

CITY OF BALTIMORE

SHEILA DIXON, Mayor

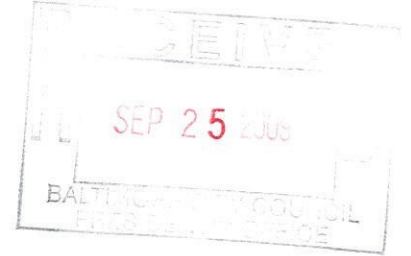


DEPARTMENT OF LAW

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

September 25, 2009

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 09-0385 – Tobacco Products – Unpackaged Cigarettes
or Cigars

Dear Madame President and City Council Members:

The Law Department has reviewed City Council Bill 09-0385 for form and legal sufficiency. The bill is virtually identical to City Council Bill 09-0271, with the exception of one section in Bill 385 entitled “Special Penalties” and one change in the amount of the fine for unpackaged cigarettes and cigars under subtitles 40 and 41 (from \$150 to \$500). The “Special Penalties” section of the bill grants the Health Commissioner the authority to suspend a food service facility’s license for certain durations of time when it is found to have violated any provision of the subtitle more than once in a 24 month period or more than 3 times in a 24 month period. It also authorizes the Health Commissioner to confiscate any products offered for sale or other distribution in violation of the subtitle. Since Bill 385 is identical in other respects to Bill 271, the Law Department herein incorporates our report for Bill 271. It reads as follows:

The bill amends the City Code to clarify the existing prohibition on the distribution of unpackaged cigarettes and to add a prohibition on the distribution of unpackaged cigars (defined as those not in sealed, original packages of 5 or more with a specific warning label), subject to some exceptions. The exceptions for cigars include any sold by certain tobacco shops and any wholesaling for more than \$2 apiece or retailing for more than \$2.50 apiece, although those amounts could be adjusted by the Health Commissioner based on the Consumer Price Index. The bill also explicitly exempts cigars for sale or distribution to another retailer or distributor, or to someone outside of the City. Enforcement is by citation, with the specific language on citations in subtitle 1 of Article 40 being amended to reflect the appropriate changes. Finally, the bill has a special effective date of October 1, 2009.

The City Council has the power to “provide for the preservation of the health of all persons within the City,” “to prevent and remove nuisances” and to “pass any ordinance, not inconsistent with the provisions of this Charter or the laws of the State, which it may deem proper in the exercise of any of the powers, either express or implied, enumerated in this Charter, as well as any ordinance as it may deem proper in

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maintaining the peace, good government, health and welfare of Baltimore City.” See City Charter, Art. II, §§11, 47.

Under these powers, the City Council has the authority to enact this legislation because the Health Commissioner has determined that the sale of these unpackaged cigars and cigarettes pose a unique health risk to minors and those who buy tobacco products without specific warning labels. Based on this determination, the City Code already prohibits the sale of unpackaged cigarettes. This bill seeks to clarify those prohibitions and enact similar ones for the distribution of cigars.

The Law Department anticipates that tobacco companies or other opponents may argue that the City Council does not possess the requisite authority to enact this bill or that the law would be unconstitutional. On November 18, 2008, Prince George’s County enacted legislation prohibiting the distribution of unpackaged cigars (defined as not in a sealed package of at least 5) by retailers or wholesalers, except by certain tobacco shops. See Prince George’s County Bill No. CB-47-2008. That legislation became effective 45 days later on January 2, 2009. Approximately a week prior to the effective date, tobacco companies sued and asked for a temporary restraining order arguing that 1) the enactment exceeds the home rule charter power of that County because it was not local in nature; 2) the enactment is preempted by State law in a variety of ways; 3) the enactment is a violation of the Due Process Clauses of both the US and Maryland Constitutions; 4) the enactment is void for vagueness; and 5) the enactment violates the Commerce Clause of the US Constitution. *Altadis USA, Inc. et. al. v. Prince George’s County, MD et. al.*, Circuit Court for Prince George’s County, Case No. CAL08-38160 (removed to and then remanded back from United States District Court for the District of Maryland, Case No. 8:08-cv-03492-AW). That litigation has not yet concluded.

Assuming similar challenges to this bill, the City has cogent arguments to make in response. Although Article XI-A of the Maryland Constitution gives the City power to enact laws confined in subject matter and substance to the City’s territorial limits, the Maryland Constitution “attempts no definition of the distinction between a local law and a general law, but leaves that question to be determined by the application of settled legal principles to the facts of particular cases in which the distinction may be involved.” *Holiday Universal, Inc. v. Montgomery County*, 377 Md. 305, 314-15 (2003). In this case, the text of the bill specifically states that it does not apply outside of the City. Moreover, the Health Article of the Code already has an entire title on tobacco products, including laws with respect to youth smoking and the aforementioned existing City prohibition on the sale of unpackaged cigarettes. See City Code, Health Article, §§12-202, 12-502.

With respect to preemption, other City laws regulating tobacco have survived preemption challenges when the state or federal legislation’s scope and purposes are different than that of the City law. See, e.g., *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 63 F.3d 1318, 1324-25 (4th Cir. 1995). In fact, the Maryland Court of Appeals has held that, “[w]hile the General Assembly has passed legislation addressing the health effects of smoking on Maryland citizens, it has not

regulated smoking in so all-encompassing a fashion as to suggest that it meant to reserve to itself for direct legislative action all regulation of smoking.” *Fogle v. H & G Restaurant, Inc.*, 337 Md. 441, 464 (1995). Moreover, because this bill only clarifies existing laws on the distribution of unpackaged cigarettes and extends similar prohibitions to unpackaged cigars, a court can find that this bill does not legislate in a new area of the law.

