

CITY OF BALTIMORE

STEPHANIE RAWLINGS-BLAKE, Mayor

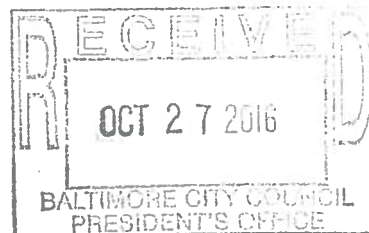


DEPARTMENT OF LAW

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

October 26, 2016

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



Re: City Council Bill 16-0621 – Transport of Crude Oil by Rail

Dear President and City Council Members:

The Law Department has been asked to review City Council Bill 16-0621 for form and legal sufficiency. The bill requires the City to conduct a health impacts assessment and a risk assessment of the transport of crude oil by rail. It requires the City to update, periodically study, and report on the City's incident response plans as they relate to the transport of crude oil by rail. The bill also requires the City to create a mechanism to ensure proper clean up and effective response to derailments or other adverse impacts as well as develop certain public outreach programs. The bill has an immediate effective date.

The Law Department's concern with this bill focuses on §§ 8-3, 8-4 and 8-5. These sections require the Health Department to assess certain health risks associated with rail shipments of crude oil. They establish how the assessment is to be conducted and the elements that must be present within the assessment. Section 8-5 requires other City agencies to update the City's incident response plan in accordance with the Health Department's assessment. These sections conflict with the City Charter and, in any case, are not the proper subjects of an ordinance.

Article XI-A of the Maryland Constitution grants Baltimore City the power to legislate locally only the subject matter delegated by the General Assembly. *See* MD Const Art. 11-A, § 2; *see also*, *State v. Stewart*, 137 A. 39, 41 (1927) (“This article empowers the General Assembly to designate the subjects in respect to which the city or counties may legislate locally.”). “Article II [of the Baltimore City Charter] contains the ‘General Powers’ expressly delegated to the City.” *Cheeks v. Cedlair Corp.* 287 Md. 595, 607 (1980)). Article II, however, does not include the legislative power to control the day-to-day operations of the City government. Instead, the City Charter expressly designates the Mayor as the “chief executive officer of the City...[exercising] general supervision over all municipal officers and agencies.” Baltimore City Charter, Art IV, § 4(b).

The legislative powers of the Mayor and City Council include the power to regulate by ordinance “the use of streets by street railways and railroads.” City Charter, Art. II, § 27. This

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legislative power, however, can only be exercised to the extent the exercise has not been preempted by federal law. *See PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 218 (4th Cir.2009) (The Interstate Commerce Commission Termination Act preempts State and local law “that may reasonably be said to have the effect of ‘managing’ or ‘governing’ rail transportation.”). In performing its legislative responsibilities, the Charter allows the City Council to demand that various executive branch officers appear before the legislative body if requested by a majority vote of councilmembers. City Charter, Art. III, § 9. In furtherance of this power, the City Code permits the City Council, acting through its Committee on Legislative Investigations, to compel the production relevant papers, books, accounts, records, and testimony on matters before the Committee. City Code, Art. I, § 1-4.

Nonetheless, the investigative powers must be read in harmony with all the provisions of the City Charter. *Moore v. State*, 424 Md. 118, 128 (2011) (“When the statute is part of a larger statutory scheme, it is axiomatic that the language of a provision is not interpreted in isolation; rather, we analyze the statutory scheme as a whole considering the purpose, aim, or policy of the enacting body and attempt to harmonize provisions dealing with the same subject so that each may be given effect.”). In effect, the investigative powers must be interpreted in relation to the Mayor’s responsibility over the day-to-day affairs and the absence of any legislative control over routine or daily operations.

Examining all of these provisions together leads to the following conclusions: First, it is clear the Committee on Legislative Investigations may compel the attendance and testimony of Executive Branch officials in regard to matters before the Committee. Second, the Committee can compel the production of documents that already exist and that may be useful to the Committee’s legislative affairs. But a conflict with the City Charter arises when local legislation aims to disrupt City operations by requiring agencies to perform tasks of a temporary nature that fall outside the routine work of an agency. This conflict would extend to legislative demands for special studies and reports as required by §§ 8-3, 8-4 and for updating existing plans, as required by § 8-5.

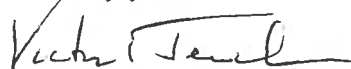
Besides conflicting with the City Charter, these provisions are not the proper subject matter of an ordinance. While an ordinance is an expressly legislative act, an ordinance is defined as prescribing “some permanent rule of conduct or government, to continue in force until the ordinance is repealed.” *Inlet Associates v. Assateague House Condominium Ass’n*, 313 Md. 413, 428 (1988), *quoting* McQuillin, *The Law of Municipal Corporations*, § 15.02. “Indeed, our cases ... recognize that if a municipal action is one of general application prescribing a new plan or policy, it is considered legislative and therefore must be accomplished by ordinance. *Inlet Associates*, 313 Md. at 429. In contrast to these principles, §§ 8-3, 8-4 and 8-5 are not establishing any permanent rule of conduct or government. Rather, they are requiring the performance of a temporary administrative activity, which could be the proper subject of a resolution, but never the topic of an ordinance. “A resolution passed by a legislative body ...

deals with matters of a special or temporary character...[and] generally speaking, is simply an expression of opinion or mind concerning some particular item of business coming within the legislative body's official cognizance, ordinarily ministerial in character and relating to the administrative business of the municipality." *City of Hagerstown v. Long Meadow Shopping Center*, 264 Md. 481, 491-92 (1972).

In contrast to the provisions in §§ 8-3, 8-4 and 8-5, those contained in §§ 8-7, 8-8 and 8-10 are proper legislative subject matter and offer no conflict with the City Charter. But we suspect that without the inclusion of §§ 8-3, 8-4 and 8-5 the remaining sections of the bill have limited utility.

In conclusion, the Law Department cannot approve the inclusion of §§ 8-3, 8-4 and 8-5 in Council Bill 16-0621. Instead, we would encourage the City Council to address its concerns over shipments of crude oil through the City in a resolution, encouraging the Administration to study the issue to determine the extent to which a departmental program or City policy is necessary.

Sincerely yours,



Victor K. Tervala
Chief Solicitor

cc: David Ralph, Acting City Solicitor
Angela C. Gibson, Mayor's Legislative Liaison
Elena DiPietro, Chief Solicitor, Opinions & Advice
Hilary Ruley, Chief Solicitor
Jennifer Landis, Assistant Solicitor