

CITY OF BALTIMORE

SHEILA DIXON, Mayor

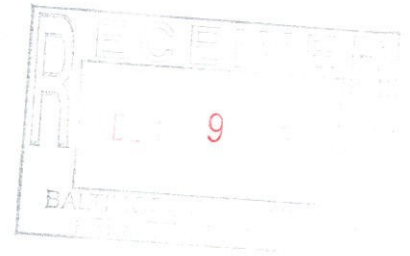


DEPARTMENT OF LAW

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

December 9, 2009

The Honorable President and
Members of the Baltimore
City Council
c/o Karen Randle, Executive Secretary
409 City Hall
Baltimore, MD 21202



Re: City Council Bill 09-0400-Zoning Conditional Use Incinerator-Amending
Conditional Use

Dear President and Members:

You have requested the advice of the Law Department regarding City Council Bill 09-0400. City Council Bill 400 removes the geographical limitations on the operation of the medical waste incinerator in Hawkins Point operated by Curtis Bay Energy Limited Partnership and removes the provision prohibiting the pass through of medical waste from institutions outside of the geographic limits. The current law only allows the incinerator to accept medical waste from generators within a 250-mile radius of the facility. For the reasons detailed below, we believe that the current law is preempted by State law and is unconstitutional under the Commerce Clause of the U.S. Constitution and City Council Bill 400 will resolve these legal problems with the existing law.

Preemption

The first argument that the current law is invalid is that it is preempted by State law governing solid waste management. The doctrine of preemption is based upon the authority of the General Assembly to reserve to itself exclusive domain over an entire field of legislative concern. County Comm'ers of Queen Anne's County v. Days Cove Reclamation, 122 Md. App. 505 (1998). There are three types of preemption of local law that are recognized in Maryland, express preemption, preemption by conflict and implied preemption. Id. State law does not expressly preempt local legislation in the area of solid waste management. There is, however, a significant amount of State regulation in the field of solid waste management creating the likelihood that State law impliedly preempts local legislation in this area. There are a number of cases from the Maryland courts discussing the role of the State and local governments in the management of solid waste and the principles of implied preemption.

The nature of the current law and the case law in this area indicate that the current imposition of geographic limits for the incinerator is impliedly preempted by State law governing permitting of refuse disposal facilities and authority over the City's Solid Waste Management Plan. In order to



determine whether the General Assembly has impliedly preempted an entire field of law, the pivotal factor is the comprehensiveness with which the General Assembly has legislated in the field. Id. In addition, there are secondary factors that can be considered that involve the existence of local laws prior to state law in the area, the existence of pervasive State administrative regulations, whether traditionally local control has been allowed, the express allowance of concurrent legislative authority or required compliance with local laws, recognition by state agencies of local authority, whether the specific aspect of the field is covered by state law and whether a two-tiered regulatory process would cause confusion. Id.

Title 9, Subtitle 2, Sections 9-204 through 9-229 of the Environment Article governs the permitting of refuse disposal systems including incinerators. These sections in conjunction with COMAR 26.04.07.25 set forth the requirements of the permitting process. Environment Article, Title 9, Subtitle 5, Sections 9-501 through 9-512 mandate the creation of and the requirements for the solid waste management plans that must be submitted by the counties. COMAR 26.03.03.01 provides for further regulation of the local government solid waste management plans.

With regard to permitting, Section 9-204 requires that a permit be obtained from the Maryland Department of the Environment (MDE) to operate a refuse disposal system, which includes an incinerator. COMAR 26.04.07.25.B requires that the application for the permit include plans and reports that contain detailed information about the facility including the area and population which will be served by the facility. Section 26.04.07.25.D. sets forth the General Requirements and Operating Procedures for incinerators. That Section contains standards for access to the facility, environmental protection, supervision and training of personnel, sanitation, fire control, posting of operating hours, and requirements for the condition of loading and unloading areas. Section 26.04.07.25.G requires that a statement from the local governing body concerning consistency with the local solid waste management plan be included in the application along with proof that the facility is consistent with the approved local government comprehensive solid waste management plan. In addition, Section 9-204(j) of the Code requires that owners of incinerators may not accept more than 150 tons of special medical waste per day. These statutes and regulations cover in detail all aspects, other than land use issues, of the management of solid waste by local jurisdictions which leaves little opportunity for local legislation in this field.

