
CITY OF BALTIMORE

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Mayor



DEPARTMENT OF LAW
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August 1, 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 19-0401 – Comprehensive Bag Reduction

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 19-0401 for form and legal sufficiency. The bill would prohibit retailers from giving customers non-compostable plastic bags for most products purchased, with some enumerated exemptions. This requirement does not apply to customers paying through three designated assistance programs: Food Supplement Program (FSP), Women, Infants and Children Program (WIC) or Supplemental Nutrition Assistance Program (SNAP). Failure to comply with these requirements subjects retailers to citations of \$250 for the first offense, \$500 for the second offense that occurs within six months of the first offense and \$1,000 for every subsequent offense in that same six-month period. Failure to comply is also a criminal misdemeanor and, upon conviction, the retailer can be subject to a fine that does not exceed \$1,000.

The bill would also require retailers to charge customers five cents for every bag given at check-out, including the compostable plastic bags and paper bags that are not banned. The retailers must remit four of the five cents collected, along with other information about the bags, to the Director of Finance monthly. Failure to do so timely will result in interest on the overdue amount of one percent per month (or fraction thereof) and a ten percent penalty. Failure to remit enough information to the Director of Finance to demonstrate the amount of surcharge owed allows the Director of Finance to estimate that amount. Failure to comply is also a criminal misdemeanor and, upon conviction, the retailer can be subject to a fine that does not exceed \$1,000, or imprisonment of at least six months.

The City can both require the bag fee and prohibit the use of certain bags under its police and general welfare powers and the power to abate nuisances. City Charter, Art. II, §§ (11), (27), (47); *see e.g.*, Restatement (Second) of Torts §821B(2)(a) (pollution can be deemed a nuisance) (followed by *Tadger v. Montgomery County*, 300 Md. 539, 552-53 (1984)).

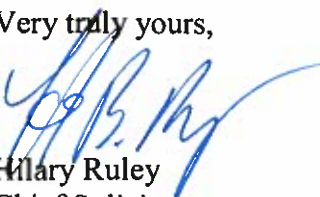
Although, there may be some argument that bag bans or fees impact interstate commerce in violation of the Commerce Clause of the United States Constitution, the Supreme Court has stated that “the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.” *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981) (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). To determine if the burden imposed on interstate commerce is excessive relative to the legitimate local interest, “the critical consideration is the overall effect of the statute on both local and interstate activity.” *MaryCLE, LLC v. First Choice Internet, Inc.*, 166 Md. App. 481, 515-16 (2006) (citing *Brown-Forman Distillers v. N.Y. State Liquor Authority*, 476 U.S. 573, 579 (1986)). Any administrative burden on local retailers will be lessened by their receipt of one cent per bag to offset costs. There is no indication that there will be a disproportionate adverse impact on interstate activity. As such, the law will likely survive a Commerce Clause challenge.

As to the five-cent bag charge, courts may conclude that it is a regulatory fee or an excise tax. *See, e.g., Weaver v. Prince George's County*, 281 Md. 349, 357 (Md. 1977) (charge on consumption of commodities is an excise tax); *but see Eastern Diversified Properties, Inc. v. Montgomery Co.*, 319 Md. 45, 53 (1990) (“Where the fee is imposed for the purpose of regulation, and the statute requires compliance with certain conditions in addition to the payment of the prescribed sum, such sum is a license proper, imposed by virtue of the police power”). The City has the power to enact either. City Charter, Art. II, §§(27), (40), (47), *Mayor and City Council of Baltimore v. Canton Co. of Baltimore*, 186 Md. 618, 631-32 (1946) (power to regulate includes power to impose a fee to raise revenue that bears a reasonable relation to the expense of the regulation). The distinction between the two types of charges only becomes important if the bill is amended to substantially raise the amount of the bag charge such that the projected revenue would be greater than what the City would require to manage the program. If that happens, and a court were to find this to be a regulatory fee, the amount could be deemed to bear no reasonable relation to the City’s expense in running the program. *See, e.g., Theatrical Corp. v. Brennan*, 180 Md. 377, 381-82 (1942).

The only legal issue in the bill is Section 31-5, which gives the Department of Finance the ability to estimate the amount a retailer owes if it does not submit the requisite information. Courts strike down laws that do not give enough legislative guidance to determine an amount to be charged. *See, e.g., Maryland Theatrical Corp. v. Brennan*, 180 Md. 377, 385 (1942) (statute allowing the Baltimore City Police Commissioner to set a fee for a dance license was struck down as “the amount is left, within certain limits, to the uncontrolled discretion of an administrative official. This is not permitted under the police power.”) (cited with approval in *County Council of Montgomery County v. Investors Funding Corp.*, 270 Md. 403, 442 (1973) (statute giving a County Commission discretion to fix civil penalties in any amount up to \$ 1,000 was held invalid because it completely “lack[ed] any legislative safeguards or standards”)); *accord Andy's Ice Cream v. City of Salisbury*, 125 Md. App. 125, 162 (1999) (“municipal delegation of ministerial authority must contain sufficient guidelines to ensure that the officers carrying out the delegations will act in accordance with the legislative will, and not employ their own unbounded discretion.”). Thus, Section 31-5 must be removed from the bill. In its place, the City Council could allow the Department of Finance the authority to review the books of the retailer to determine the actual number of bags sold. City Charter, Art. II, § (5). Alternatively, the City Council could implement a fine for every month a retailer fails to submit the requisite information. The Law Department has drafted a suggested amendment using the latter approach. However, the bill would be legally sufficient so long as the provision for the Department of Finance to estimate amounts owed is removed.

With the necessary amendment, the Law Department can approve the bill for form and legal sufficiency.

Very truly yours,



Hilary Ruley
Chief Solicitor

cc: Andre M. Davis, City Solicitor
Jeffrey Amoros, Mayor's Office of Government Relations
Elena DiPietro, Chief Solicitor, General Counsel Division
Victor Tervalo, Chief Solicitor
Ashlea Brown, Assistant Solicitor

AMENDMENTS TO COUNCIL BILL 19-0401
(1st Reader Copy)

Proposed by: Law Dep't

Delete lines 22 through 31 on page 9 and lines 1 through 5 on page 10.

On page 10, in line 7, insert "(A)" before "If"

On page 10, after line 11, insert "(B) IF A DEALER FAILS TO MAKE REPORTS WHEN DUE OR FAILS TO KEEP SUITABLE RECORDS AS REQUIRED UNDER THIS SUBTITLE, THE DEALER MUST PAY THE DIRECTOR A PENALTY OF \$1,000 FOR EACH MONTH THAT REPORTS ARE NOT MADE, OR SUITABLE RECORDS ARE NOT KEPT."