

CITY OF BALTIMORE

SHEILA DIXON, Mayor



DEPARTMENT OF LAW

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

September 23, 2009

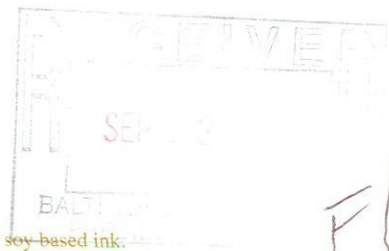
The Honorable President and Members  
of the Baltimore City Council  
Attn: Karen Randle, Executive Secretary  
Room 409, City Hall  
100 N. Holliday Street  
Baltimore, Maryland 21202

Re: City Council Bill 09-0388 – Flavored Tobacco Wrappings – Sale or  
Distribution

Dear Madame President and City Council Members:

The Law Department has reviewed City Council Bill 09-0388 for form and legal sufficiency. The bill would prohibit the sale or distribution of flavored tobacco wrappings. The prohibition would not apply to a tobacco retail establishment which derives at least 75% of its revenues from non-cigarette tobacco products, regularly sells loose tobacco products, and prohibits the entry of minors at all times. Enforcement of the law is by either environmental citation or civil citation and violation constitutes a misdemeanor.

Generally speaking, City Council has the authority to “provide for the preservation of the health of all persons within the City” 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. City Council, therefore, has the authority to enact this prohibition against the sale or distribution of flavored tobacco wrappings, since the ban is intended to promote the health and general welfare of citizens by eliminating the accessibility of these products by minors. This prohibition is in furtherance of the public policy of protecting minors from smoking, which has already been reflected in the City Code. *See, e.g.* § § 12-202 (sale of unpackaged cigarettes prohibited), 12-402 (placement of tobacco products in retail establishments must require seller intervention for customer access) and 12-502 (prohibits sale or distribution of cigarettes to minors) of the Health Article of the City Code.



F/Comments



Although State law regulates tobacco products to some extent, the Court of Appeals 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). Furthermore, the Attorney General has opined that certain tobacco-related local legislation also designed to protect minors is not preempted. 93 Md. Op. Atty. Gen. 149 (2008) (Baltimore City Health Code regulation banning sale of cheap cigars is not preempted by state law, since there is no express preemption, there is no conflict with state law, and preemption of local legislation regarding cigarette vending machines does not preclude other kinds of tobacco-related local legislation) (citing *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 862 F. Supp. 1402, 1420 (D. Md. 1994)).

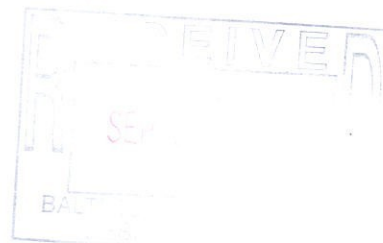
It should be noted that Federal law governs cigarette labeling and advertising to an extent, but this bill does not address either aspect of cigarettes, and therefore would fall outside the scope of federal preemption. *See, e.g.* 78 Md. Op. Atty. Gen. 359 (1993).

There are two possible legal challenges to this bill which warrant discussion and perhaps amendments. First, the Court of Appeals has held that local regulation of cigarette vending machines is preempted by Maryland law. *Allied Vending, Inc. v. City of Bowie*, 332 Md. 279 (1993). Therefore, to the extent that flavored tobacco wrappings (or products containing them) are sold in the City in cigarette vending machines, there is a strong argument that the law could not apply. The Law Department recommends the following:

On page 2, line 29 add § 12-604 EXCEPTION FOR PRODUCTS SOLD IN VENDING MACHINES.

THIS SUBTITLE DOES NOT APPLY TO THE SALE OR DISTRIBUTION OF TOBACCO PRODUCTS BY VENDING MACHINES.

The second predicted challenge is based on the Commerce Clause. Although opponents may argue that this bill places a burden on interstate commerce, “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). Furthermore, courts have recognized 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)).



Therefore, despite these potential challenges, the Law Department approves City Council Bill 09-0388 for form and legal sufficiency.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Ashlea Brown', with a long horizontal flourish extending to the right.

Ashlea Brown  
Special Assistant Solicitor

cc: George Nilson, City Solicitor  
Angela C. Gibson, Mayor's Legislative Liaison  
Elena DiPietro, Chief Solicitor  
Hilary Ruley, Assistant Solicitor