digital billboard defined*” and substitute “DEFINITIONS IN THIS SECTION”; and in line 22 on page 1, add “(1)” at the beginning of the line; and in that same line delete “In this section,” and replace “digital” with “DIGITAL”.

On page 1 after line 22, insert “(2) “RAILROAD RIGHT-OF WAY” MEANS THE _____ NUMBER OF FEET ON EITHER SIDE OF A RAIL ROAD TRACK.”