Opponents may challenge this bill, as they have done with the Prince George’s County law, on the grounds that it would violate the Due Process Clauses of both the Maryland and federal constitutions. Although Due Process challenges can take on many forms, in this instance opponents may argue the law is an unreasonable use of City police power. Maryland Courts have held, however, that “such a statute will not be held void if there are any considerations relating to the public welfare by which it can be supported.” *Governor of Maryland v. Exxon Corp.*, 279 Md. 410, 424 (1977). A court can easily conclude that this legislation has sufficient public health concerns to support it.

Although courts have held that the Commerce Clause limits a state or city’s ability to pass laws that would regulate interstate commerce, they also recognize that “incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people.” *Medical Waste Associates Ltd. Partnership v. Mayor and Council of City*, 1991 WL 340561, *2 (Md. 1991)(unreported)(citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). “Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” *Board of Trustees of Employees’ Retirement System of City of Baltimore*, 317 Md. 72, 141 (1989). Thus, each case must be analyzed separately to balance the local interest with the burden on commerce. In this case, because the sale of unpackaged cigarettes is already prohibited, a court can conclude that any additional burden on manufacturers is outweighed by the legislation’s health benefits.

A law is declared void for vagueness if it “prohibits the doing of an act in terms so vague that persons of ordinary intelligence must necessarily guess at its meaning.” *Fogle*, 337 Md. at 467 (citations omitted). In this case, a court can find the bill’s language is “sufficiently definite to provide notice of the conduct it prohibits or requires and to guide those that must apply it,” because it states exactly which types of cigarettes and cigars are affected and which retailers will be subject to its provisions. *Id.*

Finally, it is worth noting that the Court of Appeals of Maryland recognizes that “[e]specially where reviewing legislation dealing with a serious problem in a new and untried fashion, the courts are under a special duty to respect the legislative judgment as to the proper means of solving the problem.” *Governor of Maryland*, 279 Md. at 428. Therefore, despite possible challenges to this law, the Law Department approves Council Bill 09-0271 for form and legal sufficiency as an exercise of the City’s power to preserve the health of its residents and to prevent and remove nuisances.

Special Penalties (Unique to Bill 385)

The Health Commissioner has the power to suspend the license of a food service facility. *See* City Code, Health Art., Title 6, Subtitle 6. Therefore, suspending the license of a food service facility for violations of the subtitle is legally sufficient, assuming that the procedures and due process guarantees found in Subtitle 6 of Title 6 of the Health Article are complied with for the suspension.

As stated above, the City Charter grants the Health Commissioner the authority to provide for the preservation of the health of all people in the City, and the City Council the power to effectuate laws to do the same. *See* City Charter, Art. II, §11, 47. Although there is no express provision in the Charter or other law granting the Commissioner the power to confiscate illegal products, he does have the power to confiscate food that does not comply with certain provisions of the Health Article. *See* City Code, Health Art., §6-105. Furthermore, the Health Commissioner has the authority to exercise the City's police powers to the extent that he does not interfere with the Police Commissioner. *See* City Charter, Art. II, §27. Therefore, it is reasonable to conclude that the Commissioner has the authority to confiscate products in violation of Subtitle 2 of Title 12 of the Health Article.

However, the Law Department cannot approve Section B (Confiscation) of §12-206 as written, because it lacks due process guarantees. The government may not deprive a person of property without notice and an opportunity to be heard. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) *as cited in* 72 Md. Op. Atty. Gen. 220 (1987). Seizure without due process is only upheld in limited circumstances, for example, where there is an immediate risk to the health or safety of citizens which mandates seizure. The sale or distribution of packages of cigarettes or cigars does not present an analogous imminent danger. Therefore, the bill must be amended to protect the due process rights of the owner of the products. However, the Law Department cannot draft amendments to this section of the bill until policy decisions are made regarding the goal of the confiscation. In other words, what will happen to the confiscated products? Would the owner have an opportunity to get them back? Would the products be forfeited? Once these policy decisions are made, the Law Department can assist in crafting an amendment to this section which incorporates due process guarantees.

Amendment to Bill 271 and/or Bill 385

Should the City Council choose to pass either Bill 271 or Bill 385, the Law Department recommends an amendment making an exception for products sold in cigarette vending machines. The Court of Appeals has held that local regulation of cigarette vending machines is preempted by Maryland law. *Allied Vending, Inc. v. City of Bowie*, 332 Md. 279 (1993). Therefore, to the extent that products falling within the scope of these laws are sold in the City in cigarette vending machines, there is a strong argument that these laws could not apply to those products. The Law Department recommends the following:

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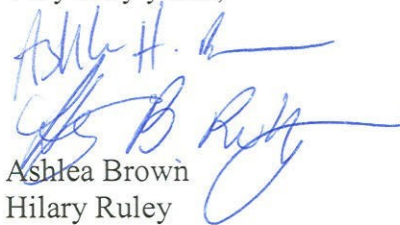
On page 4, line 17 of both Bill 271 and Bill 385 add §12-205 EXCEPTION FOR PRODUCTS SOLD IN VENDING MACHINES.

THIS SUBTITLE DOES NOT APPLY TO THE SALE OR DISTRIBUTION OF TOBACCO PRODUCTS BY VENDING MACHINES.

Finally, both bills have a special effective date of October 1, 2009. This must be changed to give sellers a reasonable amount of time to comply with the law.

Subject to the above, the Law Department approves City Council Bill 385 for form and legal sufficiency.

Very truly yours,

Handwritten signatures in blue ink. The first signature is "Ashlea H. Brown" and the second is "Hilary Ruley".

Ashlea Brown
Hilary Ruley
Assistant Solicitors

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cc: George Nilson, City Solicitor
Angela C. Gibson, Mayor's Legislative Liaison
Elena DiPietro, Chief Solicitor