Nancy E. Glowa
City Solicitor

Arthur J. Goldberg
Deputy City Solicitor

Vali Buland
First Assistant City Solicitor

Assistant City Solicitors

Paul S. Kawai
Samuel A. Aylesworth
Keplin K. U. Allwaters
Anne Sterman
Sean M. McKendry

CITY OF CAMBRIDGE

Office of the City Solicitor
795 Massachusetts Avenue
Cambridge, Massachusetts 02139

October 17, 2016

Lisa C. Peterson
Acting City Manager
City Hall
Cambridge, MA 02139

RE: City Council Order No. 0-5 dated June 13, 2016 Re: Gas Pump Labels Containing Information About Fossil Fuel Consumption

Dear Ms. Peterson:

In City Council Order No. 0-5 (dated June 13, 2016, a copy of which is attached hereto for reference) (hereinafter, "Council Order"), the City Council requested the City Manager to "confer with the appropriate City departments to determine the feasibility of requiring gas pump labels with information about the environmental impact of burning fossil fuels at all gas stations in the City[.]" The Council Order states that "[r]equiring these labels at [gas pumps] will provide consumers with information about the impact of fossil fuel consumption, which may encourage them to use alternative forms of transportation where appropriate[.]"[1]

In order to make a gas pump handle warning label requirement have the force of law and to enforce any violations thereof, the City Council will need to enact an ordinance establishing this requirement. As will be discussed below, if the City of Cambridge ("City") enacts an ordinance requiring the placement of labels on gas pump handles that contain information about the environmental effects of burning fossil fuels, the ordinance could be found to invoke the First Amendment, but arguably will not violate it depending on what information is required to be included in the labels. Also, this type of ordinance likely will not violate the Commerce Clause, and likely will not be preempted by existing federal or state laws.

[1] The Council Order also notes that North Vancouver, Berkeley and San Francisco have recently implemented laws requiring such labels on gas pump handles. We have conferred with attorneys from the City of Berkeley and City of San Francisco Law Departments, and to date, neither city has enacted a law requiring the placement of warning labels on gas pumps handles. Rather, each City is currently considering such laws. Additionally, we understand that the City of Seattle has not passed but is also considering such a law.

A. First Amendment Concerns.

i. Requiring the Placement of Warning Labels Concerning the Environmental Effects of Burning Fossil Fuels on Gas Pump Handles Will Likely Constitute Compelled Commercial Speech Under the First Amendment.

The Supreme Court has recognized that laws requiring the disclosure of specific information "may be as violative of the First Amendment as prohibitions on speech." Zauderer v. Office of Discipli. Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 650 (1985). Thus, a City ordinance requiring the placement of labels on gas pump handles containing information about the environmental effects of burning fossil fuels will be subject to the protections of the First Amendment as it will amount to the City compelling speech from gas station operators and franchisors (if applicable).

The speech compelled by this ordinance will likely be considered "commercial speech," as it will be provided to consumers in connection with a proposed commercial transaction (*i.e.*, purchasing gas) with the intent of encouraging consumers not to engage in said transaction (*i.e.*, encouraging consumers to use alternative transportation instead of purchasing gas). See New York Rest Ass'n v. New York City Bd. of Health, 556 F.3d 114, 131-34 (2d Cir. 2009); El Dia, Inc. v. P.R. Dept. of Consumer Affairs, 413 F.3d 110, 115 (1st Cir. 2005); Consol. Cigar Corp. v. Reilly, 218 F.3d 30, 54-55 (1st Cir. 2000) rev'd other holdings, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 539 (2001).

ii. The Suggested Ordinance Likely Will not Violate the First Amendment if the Information Required to be Stated in the Gas Pump Warning Labels is "Purely Factual and Uncontroversial."

In analyzing laws that compel commercial speech in the context of the First Amendment, different standards apply depending on the nature of the compelled speech. Here, if the ordinance requires the label to contain "purely factual and uncontroversial information," it likely will not violate the First Amendment as long as: (1) the compelled speech is "reasonably related" to a legitimate governmental interest; and (2) the ordinance is not unjustified or unduly burdensome so that it chills protected commercial speech. Zauderer, 471 U.S. at 650-51; Safelite Group, Inc. v. Jepsen, 764 F.3d 258, 261-62 (2d Cir. 2014); Cook v. Gates, 528 F.3d 42, 55 (1st Cir. 2008); Pharm. Care Mgmt. Ass'n, 429 F.3d at 297-98, 310 n. 8, 316.

