

CITY OF BALTIMORE

STEPHANIE RAWLINGS-BLAKE, Mayor

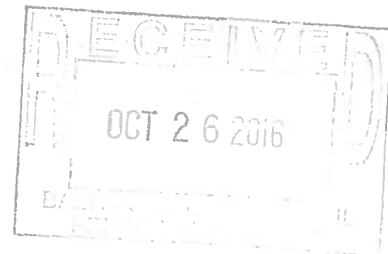


DEPARTMENT OF LAW

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

October 25, 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 16-0758 – Health – Hydraulic Fracturing Ban

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 16-0758 for form and legal sufficiency. The bill would prohibit hydraulic fracturing to extract oil, gas or other hydrocarbons within the City of Baltimore.

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

Although courts have held that the Commerce Clause limits a state or city’s ability to pass some laws, 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 City Council of Baltimore*, 966 F.2d 148, 150 (4<sup>th</sup> Cir. 1992)(citing *City of Philadelphia v. State of New Jersey*, 437 U.S. 617, 623-23 (1978); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). “Where the statute regulates evenhandedly 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 v. Mayor and City Council of Baltimore*, 317 Md. 72, 141 (1989)(citation omitted). This law will withstand a Commerce Clause challenge if the City is able to show that its effects on interstate commerce are only incidental. It would behoove the Mayor and City Council to elicit testimony on this prohibition’s effects on interstate commerce.

If enacted, this law would be consistent with current state law, which prevents the state from issuing a permit for extracting gas by hydraulic fracturing until October 1, 2017. Md. Code, Env., §14-107.1. The state law, enacted in the 2015 Session of the Maryland General

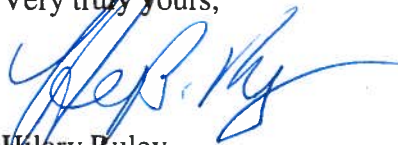
*Fav w/ Comments*

Assembly, also required the Maryland Department of the Environment (“MDE”) to adopt “regulations for the hydraulic fracturing of a well for the exploration or production of natural gas in the State.” Md. Code, Env., §14-107.1(b). These regulations, however, are not effective until October 1, 2017. Md. Code, Env., §14-107.1(c). Therefore, this bill is not currently preempted by any state law.

Once the MDE regulations are put into effect, however, they may preempt, and therefore effectively repeal, this City-wide ban. *Worton Creek Marina, LLC v. Claggett*, 381 Md. 499, 512-513 (Md. 2004)(citations omitted). State law envisions that the state would retain the ability to grant a fracturing permit subject to MDE regulations or additional state law. See Oil and Gas Exploration and Production Regulations, <[http://mde.maryland.gov/programs/Land/mining/marcellus/Documents/261901\\_NPA\\_Complete\\_92316\\_4.pdf](http://mde.maryland.gov/programs/Land/mining/marcellus/Documents/261901_NPA_Complete_92316_4.pdf)> (last visited on October 4, 2016), to be codified in COMAR 26.19.01; Underground Injection Control Regulations, <[http://mde.maryland.gov/programs/Land/mining/marcellus/Documents/260807\\_NPA\\_Complete\\_92316\\_4.pdf](http://mde.maryland.gov/programs/Land/mining/marcellus/Documents/260807_NPA_Complete_92316_4.pdf)> (last visited on October 4, 2016), to be codified in COMAR 26.08.07. The extent of any preemption, however, cannot be determined until the state law is fully in effect.

The Law Department approves this bill for form and legal sufficiency with the understanding that future state regulation may preempt City law and that this law may be susceptible to a challenge under the Commerce Clause.

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 Tervalá, Chief Solicitor  
Jennifer Landis, Chief Solicitor