
CITY OF BALTIMORE

CATHERINE E. PUGH,
Mayor



DEPARTMENT OF LAW
ANDRE M. DAVIS, CITY SOLICITOR
100 N. HOLLIDAY STREET
SUITE 101, CITY HALL
BALTIMORE, MD 21202

January 29, 2018

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

Re: City Council Bill 17-0117 – Food Service – Polystyrene Foam Products

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 17-0117 for form and legal sufficiency. The bill would prohibit a “food service facility” (a term already defined in the Code) from using “disposable food service ware” that is made from polystyrene foam. The bill would also set various penalties for violations of this ordinance.

The City has the general police and welfare powers to legislate in this area. *See* City Charter, Art. II, §§ 27, 47. This allows the City “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).

An argument may be raised asserting that the Commerce Clause in the federal Constitution limits the City’s power to enact this law. A challenge of this nature would likely fail. The City may regulate local aspects of interstate commerce if the law: (1) does not discriminate against outside interests to benefit local economic interests; and (2) is not unduly burdensome. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470-71 (1981); *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). This bill does not appear to discriminate against out-of-state interests. Furthermore, any incidental burden on interstate commerce would not outweigh the significant local environmental benefits produced by the legislation.

We note that this legislation is nearly identical to City legislation proposed in 2012. We also call your attention to the fact that legislation is now pending before the General Assembly on a similar subject (HB538). This bill would prohibit persons from selling polystyrene food service products and prohibit certain businesses and schools from providing food in polystyrene food service products on or after January 1, 2019. A similar bill was introduced last year in the General Assembly (HB229). It failed to advance to the floor of the House of Delegates.

The Law Department approves CB 17-0117 as drafted for form and legal sufficiency.

Sincerely,

A handwritten signature in black ink, appearing to read "Victor K. Tervala". The signature is fluid and cursive, with a prominent initial "V" and a long horizontal stroke at the end.

Victor K. Tervala
Chief Solicitor

cc: Andre M. Davis, City Solicitor
Karen Stokes, Director, Mayor's Office of Government Relations
Kyron Banks, Mayor's Legislative Liaison
Elena DiPietro, Chief Solicitor, General Counsel Division
Hilary Ruley, Chief Solicitor
Jennifer Landis, Assistant Solicitor