Thus, if the ordinance requires the warning labels to contain information identifying what pollutants are emitted from motor vehicles as a result of burning fossil fuels, it will likely pass constitutional muster. This information will be "purely factual and uncontroversial," and "reasonably related" to the legitimate governmental interest in reducing pollution and protecting the environment as it will encourage consumers to use alternative forms of transportation where appropriate. Int'l Paper Co. v. Town of Jay, 928 F.2d 480, 485 (1st Cir. 1991). Further, this type of warning will not be unjustified or unduly burdensome so that it chills protected commercial speech as the warning label (presumably) will not physically limit gas station operators from placing advertisements on other portions of gas pumps. See Dwyer v. Cappell, 762 F.3d 275, 283-84 (3d Cir. 2014); Consol. Cigar Corp., 218 F.3d at 54-55 rev'd other holdings, Lorillard Tobacco Co., 533 U.S. at 539.

iii. It is not Clear Whether the Suggested Ordinance will be found to Violate the First Amendment if the Gas Pump Warning Labels are Required to Display Non-factual and/or Controversial Information.

Neither the Supreme Court nor the First Circuit have established what level of scrutiny applies to a law that compels commercial speech containing non-factual and/or controversial information (*e.g.*, burning fossil fuels contributes to climate change).[2] In light of how other courts have reviewed such laws, a Massachusetts court will likely analyze this type of ordinance under intermediate scrutiny or strict scrutiny to determine whether it violates the First Amendment.[3]

a. If the Suggested Ordinance Requires Gas Pump Warning Labels to Display Non-factual and/or Controversial Information, it Arguably may be found not to Violate the First Amendment if the Ordinance is Analyzed Under Intermediate Scrutiny.

If a court determines that intermediate scrutiny is the proper standard of review, the court will need to determine whether the compelled commercial speech is false, deceptive or misleading, or whether it proposes an unlawful activity. Mass. Ass'n of Private Career Schools, 2016 WL 308776 at *7. If the compelled commercial speech is not false, deceptive or misleading, and does not propose an unlawful activity, three (3) additional inquiries need to be made: (1) whether the asserted governmental interest is substantial; (2) whether the regulation directly advances said governmental interest; and (3) whether the regulation is not more extensive than is necessary to serve that interest. Id. at *8.

Under this test, a warning indicating that the burning of fossil fuels contributes to climate change will arguably not be found to be false, deceptive or misleading, and will not encourage unlawful activity. Massachusetts v. E.P.A., 549 U.S. 497, 521-24 (2007) ("Judged by any standard, U.S. motor-vehicle emissions make a meaningful contribution to greenhouse gas concentrations and hence . . . to global warming."); see generally Endanger. Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009). Additionally, the City's asserted interest in enacting such an ordinance will be substantial as reducing pollution is a substantial governmental interest. See Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 656-58 (10th Cir. 2006); Nat'l Elec. Mfr. Ass'n v. Sorrell, 272 F.3d 104, 115 n.6 (2d Cir. 2001).

---

[2] Even if it can be established that burning fossil fuels contributes to climate change, this will likely be considered controversial information given the current national debate over climate change. Compare Chelsea Harvey, Human-caused climate changes has been happening for a lot longer than we thought scientists say, Wash. Post, Aug. 24, 2016, available at https://www.washingtonpost.com/news/energy-environment/wp/2016/08/24/human-caused-climate-change-has-been-happening-for-a-lot-longer-than-we-thought-scientists-say/?utm_term=.1310109408ba, with Matt Ridley & Benny Peiser, Your Complete Guide to the Climate Change Debate, Wall St. Journal, Nov. 27, 2015, available at http://www.wsj.com/articles/your-complete-guide-to-the-climate-debate-1448656890.

[3] The few federal courts that have addressed such laws have varied on what level of scrutiny applies. See Safelite Group, Inc., 764 F.3d at 261-266 (applying intermediate scrutiny); Mass. Ass'n of Private Career Schools v. Healey, 2016 WL 308776, *15-16, 21 (D. Mass. 2016) (same); Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 651-53 (7th Cir. 2006) (applying strict scrutiny). Although the District of Massachusetts applied intermediate scrutiny to a regulation that compelled potentially non-factual commercial speech in Mass. Ass'n of Private Career Schools, this case is only persuasive authority, rather than binding authority.

Next, the warning label requirement will directly advance the City's interest in reducing pollution as the compelled speech will be delivered to listeners at the point where it is most likely to affect them— at the location where they purchase gas. See Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 543 (2012); see also Lorillard Tobacco Co., 533 U.S. at 546. Lastly, this ordinance arguably will not be more extensive than is necessary to serve the City's interest in reducing pollution as the ordinance will not prohibit gas station operators from using the rest of the pump itself to place advertisements from third parties, or their own factual information and/or opinions concerning the information provided in the required warning label. See Greater New Orleans Broadcas. Ass'n v. United States, 527 U.S. 173, 188 (1999).

Accordingly, if the suggested ordinance requires gas pump warning labels to contain information about climate change, it will arguably not violate the First Amendment if a court determines intermediate scrutiny is the proper standard of review.

b. If the Suggested Ordinance Requires the Gas Pump Warning Labels to Display Non-factual and/or Controversial Information, it will Likely be found to Violate the First Amendment if the Ordinance is Analyzed Under Strict Scrutiny.