When the courts have considered whether local legislation regarding the permitting of refuse disposal systems and the adoption of solid waste management plans is appropriate, they have found that local legislation is preempted by State law. In Holmes v. Md. Reclamation Ass., Inc., 90 Md. App. 120 (1992), the Harford County Council voted to include a proposed rubble landfill in its Solid Waste Management Plan (SWMP) and notified MDE of its decision. MDE gave approval to the project. Subsequently, a resolution was introduced in the County Council to delete the landfill from the SWMP. The County Council passed the resolution. The owners of the landfill sued the county. The court ruled that it was "the legislature's general intent to reserve to MDE the specific subject matter governing the decision to issue permits to solid waste management facilities and to relegate to counties a restricted role in planning." With regard to the SWMP, the Court noted that although the counties are responsible for preparing their SWMP's, they have little control over the final version of the Plan. Section 9-503 and 9-507(e).

The county plans are merely “proposed” plans until they are approved by MDE. Counties may revise their plans but revisions must be approved by MDE and MDE may, on their own initiative, revise a county’s plan. Section 9-503. In addition, State laws and regulations govern the contents of the plans. Section 9-505. The Court concluded that the legislature intended to occupy the field of landfill regulation and limited the county’s role to identifying the type of waste allowed (within the limited choices provide for in State law), determining whether the facility is consistent with the county’s SWMP, and determining whether the facility meets all applicable zoning and land use requirements. The actions of the county council approving legislation removing the facility from it’s SWMP where motivated by the county’s fear that it threatened ground water resources which is an impermissible invasion of the State’s permit review prerogative. Accordingly, the actions of the county council were preempted by the State’s comprehensive authority in the area of solid waste management.

Similarly, in Mayor and City Council v. New Pulaski, 112 Md. App. 218(1996), the Baltimore City Council passed an ordinance placing a moratorium on the construction, reconstruction, replacement, and expansion of incinerators within Baltimore City for a period of five years. The City’s actions prevented Pulaski from constructing a new incinerator to replace an existing facility that was not in compliance with MDE regulations. Pulaski challenged the City’s power to enact the moratorium. The court examined Title 9, Subtitles 2 and 5 and found that the two statutory schemes in Subtitles 2 and 5 indicate the intent of the General Assembly to comprehensively to occupy the field of solid waste management. The moratorium essentially established a veto over State decisions to permit or compel the installation or alteration of incinerators and veto power over the SWMP approval process which would cause confusion and frustrate State policy. The court noted that with respect to both the permitting process and the development of the SWMP that although the statutory scheme mandates local involvement, the State did not intend to vest the localities with legislative authority. The role of the counties in both areas is heavily controlled by detailed regulations on the contents of the permits and plans and the State retains authority to veto or require modification of the plans. The court also noted that although Section 9-502(c) provides the “any rule or regulation adopted under this subtitle does not limit or supercede any other county, municipal or State law, rule, or regulation that provides greater protection to the public health, safety or welfare”, that provision applies only to land use, planning and zoning decisions.

Finally, in Queen Anne’s Co. v. Days Cove Reclamation Co., 122 Md. App. 505(1998), the county commissioners approved the inclusion of a proposed rubble landfill in the County’s SWMP. Three years later, after creating a number of roadblocks for the proposed landfill by enacting certain prohibitive zoning laws, the County proposed a revised SWMP that removed the proposed landfill. Citing Holmes, supra, the court found that “the individual county’s role with respect to solid waste management is within the realm of planning, rather that that of permitting, and within that realm, it is one of limited scope.” The court went on to state that the County cannot initially determine that the proposed landfill is consistent with its SWMP and include it in the Plan and then turn around and amend the Plan to exclude it based upon negative reaction from the community. Once it is included in the Plan, the facility’s fate is within the province of the MDE.

Applying the courts' reasoning regarding preemption to current City legislation on medical waste facilities, it is clear that, the City Council legislation imposing geographic limits for the incinerator is impliedly preempted by State law governing permitting of facilities and authority over the City's Solid Waste Management Plan. The law impermissibly attempts to regulate in the field of solid waste management. Regulation of the operation of the Incinerator is governed by numerous State laws and regulations regarding not only the operation of refuse disposal systems in general but specific laws and regulations dealing with incinerators and medical waste.

