

CITY OF BALTIMORE

SHEILA DIXON, Mayor



DEPARTMENT OF LAW

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

February 12, 2009

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

RE: City Council Bill 08-0231 – Health-Smoking on or Adjacent to Hospital
Premises

Dear President and Members

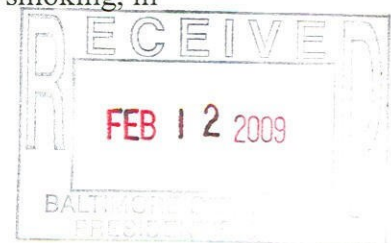
You have requested the advice of the Law Department regarding City Council Bill 08-0231. City Council Bill 231 for a ban on smoking on the premises of any hospital and any public right-of-way adjoining the premises of a hospital. The bill requires the posting of signs and is enforceable by environmental and civil citation or is also a misdemeanor punishable by a fine of not more than \$50 for each offense

The State of Maryland in Health General Art. ,Section 24-205 also prohibits “smoking in any area of a hospital.” Unlike the Indoor Clean Air Act found in Subtitle 5 of Article 24, in Subtitle 2, there is not express language granting authority to local governments to legislate in this area. The doctrine of conflict preemption states that a local ordinance is preempted when it either prohibits an act which under State law is permitted or permits an act which under State law is prohibited. Worton Creek Marina v. Claggett, 381 Md. 499, 512 (2004) (internal citations and quotations omitted). Conflict preemption will also apply to invalidate a local law when the local law is in direct conflict with a State statute regulating the same matter. Montgomery Co. Bd. of Realtors v. Montgomery Co., 287 Md. 101 (1980).

City Council Bill 231 conflicts with State law on this subject because it would prohibit smoking under circumstances where it would be permitted under State law. Section 24-205, although prohibiting smoking in any area of a hospital, grants several exceptions and permits smoking

- (i) in a facility for the treatment of mental disorders as defined in Se. 10-101(e);
- (ii) In a facility where the average stay is more than 30 days;
- (iii) In an acute care hospital and the attending physician authorizes smoking, in writing, as part of the care for the patient.

F/A



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City Council Bill 08-0231 should be amended to be consistent with the provisions of State law and preemption by conflict. Subject to the incorporation of the attached amendments, the Law Department approves City Council Bill 08-0231 for form and legal sufficiency.

Sincerely yours,



Elena R. DiPietro
Chief Solicitor

cc: Honorable Robert Curran
Angela Gibson, City Council Liaison
George A. Nilson, City Solicitor
Deepa Bhattacharyya, Assistant Solicitor
Ashlea Brown, Assistant Solicitor
Hilary Ruley, Assistant Solicitor

Amendments to City Council Bill 08-0231

1. On Page 2, line 25 insert “post” after “must.”
2. On Page 2, line 15 Insert (A) before “Except.”
3. On Page 2, after line 19, insert:

(B) Notwithstanding the provisions of § 12-603(A) of this subtitle, this section does not apply to patients who are:

- (1) In a facility for the treatment of mental disorders as defined in § 10-101(e) of this article;
- (2) In a facility where the average patient stay is more than 30 days; or
- (3) In an acute care hospital and the attending physician authorizes smoking, in writing, as part of the care for the patient.

(C) Smoking permitted under this section shall be in designated areas that are considered safe and provide nonsmoking patients, family members, and employees protection from tobacco smoke.

(D) Smoking may not be permitted where nonsmoking patients sleep.

**CITY OF BALTIMORE
COUNCIL BILL 08-0231
(First Reader)**

Introduced by: Councilmember Curran, President Rawlings-Blake, Councilmembers Holton,
Kraft, Reisinger, Middleton, D'Adamo, Henry, Branch, Cole

Introduced and read first time: November 17, 2008

Assigned to: Public Safety and Health Committee

REFERRED TO THE FOLLOWING AGENCIES: City Solicitor, Health Department, Environmental
Control Board, Department of Finance

A BILL ENTITLED

1 AN ORDINANCE concerning

2 **Health – Smoking On or Adjacent to Hospital Premises**

3 FOR the purpose of prohibiting smoking on or adjacent to hospital premises; defining certain
4 terms; providing for certain exceptions; imposing certain penalties; providing for a special
5 effective date; and generally relating to smoking in areas near hospitals.

6 BY adding

7 Article - Health

8 Section(s) 12-601 through 12-612, inclusive, to be under the new subtitle

9 “Subtitle 6. Smoking On or Adjacent to Hospital Premises”

10 Baltimore City Revised Code

11 (Edition 2000)

12 BY repealing and reordaining, with amendments

13 Article 1 - Mayor, City Council, and Municipal Agencies

14 Section(s) 40-14(e)(7)(Title 12) and 41-14(6)(Title 12)

15 Baltimore City Code

16 (Edition 2000)

17 **SECTION 1. BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF BALTIMORE,** That the
18 Laws of Baltimore City read as follows:

19 **Baltimore City Revised Code**

20 **Article – Health**

21 **Title 12. Tobacco Products**

22 **SUBTITLE 6. SMOKING ON OR ADJACENT TO HOSPITAL PREMISES**

23
24 **§ 12-601. DEFINITIONS.**

25 (A) *IN GENERAL.*

EXPLANATION: CAPITALS indicate matter added to existing law.
[Brackets] indicate matter deleted from existing law.

Council Bill 08-0231

1 (2) IS NOT A DEFENSE TO SMOKING IN VIOLATION OF THIS SUBTITLE.

2 §§ 12-606 TO 12-610. {RESERVED}

3 § 12-611. ENFORCEMENT BY CITATION.

4 (A) IN GENERAL.

5 IN ADDITION TO ANY OTHER CIVIL OR CRIMINAL REMEDY OR ENFORCEMENT PROCEDURE,
6 THIS SUBTITLE MAY BE ENFORCED BY ISSUANCE OF:

7 (1) AN ENVIRONMENTAL CITATION AS AUTHORIZED BY CITY CODE ARTICLE 1,
8 SUBTITLE 40 {"ENVIRONMENTAL CONTROL BOARD"}; OR

9 (2) A CIVIL CITATION AS AUTHORIZED BY CITY CODE ARTICLE 1, SUBTITLE 41 {"CIVIL
10 CITATIONS"}

11 (B) PROCESS NOT EXCLUSIVE.

12 THE ISSUANCE OF A CITATION TO ENFORCE THIS SUBTITLE DOES NOT PRECLUDE PURSUING
13 ANY OTHER CIVIL OR CRIMINAL REMEDY OR ENFORCEMENT ACTION AUTHORIZED BY LAW.

14 § 12-612. PENALTIES.

15 ANY PERSON WHO SMOKES IN VIOLATION OF THIS SUBTITLE IS SUBJECT TO A CIVIL FINE OF
16 NOT MORE THAN \$50 FOR EACH OFFENSE.

Baltimore City Code

Article 1. Mayor, City Council, and Municipal Agencies

Subtitle 40. Environmental Control Board

20 § 40-14. Violations to which subtitle applies.

21 (e) Provisions and penalties enumerated.

22 (7) Health Code

23 Title 12: Tobacco Products

24 Subtitle 1: Indoor Smoking

25 Person smoking \$250

26 Employer, other person in charge \$500

27 Subtitle 2: Sale of Unpackaged Cigarettes \$150