

CITY OF BALTIMORE

SHEILA DIXON, Mayor



DEPARTMENT OF LAW

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

February 6, 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 09-0271 – Tobacco Products – Unpackaged Cigarettes
or Cigars

Dear Madame President and City Council Members:

The Law Department has reviewed City Council Bill 09-0271 for form and legal sufficiency. The bill amends the City Code to clarify the existing prohibition on the distribution of unpackaged cigarettes and to add a prohibition on the distribution of unpackaged cigars (defined as those not in sealed, original packages of 5 or more with a specific warning label), subject to some exceptions. The exceptions for cigars include any sold by certain tobacco shops and any wholesaling for more than \$2 apiece or retailing for more than \$2.50 apiece, although those amounts could be adjusted by the Health Commissioner based on the Consumer Price Index. The bill also explicitly exempts cigars for sale or distribution to another retailer or distributor, or to someone outside of the City. Enforcement is by citation, with the specific language on citations in subtitle 1 of Article 40 being amended to reflect the appropriate changes. Finally, the bill has a special effective date of October 1, 2009, which will allow manufacturers ample time to conform the products that they ship into the City to these changes in the Code.

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.

Under these powers, the City Council has the authority to enact this legislation because the Health Commissioner has determined that the sale of these unpackaged cigars and cigarettes pose a unique health risk to minors and those who buy tobacco products without specific warning labels. Based on this determination, the City Code already prohibits the sale of unpackaged cigarettes. This bill seeks to clarify those prohibitions and enact similar ones for the distribution of cigars.

The Law Department anticipates that tobacco companies or other opponents may argue that the City Council does not possess the requisite authority to enact this bill or that the law



would be unconstitutional. On November 18, 2008, Prince George's County enacted legislation prohibiting the distribution of unpackaged cigars (defined as not in a sealed package of at least 5) by retailers or wholesalers, except by certain tobacco shops. *See* Prince George's County Bill No. CB-47-2008. That legislation became effective 45 days later on January 2, 2009. Approximately a week prior to the effective date, tobacco companies sued and asked for a temporary restraining order arguing that 1) the enactment exceeds the home rule charter power of that County because it was not local in nature; 2) the enactment is preempted by State law in a variety of ways; 3) the enactment is a violation of the Due Process Clauses of both the US and Maryland Constitutions; 4) the enactment is void for vagueness; and 5) the enactment violates the Commerce Clause of the US Constitution. *Altadis USA, Inc. et. al. v. Prince George's County, MD et. al.*, Circuit Court for Prince George's County, Case No. CAL08-38160 (removed to and then remanded back from United States District Court for the District of Maryland, Case No. 8:08-cv-03492-AW). That litigation is still in its early stages and Prince George's County has not yet responded to the substantive arguments against it.

Assuming similar challenges to this bill, the City has cogent arguments to make in response. Although Article XI-A of the Maryland Constitution gives the City power to enact laws confined in subject matter and substance to the City's territorial limits, the Maryland Constitution "attempts no definition of the distinction between a local law and a general law, but leaves that question to be determined by the application of settled legal principles to the facts of particular cases in which the distinction may be involved." *Holiday Universal, Inc. v. Montgomery County*, 377 Md. 305, 314-15 (2003). In this case, the text of the bill specifically states that it does not apply outside of the City. Moreover, the Health Article of the Code already has an entire title on tobacco products, including laws with respect to youth smoking and the aforementioned existing City prohibition on the sale of unpackaged cigarettes. *See* City Code, Health Article, §§12-202, 12-502.

With respect to preemption, other City laws regulating tobacco have survived preemption challenges when the state or federal legislation's scope and purposes are different than that of the City law. *See, e.g., Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 63 F.3d 1318, 1324-25 (4th Cir. 1995). In fact, the Maryland Court of Appeals has held that, "[w]hile the General Assembly has passed legislation addressing the health effects of smoking on Maryland citizens, it has not regulated smoking in so all-encompassing a fashion as to suggest that it meant to reserve to itself for direct legislative action all regulation of smoking." *Fogle v. H & G Restaurant, Inc.*, 337 Md. 441, 464 (1995). Moreover, because this bill only clarifies existing laws on the distribution of unpackaged cigarettes and extends similar prohibitions to unpackaged cigars, a court can find that this bill does not legislate in a new area of the law.

Opponents may challenge this bill, as they have done with the Prince George's County law, on the grounds that it would violate the Due Process Clauses of both the Maryland and federal constitutions. Although Due Process challenges can take on many forms, in this instance opponents may argue the law is an unreasonable use of City police power. Maryland Courts have held, however, that "such a statute will not be held void if there are any considerations relating to the public welfare by which it can be supported." *Governor of Maryland v. Exxon Corp.*, 279 Md. 410, 424 (1977). A court can easily conclude that this legislation has sufficient public health concerns to support it.

Although courts have held that the Commerce Clause limits a state or city's ability to pass laws that would regulate interstate commerce, 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 Council of City*, 1991 WL 340561, *2 (Md. 1991)(unreported)(citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). "Where the statute regulates even-handedly 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*, 317 Md. 72, 141 (1989). Thus, each case must be analyzed separately to balance the local interest with the burden on commerce. In this case, because the sale of unpackaged cigarettes is already prohibited, a court can conclude that any additional burden on manufacturers is outweighed by the legislation's health benefits.

A law is declared void for vagueness if it "prohibits the doing of an act in terms so vague that persons of ordinary intelligence must necessarily guess at its meaning." *Fogle*, 337 Md. at 467 (citations omitted). In this case, a court can find the bill's language is "sufficiently definite to provide notice of the conduct it prohibits or requires and to guide those that must apply it," because it states exactly which types of cigarettes and cigars are affected and which retailers will be subject to its provisions. *Id.*

Finally, it is worth noting that the Court of Appeals of Maryland recognizes that "[e]specially where reviewing legislation dealing with a serious problem in a new and untried fashion, the courts are under a special duty to respect the legislative judgment as to the proper means of solving the problem." *Governor of Maryland*, 279 Md. at 428. Therefore, despite possible challenges to this law, the Law Department approves Council Bill 09-0271 for form and legal sufficiency as an exercise of the City's power to preserve the health of its residents and to prevent and remove nuisances.

Very truly yours,



Hilary Ruley
Assistant Solicitor

cc: George Nilson, City Solicitor
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