Similarly, the City's law is impliedly preempted by State law regarding county solid waste management plans. The Incinerator is included in the City's SWMP. Although State law allows for local government involvement in the development of local SWMP's, the role of the local government is defined in the State law. County plans, even at the stage at which they have been adopted and subsequently undergone revision, are not final and operational until the State signifies its approval. Holmes at 150. Counties may initiate plan revision, but MDE sua sponte may require a county to revise or amend its plan. Id. MDE may reject a county's plan or plan revisions, or it may modify or take other appropriate action on the proposal. Id. In addition, these provisions (i.e. Subtitle 5) indicate MDE's strong control over county plans, including its ability to modify or veto plans or amendments of which it does not approve. Id. Although the statutory scheme under Subtitle 5 requires local involvement, we do not believe that the State intended to vest the localities with legislative authority but rather intended to comprehensively occupy the field of solid waste management. Mayor and City Council v. New Pulaski, 112 Md. App. 218 (1996).

The City's current SWMP does not include any geographic limitations on the acceptance of medical waste. In fact, the City's SWMP indicates that the City relies on a mixed public/private system for solid waste management. SWMP Sec. 3.0. The Plan states that one of its elements is to allow private haulers to dispose of wastes generated outside the City at facilities inside the City. The constraints for importing solid wastes into the City are the capacities of acceptance facilities and market considerations. These facilities are free to compete in the marketplace to provide waste disposal services in response to demand from their customers. Sec. 3.0. The Plan also acknowledges that special medical waste is imported to the Baltimore Regional Medical Waste Facility (the Incinerator). Sec. 3.2.4. Finally, the Plan notes that the City will continue to evaluate provisions for incineration for medical waste based on overall City export/import policy and State assessment of on-site hospital incinerators. Sec. 5.1.3. City laws imposing geographic limits on waste acceptance qualify the provisions of the existing SWMP, in effect amending the plan legislatively. This action is preempted by the State's occupation of the field of solid waste management and prohibited by State law which requires revisions to the SWMP to be approved by MDE.

Commerce Clause

Another area of concern is whether the City law violates the Commerce Clause of the United States Constitution by discriminating against out-of-state commerce in favor of in-state

interests. There are two tests for evaluating statutes that are in danger of running afoul of the Commerce Clause. First, if a statute discriminates against interstate commerce either on its face, in practical effect or in its purpose an almost per se rule of invalidity applies. In order to be found constitutional, the government must show that the discrimination is justified by a valid factor unrelated to economic protectionism and that no nondiscriminatory alternatives will protect the local interests. Second, if a statute regulates evenhandedly to effectuate a legitimate local public interest and the effects on interstate commerce are only incidental, the law will not be found unconstitutional unless the burdens on interstate commerce are clearly excessive in relation to the putative local benefits. Chambers Medical Tech. v. South Carolina DHEC, 52 F.3d 1252 (1995).

Baltimore City's geographic limitation on the receipt of medical waste has already been the subject of a Commerce Clause challenge. In Medical Waste Assoc. v. Mayor and City Council of Balt., 966 F.2d 148(1992), the Court was asked to determine whether an ordinance that proposed a geographic limit on the import of medical waste violated the Commerce Clause. In that case, the Court acknowledged that there were two standards of review under the Commerce Clause. The Court reasoned that the ordinance did not discriminate on its face against out-of-state waste being brought into Baltimore City because it banned such waste from one facility only and not from all facilities in the City. It, therefore, applied the less stringent standard of review, and found that the ordinance served the legitimate public purpose of meeting emergency regulations and preventing waste from polluting the Bay and landfills in the area. The Court noted that any burden on interstate commerce that might exist, although no evidence of a burden was presented, is only incidental and is not excessive in light on the need to provide for disposal of the region's medical waste. The Court concluded that the ordinance satisfied the second test under the Commerce Clause and was therefore constitutional.

