

CITY OF BALTIMORE

CATHERINE E. PUGH, Mayor



DEPARTMENT OF LAW

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January 29, 2018

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 18-0178 – Indoor Smoking – Hookah Lounges

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 18-0178 for form and legal sufficiency. The bill would amend the Health Code to remove private clubs, lodges and smoking bars from the exception to the City's prohibition on indoor smoking. It would add hookah lounges to places where indoor smoking can occur if those lounges meet three criteria: 1) 75% of its revenue comes from non-cigarette smoking products; 2) a ventilation system prevents smoke from going anywhere it is otherwise prohibited and 3) no minors are allowed. If adopted, the only places patrons could smoke indoors would be these designated hookah lounges and retail tobacco establishments.

Maryland's Indoor Clean Air Act provides that after February 1, 2008 a person may not smoke in either an indoor area open to the public or an indoor place of employment. Md. Code, Health-Gen., §24-504. An indoor area open to the public is defined as an "indoor area or a portion of an indoor area accessible to the public by either invitation or permission" or a place that is licensed or permitted to sell or possess alcoholic beverages. Md. Code, Health-Gen., §24-501(e). Smoking is defined as burning any substance containing tobacco. Md. Code, Health-Gen., §24-501(g). The only applicable exemption under state law is for a "retail tobacco business that is a sole proprietorship, limited liability company, corporation, partnership or other enterprise, in which: (i) The primary activity is the retail sale of tobacco products and accessories; and (ii) The sale of other products is incidental." Md. Code, Health-Gen., §24-505.

Although this State Clean Indoor Air Act explicitly provides that a local government may enact and enforce more stringent measures, as written this bill would appear to allow smoking in Hookah lounges so long as they meet the three criteria that the City lists in Section (c)(2) of its bill. Md. Code, Health – Gen., §24-510. To be clear, **if enacted, the Hookah lounge would have to satisfy the criteria listed in the bill and the criteria in state law.** This means that those lounges would also have to be "a sole proprietorship, limited liability company, corporation, partnership or other enterprise, in which: (i) The primary activity is the retail sale of tobacco products and accessories; and (ii) The sale of other products is incidental." Md. Code, Health-Gen., §24-505. **The Council should consider clarifying this bill to make it clear that**

both the state and local criteria need to be met. This could be done by adding “meets the criteria listed in state law and” before the colon in line 2 on page 3.

The addition of hookah lounges as places where indoor smoking is allowed under certain conditions and the removal of private clubs, lodges and smoking bars as a place where one can smoke inside is consistent with the City’s general power “to prescribe, within the limits of the federal and state constitutions, reasonable regulations necessary to preserve the public order, health, safety, or morals.” *Tighe v. Osborne*, 149 Md. 349, 356 (1925); City Charter, Art. II, §§ (11), (47). Opponents may argue that the Commerce Clause in the federal Constitution limits the City’s power to enact this type of law. To withstand such a challenge, the City Council must show that the law is aimed at 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); *accord BlueHippo Funding, LLC v. McGraw*, 609 F. Supp. 2d 576, 586 (S.D. W. Va. 2009)(recognizing that the Fourth Circuit has consistently used this two part test). It would behoove the Council to elicit testimony that any burdens on interstate commerce are incidental and do not outweigh the significant local environmental benefits produced by the legislation.

Additionally, this bill 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 that decision concerned only the packaging, sale and distribution of certain kinds of tobacco, not where those products can be used.

Therefore, the Law Department approves the bill for form and legal sufficiency.

Very truly yours,



Hilary Ruley
Chief Solicitor

cc: Andre M. Davis, City Solicitor
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