

CITY OF BALTIMORE

STEPHANIE RAWLINGS-BLAKE, Mayor

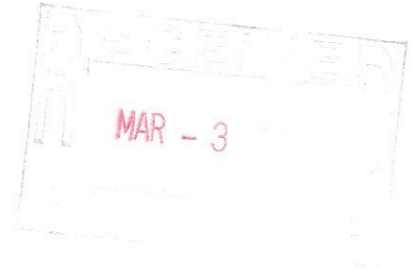


DEPARTMENT OF LAW

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

March 3, 2011

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 10-0631 – Charter Amendment – Nonlapsing Funds for Quality Schools

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 10-0631 for form and legal sufficiency. The bill would resolve to amend the City Charter by including a new Section 12 in Article I. This Section would authorize the Mayor and City Council by ordinance to create one or more nonlapsing funds dedicated to “enhancing the educational environment in Baltimore City.” These funds could be used for capital costs such as school building maintenance, increased school construction, renewing athletic facilities and modernizing equipment. In addition, the bill seeks to allow the funds to be used for programs to expand recreational activities and modernize the curriculum. The funds may be comprised of money appropriated in the Ordinance of Estimates, proceeds from fees dedicated by ordinance to be deposited in the fund or from grants and donations. Appropriations to the fund(s) would not lapse or revert to the general fund of the City. This differs from the usual requirement under the Charter that all appropriations lapse at the end of the fiscal year unless the Board of Estimates has approved a carry-over for a specific program, purpose or activity. *See* Charter, Art. VI, §9(c).

Under Article XI-A, Section 5 of the Maryland Constitution, a resolution, such as City Council Bill 10-0631, is an appropriate method of initiating an amendment to the Baltimore City Charter. As such, prior resolutions have initiated Charter amendments to create non-lapsing funds (for affordable housing and for sustainability purposes) so that appropriations from those funds do not lapse at the end of the fiscal year.

However, any amendment to the Charter may not conflict with state or federal law. Article II of the City Charter contains the express powers granted to the City by the General Assembly, and therefore other provisions of the Charter may not conflict with Article II. Maryland Constitution, Art. XI-A, §2 (express powers granted by General Assembly “shall not be enlarged or extended by any charter.”). The City’s power to act with respect to schools is expressly limited in Article II by “the applicable provisions of the Education Article of the Annotated Code of Maryland.” *See* Charter, Art. II, §30. This Section of Article II was enacted in 1997 as part of Senate Bill 795, which created the New Baltimore City Board of School

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Commissioners (herein after the "Board") and began the current era of state shared control over the Baltimore City Public School System (hereinafter "BCPSS"). See 1997 Laws of Maryland, ch. 105.

Section 4 of 1997 Senate Bill 795 contemplates that there will be one or more agreements between the City and the State to define how the City will support the BCPSS. See 1997 Laws of Maryland, ch. 105, §4. Such an agreement must be approved by two House and two Senate committees of the General Assembly. One such agreement, dated June 24, 1998, provides that "the City and the Board shall consult, and, as appropriate, reach joint-use agreements for the use of the City's Department of Recreation and Parks facilities located on or near school sites." See June, 24, 1998 MOU between Mayor and City Council of Baltimore and the Board (hereinafter the "MOU"), ¶7. It also states that the "City and the Board shall consult and reach agreement on any proposed policy changes or changes through collective bargaining that would affect the City before any changes are implemented." *Id.*, ¶13. While neither of these provisions prevent the creation of one or more non-lapsing funds, these provisions highlight the care that must be taken when money from these non-lapsing funds is appropriated so as to not run afoul of any agreements. This is especially important because state law contemplates future agreements, making it impossible to opine now that any particular use of the funds will definitely be permissible under any agreement.

However, it can be said with reasonable certainty that using the money from the non-lapsing funds to pay for expenses that are not capital in nature, i.e. for programs to expand recreational activities and modernize the curriculum, poses a conflict with current state law on funding the operational expenses of the BCPSS. This is because state law requires that "local funds to the school operating budget" each year be "in an amount no less than" the "per pupil basis for the prior fiscal year." Md. Code, Educ., §5-202(d)(ii). This means that once money is appropriated from this fund for operational expenses that are not non-recurring costs as defined by state regulations, the per pupil funding amount for the year of the appropriation may increase, and therefore require the City to maintain the level of per pupil funding the following years. See Md. Code, Educ., §5-202(d)(3)(i); C.O.M.A.R. 13A.02.05.03. In order to avoid this issue, as well as a potential preemption challenge to this bill for potentially legislating in the area of funding BCPSS operational expenses, the Law Department recommends deleting the terms "expand recreational activities" in line 3 of page 2 and deleting "and curriculum" in line 4 of page 2. See, e.g., *Allied Vending v. Bowie*, 332 Md. 279, 297 (1993) (quoting *Ad + Soil, Inc. v. County Comm'rs*, 307 Md. 307, 324 (1986))("The doctrine of pre-emption is grounded upon the authority of the General Assembly to reserve for itself exclusive dominion over an entire field of legislative concern."); see also 94 Op. Att'y Gen. 177 (2009)(shifting expenses between the locality's budget and the school's budget may not be done in a way that impacts the locality's maintenance of effort requirements).

Subject to the necessary amendments discussed herein, the Law Department approves this resolution seeking to create one or more non-lapsing funds for form and legal sufficiency. The Law Department cannot opine, however, on whether the placement of money into or appropriations from the funds will conflict with applicable state law or with any current or future agreement with the BCPSS.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Hilary B. Ruley". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Hilary Ruley  
Assistant Solicitor

cc: George Nilson, City Solicitor  
Angela C. Gibson, Mayor's Legislative Liaison  
Elena DiPietro, Chief Solicitor  
Ashlea Brown, Special Assistant Solicitor  
Victor Tervalá, Assistant Solicitor