Since the court's decision in Medical Waste Assoc., there have been several other cases in the federal courts involving interstate restrictions on waste. In BFI v. Whatcom County, 983 F.2d 911 (1992), a county ordinance banned all infectious medical waste from being disposed of in the County. The court found that the ordinance was a per se violation of the Commerce Clause and applied the more stringent test. The county argued that its purpose was to protect its citizens from the hazards of transporting and disposing of medical waste but failed to show how out-of-state waste was more hazardous than in-state waste. Consequently, the court found the ordinance unconstitutional.

In Chambers Medical Tech. v. South Carolina DHEC, 52 F.3d 1252 (1995), the court reviewed a South Carolina statute that placed a cap on the amount of infectious medical waste that could be accepted at an incinerator in the state. The cap was based on the anticipated volume of in-state infectious medical waste. The court did not determine whether the cap should be analyzed under the per se test or the balancing test but analyzed the statute under both tests. Under the per se test, the state must show that the discrimination is justified by a valid factor unrelated to economic protectionism and that nondiscriminatory alternatives were not adequate. The justifications offered by the state concerned disrupted traffic flow in the area of the facility and dangers posed by disposal of non-combusted materials in the landfill and leaking trailers. Although these goals were not related to economic protectionism, the court found that other

nondiscriminatory alternatives existed to address those concerns and the cap could not be held constitutional under the per se test. In a footnote, the court emphasized that, since Chambers had taken over the incinerator, traffic issues and problems with leaking trailers had been cured. Applying the balancing test, the court found the burden on interstate commerce was not clearly excessive in relation to the putative local benefit. The concerns of the state were legitimate and were in areas traditionally subject to state regulation. The only burden imposed by the regulation was that the incinerator may not receive waste to its capacity. The cap did not prohibit the construction of other facilities in the state that could accept out-of-state waste. The statute, therefore, would be upheld under the balancing test. Accordingly, the court remanded the case for factual findings regarding whether the statute was discriminatory in purpose and subject to the per se test or evenhanded with only an incidental impact and subject to the balancing test.

Finally, the Supreme Court again addressed the issue of statutory bans on out-of-state waste in Fort Gratiot Sanitary Landfill v. Michigan Dept. of Natural Resources, 504 U.S. 353 (1992). In that case, Michigan passed a law that prohibited private landfill operators from accepting solid waste that originated outside the county where the facility was located. The Court rejected that argument that the law regulated evenhandedly because it applied equally to in-state and out-of-state waste and therefore applied the per se test. It also discounted the fact that individual counties could decide under the law to allow out-of-state waste if they amended their solid waste plan to allow it. Although the State argued that the law was a comprehensive health and safety regulation and not economic protectionism, the Court ruled that the law was nevertheless discriminatory and the State had not shown that other nondiscriminatory alternatives would not serve the State's purpose. The law, therefore, was found to be an unconstitutional violation of the Commerce Clause.

Since 1992, when the original geographic restrictions were imposed upon the receipt of medical waste, the City Council expanded the area and allowed medical waste generated within 250 miles of the facility to be accepted. The restrictions in the current law are unlike those in the most recent cases as they do not curtail all shipment of out-of-state medical waste into Baltimore City. The bill only curtails shipment of waste from outside a 250 mile radius to one facility. It is, therefore, difficult to predict which test would be applied to these circumstances. The one facility factor was enough for the court in Medical Waste Assoc. to determine that the balancing test applied. The Supreme Court in Fort Gratiot, however, applied the per se test to a less than absolute ban. The justifications for the original geographic limits were emergency regulations by the State and the need to protect the landfills from infectious medical waste. Those original justifications no longer exist so the City is left with health and safety concerns as justifications for the restrictions. Dangers from traffic, leaking trucks, disposal of ash and effects on air quality were considered adequate justification under the balancing test in Chambers but not adequate under the per se test. If the law were challenged, the City would be asked to explain why waste from within the 250 mile radius limitation poses less of a health and safety risk than waste from areas outside of the limits. No satisfactory answer to that question seems likely.

Given the state of the law surrounding the Commerce Clause and the nature of the City's current law, the City Council should repeal the 250 mile limit contained in the existing law as the

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potential exists for litigation regarding preemption and Commerce Clause violations. Even if the constitutional challenge were not successful, the existing law is preempted by State law. The Law Department, therefore, approves City Council Bill 09-0400 for form and legal sufficiency

Sincerely,



Elena R. DiPietro

Chief Solicitor

cc: The Honorable Edward Reisinger

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