
CITY OF BALTIMORE

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Mayor



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October 1, 2020

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

Re: City Council Bill 20-0615 – Ban the Burn at Every Turn

Dear President and Members:

You have requested the advice of the Law Department regarding City Council Bill 20-0615. City Council Bill 615 prohibits Baltimore City from entering into contracts that would authorize the use of incinerators or waste-to-fuel facilities. Specifically, the bills says “the City of Baltimore may not award a contract for disposal of waste with any entity that uses or arranges for the use of any incinerator or waste-to fuel facility located inside or outside the State of Maryland. Currently, the City disposes of much of its waste at these types of facilities. This bill would not only prohibit haulers that contract with the City from disposing City waste at incinerators but would also preclude them from using incinerators for any other clients if they want to keep their contract with the City. For the reasons detailed below, the Law Department has determined that the bill is preempted by State law and violates the Charter authority of the Board Estimates to award contracts.

Preemption

The first argument that the bill is legally insufficient 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 thereby impliedly preempting 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.

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 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 effecting refuse disposal systems impacts solid waste management plans, they have often 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 provided 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 than 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 prohibiting the City from awarding contracts for waste disposal to any entity that uses or arranges for the use of any incinerator or waste-to-fuel facility located inside or outside the State of Maryland, it is clear that, the City Council legislation is impliedly preempted by State law governing permitting of facilities and the authority of the State over the City’s Solid Waste Management Plan. The law impermissibly attempts to regulate in the field of solid waste management by preventing the city from contracting with any entity that disposes any of the City’s waste or any of its other customer’s waste in any incinerator or waste-to-energy facility. This not only in essence removes these facilities from the solid waste management plan but also has the effect of pressuring contractors to drop smaller clients who want to use incinerators in order to keep the larger client, Baltimore City. This impacts the operation of the incinerator in the same way that prohibiting disposal directly would effect it. Regulation of the operation of an 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/waste-to-fuel facilities and local jurisdictions are not free to legislate in this area.

Similarly, the bill is impliedly preempted by State law regarding county solid waste management plans. Incinerators and fuel-to-waste facilities are 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, the State did not intend 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 includes incinerators /waste-to-fuel facilities as part of the City’s plan as one method to deal with its solid waste disposal. 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. This bill essentially removes incinerators/waste-to-fuel facilities the SWMP and limits waste acceptance thereby qualifying the provisions of the existing SWMP,

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.

This action also fails to comply with the procedures for amending a SWMP. Sec. 9-503 requires that the county must conduct a public hearing on the amendment, give notice of the time and place of the hearing and a summary of the amendments by publishing in at least one newspaper of general circulation once a week for 2 weeks at least 14 days prior to the hearing. After submittal of the amendment to the Department of the Environment for approval, the Department has 60 days to provide a decision subject to extensions as provided in Sec. 9-507

Charter Authority

Art. VI, Sec. 11 of the Baltimore City Charter provides that "the Board of Estimates shall be responsible for awarding contracts and supervising all purchasing by the City as provided in this section and elsewhere in the Charter." The Charter goes on to require "in contracting for any public work, or the purchase of any supplies (unless otherwise provided by ordinance for foodstuffs and related perishables), materials, equipment, or services other than professional services, for the City or by any municipal agency, involving an expenditure of greater than the threshold set under subsection (b) of this section, advertisements for proposals shall first be published at least twice in two or more newspapers of general circulation published in Baltimore City

The Charter is, "in effect, a local constitution," which "fixes the framework for the organization of the [City] government." *Ritchmount P'ship v. Bd. of Supervisors of Elections for Anne Arundel Cnty.*, 283 Md. 48, 58 (1978). "It is the instrument which establishes the agencies of local government and provides for the allocation of power among them." *Id.*; *Mayor and City Council of Ocean City v. Bunting*, 168 Md. App. 134, 146 (2006) (explaining a charter's purpose is "to distribute power among the various agencies of government") The City Council has no authority to legislate in areas covered in the Charter. See Art. III, Sec. 11 (City Council has the power to pass all ordinances not inconsistent with the Charter.

City Council Bill 20-0615 usurps the authority of Board of Estimates by excluding from contracting with the City those haulers that have other contracts that require them to deliver waste to incinerator/waste-to-energy facilities thereby preventing the Board of Estimates from awarding contracts to the lowest responsible bidder as provided in the Charter. The competitive bidding requirement is violated by any scheme or device prevents competition among prospective bidders. The rationale is the where "competitive bidding is required, it must not be destroyed or impaired, and to officer board or body charged with authority and duty in the

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premises must determine in each case what competition the nature of the case will admit, endeavor to secure the best competition possible in the circumstances of the particular case, pursue the best possible method to secure it and accord the same treatment to all bidders.....Generally, restrictions or conditions imposed on bidders which tend to increase the

cost of work are held to violate the requirements of competitive bidding or the letting of contracts to the lowest responsible bidder.”63 C.J.S. Sec. 1149. This bill clearly violates the intent of the Charter requirement as it excludes a whole class of prospective bidders.

Accordingly, City Council Bill 20-0615 is preempted by State law and is an impermissible infringement on the Board of Estimates’ Charter authority to award contracts and supervise all purchasing for the City. The Law Department, therefore, cannot approve the bill for form and legal sufficiency.

Sincerely,

Elena R. DiPietro
Chief Solicitor

cc: Dana P. Moore, Acting City Solicitor
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