

CITY OF BALTIMORE

SHEILA DIXON, Mayor



DEPARTMENT OF LAW

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

June 9, 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

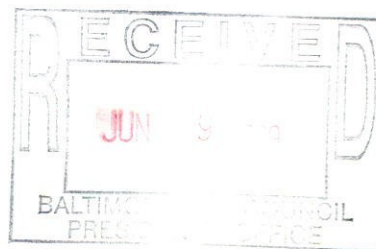
Re: City Council Bill 08-0205 – Plastic Bag Reduction

Dear Madame President and City Council Members:

The Law Department has reviewed City Council Bill 08-0205 for form and legal sufficiency. The bill provides that markets and formula retail establishments (defined in the bill) either: (1) may elect to not provide customers with checkout or carryout bags; or (2) may only provide customers with either: (1) recyclable paper bags; or (2) reusable bags. These terms are also defined in the bill. The bill also provides that the Sustainability Coordinator may seek legal redress in court for violations of the law, and it provides for an environmental citation and penalties.

Many other U.S. cities have adopted or are considering adoption of a similar law. These cities include San Francisco, Portland, Boston, Oakland, Phoenix, Santa Cruz, Seattle, and Annapolis. In addition, countries around the world with similar bans include Kenya, Uganda, Tanzania, Bhutan, Bangladesh, Eritrea, and India (in Mumbai). While a legal challenge is likely from industry groups, such as retailers associations, a legal challenge will likely fail. Possible challenges may be based upon the following:

Equal Protection – The bill could be challenged as a violation of the Equal Protection Clause of the Fourteenth Amendment and the Maryland Constitution. The ban applies only to formula retail establishments and markets and not all retail establishments in the City. In order to treat similarly situated entities differently, the City must have a rational basis for disparate treatment. It is arguable that applying the ban to larger retail establishments gets to the bulk of the problem while not placing a financial burden on the small retailer that is a very minor contributor to the problem. In addition, an Equal Protection challenge to the law based on disparate treatment of plastic bag companies as opposed to paper bag companies would fail, because the challenger would have the burden to prove that the City's enactment of the bill was not rationally related to a legitimate purpose. *See Minnesota v. Clover Leaf Creamery*



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*Co.*, 449 U.S. 456, 464 (1981). Especially in light of important environmental considerations, this would be an extremely difficult burden for a challenger to overcome.

Interstate Commerce Clause – A challenge to the law based on an alleged violation of the Commerce Clause would fail, because the City may regulate local aspects of interstate commerce if the law: (1) does not discriminate against outside interests to benefit local economic interests; and (2) is not unduly burdensome. *See Id.* at 470-71. This proposed law would withstand this challenge, because it does not consider whether the plastic bags being banned are from inside or outside the jurisdiction. The law would be upheld as not being protectionist legislation. Furthermore, any incidental burden on interstate commerce would not outweigh the significant local environmental benefits produced by the legislation.

Preemption – This bill would also withstand a preemption challenge. It is not preempted by express preemption, because neither Congress nor the General Assembly specifically prohibited local legislation. *See Worton Creek Marina v. Claggett*, 381 Md. 499, 512 fn. 6 (2004). It is also not preempted by implication, because no legislative intent to occupy the entire field may be implied from the “comprehensiveness with which the General Assembly has legislated in the field.” *Worton* at 512, fn. 6 (internal citation omitted). Moreover, this bill would not be preempted by conflict, because the ordinance would not permit an act that State law clearly prohibits or prohibit an act that the State law expressly permits. *See Worton* at 513. Rather, state and federal laws are silent on the matter, and the City may enact greater environmental protections for its citizens than the federal or state governments.

It is difficult to say that a bill absolutely withstand a equal protection challenge. To date not similar laws have been overturned. Since it can not be said with certainty what the outcome of a challenge would be, the Law Department would approves the bill for form and legal sufficiency.

Sincerely,



Deepa Bhattacharyya  
Assistant Solicitor

cc: The Honorable James B. Kraft  
George Nilson, City Solicitor  
Angela C. Gibson, Mayor's Legislative Liaison

Elena DiPietro, Chief Solicitor  
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