

---

CITY OF BALTIMORE

BERNARD C. "JACK" YOUNG  
Mayor



DEPARTMENT OF LAW  
DANA P. MOORE, ACTING CITY SOLICITOR  
100 N. HOLLIDAY STREET  
SUITE 101, CITY HALL  
BALTIMORE, MD 21202

---

April 15, 2020

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

Re: City Council Bill 19-0449 Zoning – Use Regulations – Neighborhood  
Commercial Establishments

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 19-0449 for form and legal sufficiency. The bill would prohibit the sale of tobacco products and electronic smoking devices, accessories and related products by a retail goods establishment that is a neighborhood commercial establishment.

The bill raises several legal issues.

Standards of Review and Procedure

Bill 19-0449 is a text amendment to the Zoning Code and is therefore a legislative authorization, subject to the requirements of Subtitle 5 of Article 32. A bill that authorizes a text amendment is a “legislative authorization.” Art. 32, § 5-501. Legislative authorizations require that certain procedures be followed in the bill’s passage. Specifically, certain notice requirements apply to the bill. See Art 32, § 5-601. The bill must be referred to certain City agencies, which are obligated to review the bill in a specified manner. See Art. 32, §§ 5-504, 5-506. Finally, certain limitations on the City Council’s ability to amend the bill apply. See Art. 32 § 5-507.

The following standards must be considered in the passage of a text amendment: 1) the amendment’s consistency with the City’s Comprehensive Master plan, 2) whether the amendment would promote the public health, safety, and welfare, 3) the amendment’s consistency with the intent and general regulations of the zoning code, 4) whether the amendment would correct an error or omission, clarify existing requirements, or effect a change in policy, and 5) the extent to which the amendment would create nonconformities. See Art 32 § 5-508 (c).

## Preemption

A court would likely find that the bill is not preempted. Although both federal and state law regulate tobacco and electronic smoking devices, this bill is a local zoning measure, intended to regulate the location of sale and is therefore not preempted. This distinction between generally applicable zoning laws that control the location of sale (which are generally not preempted) and laws which control the actual sale of tobacco products has been recognized by the Supreme Court. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 546-47 (2001). This distinction has also been recognized (although in different contexts) by Maryland courts. *See, e.g. Maryland Reclamation Assoc. v. Harford County*, 414 Md. 1, 38 (2010) (local zoning ordinance upheld for landfill despite state permitting) and *Hippocratic Growth, LLC v. Bd. Of County Comm. Of Queen Annes Co.*, No. 905, Sept. Term, 2017, 2018 WL 3343588 (local zoning law not preempted by state regulation of marijuana) (unreported). Although Maryland law is silent as to the extent of local zoning control over the sale of tobacco products, courts have generally upheld local zoning measures despite state licensing schemes.

“Whether the existence of a State licensing scheme prevents application of zoning laws to licensees depends on the intent of the legislature. In Maryland, the Court has generally held that licensees must meet both licensing and zoning requirements, noting that the law contemplates that zoning is ‘an activity that exists in a sphere separate from the operation of State level regulation.’” Opinion of the Attorney General of Maryland dated January 2, 2013 to the Honorable Joan Carter Conway (quoting *Maryland Reclamation Assoc.*, 414 Md. at 38.) (citations omitted). If the state law does not regulate the location of the activity (in this case, the sale of tobacco products), courts will generally find no preemption. Opinion at p. 2 (citing *Ad and Soil, Inc. v. County Commissioners*, 307 Md. 307 (1986)). The Attorney General found no preemption of Baltimore City’s restriction of sales of alcohol in certain locations, despite the state’s extensive licensing scheme, because the local law would not conflict with state law, the field was not preempted by the state, and the licensing scheme expressly required that the licensees comply with local zoning laws. Opinion, p. 2.

Like alcohol regulation, the state has not preempted the field of tobacco control. The state’s statutory scheme, although extensive, does allow local regulation of certain aspects of tobacco sales. For example, while state law preempts local control over the location of cigarette vending machines (*Allied Vending, Inc. v. The City of Bowie*, 332 Md. 279 (1993)) and the packaging of cigarettes (*Altadis v. PG County*, 431 Md. 307 (2013)), it does not preempt local control of where people smoke.

Montgomery County recently enacted a zoning law prohibiting the sale of e-cigarettes by retail stores within a certain distance of a middle or high school. *See* Montgomery County Council Bill 29-19, enacted April 3, 2020.

A court would likely find that this bill is not preempted because, similar to zoning laws which prohibition alcohol sales in certain areas, it is a local zoning measure that regulates the location of an activity licensed by the state.

## Retroactive Effect

The bill would only prohibit the sale of tobacco and e-cigarette products in Neighborhood Commercial Establishments in stores starting the sale of those products after the law's enactment. Generally, statutes are presumed to operate only prospectively and cannot have a retroactive effect if retroactive application would impair vested rights. *Waters v. Montgomery Co.*, 337 Md. 15, 28-29 (1994).

### Vagueness

The Law Department recommends further elaboration on "accessories and related products" to avoid a vagueness challenge. See, e.g., *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 238-239 (1925) (courts have held a civil "provision invalid as contravening the due process of law clause of the Fifth Amendment, among others, because it required that the transactions named should conform to a rule or standard which was so vague and indefinite that no one could know what it was")(citations omitted); see also *Johnson v. U.S.*, 135 S.Ct. 2551, 2570 (2015)(Thomas, J., concurring).

### Planning's Amendments

In the Planning staff report, a recommendation is made to place the prohibition on the sale of these products in the general nonresidential uses permitted and prohibited in Neighborhood Commercial Establishments, rather than in the retail goods establishments which are located in Neighborhood Commercial Establishments. This change will avoid possible confusion with regard to retail goods establishments.

The Law Department agrees with this recommendation.

Subject to the above, the Law Department approves the bill for form and legal sufficiency.

Very truly yours,



**Ashlea Brown**

Assistant Solicitor

cc: Dana P. Moore, Acting City Solicitor  
Matthew Stegman, Mayor's Office of Government Relations  
Elena DiPietro, Chief Solicitor  
Hilary Ruley, Chief Solicitor  
Victor Tervalá, Chief Solicitor