

CITY OF BALTIMORE

STEPHANIE RAWLINGS-BLAKE, Mayor

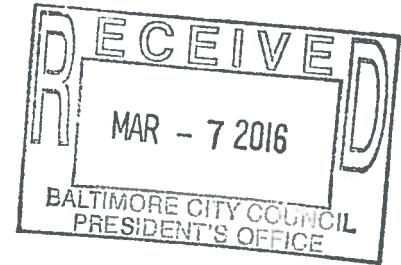


DEPARTMENT OF LAW

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

March 7, 2016

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 16-0616 – Hookah Lounges

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 16-0616 form and legal sufficiency. The bill would amend the text of the Zoning Code to define hookah lounges as a type of use and permit them as conditional uses by ordinance in the B-1 through B-5 districts, and the M-2 and M-3 districts. The bill would also mandate that the City Council consider imposing certain conditions when granting a hookah lounge as a conditional use. Additionally, the bill amends the Indoor Smoking subtitle of Title 12 on Tobacco Products and Smoking Devices in the City's Health Code to allow indoor smoking in a hookah lounge as well as to reduce the amount of revenues required by retail tobacco establishments to qualify for exemption from the Indoor Smoking prohibition. The bill would also exempt hookah lounges from the City's Late-Night Commercial Operations law in Subtitle 9 of Article 15 of the City Code.

Generally, the City 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. The increased regulation of hookah lounges is consistent with this general power. It is not preempted by the holding in the recent decision in *Altadis USA, Inc. v. Prince George's County*, 431 Md. 307, 316 (2013) because, in part, the decision does not cover this type of device. Moreover, this bill does not impact the distribution of tobacco products. It is also consistent with the State's Clean Indoor Air Act. Md. Code, Health – Gen., §24-501, *et. seq.*

The bill does, however, define a "hookah lounge" as being one which is operational "during day, evening, and late-night hours till 4am." This definition could be considered by a court as too vague to be enforceable because, for example, it is unclear if an establishment open 24 hours a day would not be a hookah lounge and not be regulated as provided in the bill. 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

For v/ Award

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)(discussing how the Supreme “Court’s application of its vagueness doctrine has largely mirrored its application of substantive due process.”). Just because there may be “some conduct that clearly falls within the provision’s grasp” does not cure an otherwise vague law. *Id.* at 2561. The Council should consider defining the establishment without reference to hours at all, thereby capturing all businesses “primarily devoted to the serving of hookah (water pipe) products for consumption on premises.” Suggested language for an amendment is attached.

Additionally, the bill suggests that the City Council could impose conditions on the “type of hookah devices and accessories to be used” inside the premises of a hookah lounge. These conditions must concern the safety of the particular products or other legitimate local health and welfare concerns, so as not to violate the Commerce Clause of the United States Constitution. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970)(cited with approval in *Medical Waste Associates Ltd. Partnership v. Mayor and City Council of Baltimore*, 966 F.2d 148, 150 (4th Cir. 1992)) (“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.”)(citations omitted). The Law Department recommends amending the bill to add the words “safety of the” prior to the words in line 23 on page 4. Suggested wording for this amendment is attached.

Any amendment to the City’s Zoning Code requires advertisement by publication in a newspaper of general circulation in the City at least 15 days before the hearing. *See* Md. Code, Land Use, §10-303(c); Zoning Code of Baltimore City (“ZC”), §§16-101(d)(2); 16-402(b)(1); 16-402(c)(2). In addition, any Zoning Legislation, such as this bill, requires a hearing before Second Reading and, if it is substantively amended after the conclusion of that hearing, a subsequent hearing is required. *See* ZC, §§16-401(a); 16-402(a); 16-403.

Assuming this bill was properly advertised, the Council holds the requisite hearings, and amends the bill to clarify the two provisions discussed herein, the Law Department can approve it for form and legal sufficiency.

Very truly yours,



Hilary Ruley
Chief Solicitor

cc: George Nilson, City Solicitor
Angela C. Gibson, Mayor’s Legislative Liaison
Elena DiPietro, Chief Solicitor, General Counsel Division
Victor Tervalá, Chief Solicitor
Jennifer Landis, Assistant Solicitor

AMENDMENTS TO COUNCIL BILL 16-0616
(1st Reader Copy)

Proposed by: Law Dep't
{To be offered to the Land Use and Transportation Committee}

Amendment No. 1

On page 2, in lines 28 and 29, strike “, DURING DAY, EVENING, AND LATE-NIGHT HOURS TILL 4AM.”

Amendment No. 2

On page 4, in line 23, before the word “TYPE” insert “SAFETY OF THE”