
CITY OF BALTIMORE

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Mayor



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January 24, 2019

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 18-0306 – Health Code – Clean Air Regulation

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 18-0306 for form and legal sufficiency. The bill regulates the emissions from commercial solid waste incinerators, which includes setting emissions limits for certain pollutants as well as requiring the continuous monitoring of these pollutants. The bill requires the production and public disclosure of certain emissions reports. It requires that commercial solid waste incinerators allow certain types of inspections and establishes a certification process for air monitoring contractors. Penalties for violations are also established.

The federal Clean Air Act, 42 U.S.C. §§7401 et. Seq. (“CAA”), requires each state to be responsible for ensuring that the ambient air quality standards established by the CAA are met by the deadlines prescribed in the CAA. 42 U.S.C. § 7410. Each state is required to establish a State Implementation Plan (SIP) for achieving these standards. *Id.* Maryland’s SIP is provided in Title 2 of the Environment Article. Pursuant to Title 2, the Department of the Environment is directed to divide the State into air quality areas and to set emission standards for each area. MD. ENVIR. §2-302. These standards can be viewed in Title 26, Subtitle 11 of the Code of Maryland Regulations (COMAR).

According to the State’s SIP, Title 2 “does not limit the power of a political subdivision to adopt ordinances, rules, or regulations that set emission standards or ambient air quality standards.” ENVIR § 2-104 (a)(1). This section provides a single caveat: a governing body “may not adopt any ordinance, rule, or regulation that sets an emission standard or ambient air quality standard less stringent than the standards set by the Department...” MD ENVIR § 2-104 (a)(2). If a local governing body would prefer not to impose local regulation, the State law allows the governing body to “ask the Department to adopt rules and regulations that set more restrictive emission standards or ambient air quality standards in that political subdivision.” MD ENVIR § 2-104 (b).

Baltimore's authority to regulate in the interest of resident health and general welfare is provided in Article II of the City Charter, § 27 (police power) and § 47 (general welfare). Article II establishes the legislative powers delegated to Baltimore City by the Maryland General Assembly pursuant to Article XI-A of the Maryland Constitution, § 2, *Cheeks v. Cedlair Corp.*, 287 Md. 595, 598 (1980).

The grant [of legislative powers] vested "full power and authority" in the Mayor and City Council of Baltimore... to "pass ordinances . . . (exercising) within the limits of the City of Baltimore all the power commonly known as the Police Power to the same extent as the State has or could exercise said power within said limits. Also granted to the City was "full power and authority" to pass ordinances deemed expedient "in maintaining the peace, good government, health and welfare of the City of Baltimore.

287 Md. at 600.

Police power is the power of the state "to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity" *Barbier v. Connolly*, 5 S.Ct. 113 U.S. 27, 31 (1884).

In its broadest sense the police power is said to be the power of government inherent in every sovereignty...In the nature of things, its precise boundaries are difficult if not impossible to define, but, as government exists for the preservation of the general welfare of society ..., its legitimate exercise must bear some actual and definite relation to that object...While [a] mass of litigation has resulted in no single comprehensive definition of the power, ...[we think] the police power is the power inherent in the state to prescribe within the limits of the federal and state Constitutions reasonable regulations necessary to preserve the public order, health, safety, or morals...In many of the cases in which the nature and extent of the police power have been considered, the words "general welfare" have been added to that definition, and there has been a tendency in some courts to treat that expression as enlarging the scope of the police power so as to reach an infinite variety of objects which could not be referred to any one of the objects definitely specified in the definition we have given. But in our opinion the words "general welfare" as used by this court and other courts in defining the scope of the police power do not have that effect, but are synonymous with and referable to the specific objects enumerated in the definition given above.

Tighe v. Osborne, 131 A. 801, 803 (Md. 1925). In reviewing exercises police power, the courts perform a very limited function.

Unless the exercise of the police power by the Legislature is shown to be arbitrary, oppressive or unreasonable, the courts will not interfere with it. [citations omitted]. Moreover, the wisdom or expediency of a law adopted in the exercise of the police power of a state is not subject to judicial review, and such a statute will not be held void if there

are any considerations relating to the public welfare by which it can be supported. [citations omitted].

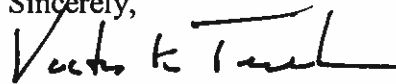
Westchester West No. 2 Ltd. Partnership v. Montgomery County, 276 Md. 448, 454–55 (1975).

Given the provisions of State law, which allow for local regulation of ambient air quality, plus the existence of the City's Article II powers, the Law Department is prepared to approve Council Bill 18-0306 as a lawful exercise of the City's police power, provided that the standards contained in the bill are at least as stringent as those set by the Department of the Environment. Given the Title 2 provisions in State law quoted above, any assertions that the bill's subject matter is preempted by implication by the State law is demonstratively false, a claim that has been made in correspondence received by the Law Department.

The same correspondence claims that the legislation is preempted by conflict. We find this claim also to be unsupportable. Preemption by conflict exists if the legislation facially seeks to ban or otherwise prohibit facilities which are intended to be permitted by state law or, in the alternative, permits facilities intended to be prohibited by state law. *Talbot County v. Skipper*, 329 Md. 481, 487 (1993) (" A local ordinance is pre-empted by conflict when it prohibits an activity which is intended to be permitted by state law, or permits an activity which is intended to be prohibited by state law."). Nothing in this legislation prohibits or bans, or suggest an intent to prohibit or ban, the operation of a commercial solid waste incinerator permitted under State law. If the legislation is adopted, these facilities may still operate in Baltimore. Nonetheless, the City will have adopted standards that govern facility operations.

Provided Council Bill 18-0306 contains standards at least as stringent as those set by the Department of the Environment, the Law Department is prepared to approve the bill for form and legal sufficiency.

Sincerely,



Victor K. Tervalo
Chief Solicitor

cc: Andre M. Davis, City Solicitor
Karen Stokes, Director, Mayor's Office of Government Relations
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