
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

February 15, 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 17-0150 – Zoning – Prohibiting Crude Oil Terminals

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 17-0150 for form and legal sufficiency. The bill would prohibit new or expanded crude oil terminals throughout Baltimore City.

Proper subject of regulation

The Interstate Commerce Commission Termination Act (“ICCTA”), codified at 49 U.S.C. §§ 10101 et seq., preempts State and local law “that may reasonably be said to have the effect of ‘managing’ or ‘governing’ rail transportation.” *PCS Phosphate Co. v. Norfolk S. Corp.*, 559 F.3d 212, 218 (4th Cir.2009). Under the ICCTA, if a local regulation attempts to manage or govern rail transportation, it will be preempted by the regulatory authority of the federal Surface Transportation Board (“STB”). The ICCTA grants the STB “exclusive” jurisdiction over “transportation by rail carriers.” 49 U.S.C. § 10501(b)(1). It defines the term “transportation” to include a “yard, property [or] facility ... of any kind related to the movement of [property] by rail....” 49 U.S.C. § 10102(9)(A). Thus, the powers of the STB are broad in scope and impact not only the movement of rail freight but extend to the facilities used in handling rail freight. *See Norfolk S. Ry Co. v. City Of Alexandria*, 608 F.3d 150,(4th Cir. 2010) (City regulation of transloading operations of a railroad facility owned and operated by the railway pre-empted by STB regulations).

Facilities not owned or substantially controlled by a railroad – that is, by an independent party – can be the subject of local regulation. For example, in *New York & Atl. Ry. Co. v. Surface Transp. Bd.*, 635 F.3d 66 (2d Cir. 2011), a railway entered into an agreement with a company to build and own a facility to transload construction materials delivered by the railway. The railway contracted with a second company to operate the facility. In reviewing the ICCTA, the New York Court noted that “where the railroad maintains the appropriate control over the transload facility,

the STB exercises its exclusive jurisdiction and federal preemption applies” 635 F.3 at 74. But “the issue before this court ... is whether the STB exercises exclusive jurisdiction ... even when such facilities are not operated by, or under the control of, a “rail carrier.” 635 F.3d at 71. The 2nd Circuit, in fact, concluded that the record “failed to demonstrate NYAR exercised sufficient control over the Facility to bring it within the STB's jurisdiction.” 635 F.3d at 73. Given these findings, the Court ruled that a local zoning regulation was not preempted by the ICCTA.

The ICCTA permits state and local governments, pursuant to their police powers, to regulate “certain areas affecting railroad activity; for example, local electric, building, fire, and plumbing codes are generally not preempted.” *City Of Alexandria*, 608 F.3d at 158. The 4th Circuit explains that local regulations are not preempted under the ICCTA when they exhibit four characteristics. They must: (1) protect public health and safety; (2) be settled and defined; (3) be obeyed with reasonable certainty; (3) entail no extended or open-ended delays; and (4) be approved (or rejected) without the exercise of discretion on subjective questions. 608 F.3d at 160.

The Law Department points out that “zoning, in general, is a valid exercise of the police power.” *Anne Arundel County Com'rs v. Ward*, 186 Md. 330, 338 (1946). Council Bill 17-0150 amends the City’s zoning ordinance to prohibit new or expanded crude oil terminals in the City. Moreover, with an eye toward the pre-emptive power for the ICCTA, the bill expressly excludes from its effect crude oil terminals “owned and operated by a rail carrier....” CB 17-0150, page 2, lines 23-25. On its face, therefore, the bill is a permissible exercise of police power.

Problems with the bill

The Law Department notes that the term “crude oil” is not defined in CB 17-0150. Neither does the bill refer to any established definition appearing in another law, regulation or publication. We might assume the term “crude oil” means oil that has yet to be processed and refined into various petroleum products, but that would be substituting the Law Department’s supposition for the bill’s intended scope of regulation. Furthermore, a “crude oil terminal” presumably is a storage facility for crude oil, but the exact nature of the storage and the facility are undefined. In effect, is the intent of the bill to prohibit storage of the product for any length of time in any vessel of any size or capacity or must the storage and facility exhibit certain characteristics before the prohibition would apply?

As it is, the lack of defined terms makes the bill as drafted unconstitutionally vague; that is, CB 17-0150 today does not sufficiently “inform those who are subject to it what conduct on their part will render them liable to its penalties.” *McFarlin v. State*, 409 Md. 391, 410-11 (2009) (“a statute must be ‘sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties’”). To this end, we point out that a violation of the zoning ordinance may result in both civil and criminal penalties. See City Code, Art 32, §§ 19-213 & 19-215.

The bill also raises Equal Protection concerns. Legislation that discriminates against the storage of one product but not others satisfies the Equal Protection Clause of the 14th Amendment only if there is a plausible reason for the classification. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (“Unless a classification warrants some form of heightened review because it jeopardizes exercise

of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest.”). Under this standard, “the relationship of the classification to its goal [cannot be] so attenuated as to render the distinction arbitrary or irrational.” *Id.* at 11-12.

We assume that CB 17-0150 is premised on health and safety concerns raised by the flammability of crude oil and the possibility that it may ignite. If the City were to allow the storage of products that equal or exceed the flammability of crude oil, its prohibition on the storage of crude oil could be deemed an unreasonable classification; that is, the prohibition of one product would not serve a legitimate governmental interest when the storage of other similar products is permitted.

The Law Department possesses no more information about this subject than what is available in the media. Its review, however, suggests that natural gas and gasoline, for example, are generally more flammable than all types of crude. Among the different types of crude, Brakken shale light crude apparently is the most volatile of the crude oils. Its shipment, rather than the shipment of other types, has been responsible in recent years for explosions resulting from train derailments. A review of the media suggests, however, that Brakken crude is less volatile than gasoline and natural gas, yet the storage of these other, more dangerous products in Baltimore is not subject today to any proposed prohibition. If these or similar assertions can be firmly established as fact by knowledgeable industry representatives, the Law Department would be forced to conclude that CB 17-0150 violates Equal Protection. In this event, the Law Department would be unable to approve the bill for form and legal sufficiency.

Sincerely,



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
Ashlea Brown, Special Assistant City Solicitor