If a court determines that strict scrutiny is the proper standard of review, the City will have to establish that the suggested ordinance is narrowly tailored to promote a "compelling" governmental interest. Wooley v. Maynard, 430 U.S. 705, 715-16 (1977); Entm't Software Ass'n, 469 F.3d at 646, 653. A law is not narrowly tailored if a less restrictive alternative would serve the government's purpose. Entm't Software Ass'n, 469 F.3d at 646.

Although some courts have recognized that reducing pollution is a compelling governmental interest, it is doubtful that the City will be able to establish that the ordinance is narrowly tailored to serve this interest as requiring the placement of warning labels on gas pump handles containing information about climate change likely is not the "least restrictive" method of advancing this purpose.[4] Thus, if the suggested ordinance is analyzed under strict scrutiny, it will likely be found to violate the First Amendment.

B. Requiring the Placement of Warnings Concerning the Burning of Fossil Fuels on Gas Pump Handles Likely will not be found to Violate the Commerce Clause.[5]

States and municipalities can violate the Commerce Clause in the Constitution, Art. I, § 8, cl. 3, through the "Dormant Commerce Clause," which "prohibits states from acting in a manner that burdens the flow of interstate commerce." Pharm. Research and Mfrs. of Am. v. Concannon, 249 F.3d 66, 79 (1st Cir. 2000). A state law invokes the Dormant Commerce Clause if it does one of the following: (1) it has an "extraterritorial reach," and "directly controls commerce occurring

[4] For example, the City could disseminate information about the connection between burning fossil fuels and climate change to residents. This would not affect the commercial speech rights of gas station operators and franchisors (if applicable), and would advance the City's interest in reducing pollution caused by the burning of fossil fuels.

[5] Many of the First Amendment cases we reviewed also contained Dormant Commerce Clause analyses. Thus, it is prudent to analyze whether the suggested ordinance will violate the Dormant Commerce Clause.

wholly outside the boundaries of a State"; (2) it discriminates against interstate commerce; or (3) it "regulates evenhandedly and has only incidental effects on interstate commerce."[6] Id. at 79-80.

i. An Ordinance Requiring Gas Station Operators in Cambridge to Place Warning Labels on Gas Pump Handles Likely will not have an Extraterritorial Reach.

"[A] state statute is a per se violation of the Commerce Clause when it has an 'extraterritorial reach,'" which occurs "[w]hen a state statute regulates commerce wholly outside the state's borders or when the statute has a practical effect of controlling conduct outside of the state." Id. at 79. An ordinance requiring the placement of warning labels on gas pump handles in the City will regulate activity wholly within Cambridge, and thus, will not interfere with commerce outside of Massachusetts. See id. at 82. Thus, the suggested ordinance likely will not have an extraterritorial reach.

ii. It is Unlikely that the Suggested Ordinance will Discriminate Against Interstate Commerce.

"[A] state regulation that discriminates against interstate commerce on **its face, in purpose, or in effect** is highly suspect and will be sustained only when it promotes a legitimate state interest that cannot be achieved through any reasonable nondiscriminatory alternative." Cherry Hill Vineyard, LLC v. Baldacci, 505 F.3d 28, 33 (1st Cir. 2007) (emphasis added).

First, the suggested ordinance will likely be determined to be facially neutral, rather than facially discriminatory, as it will apply to all gas station operators in the City (instead of explicitly discriminating against interstate commerce by distinguishing between in-state and out-of-state commerce). See Am. Beverage Ass'n v. Snyder, 735 F.3d 362, 370-71 (6th Cir. 2013); Rocky Mountain Farmers Union v. Corey, 730 F.3d 1070, 1089 (9th Cir. 2013). Next, the ordinance will not have a discriminatory purpose as the early legislative history of this suggested law (*i.e.*, the Council Order) indicates that the purpose of the law will be to encourage consumers to use alternative transportation where appropriate in order to reduce pollution and protect the environment, as opposed to discriminating against interstate commerce. See Alliance of Auto Mfrs., 430 F.3d at 37.

Lastly, as the City has not yet enacted an ordinance regarding gas pump handle warning labels, it is doubtful that someone challenging said ordinance after its initial enactment will be able to establish that it has a discriminatory effect on interstate commerce as there will be no evidence of a discriminatory effect. See Cherry Hill Vineyard, LLC, 505 F.3d at 36, 37. Further, even after this ordinance is enacted, it is unlikely that one will be able to establish that the law has a discriminatory effect as it will apply to all gas station operators in Cambridge. Cf. Constr. Materials Recycling Ass'n Issues and Educ. Fund, Inc. v. Burack, 686 F. Supp. 2d 162, 170 (D.N.H. 2010).

---

[6] The Dormant Commerce Clause can also be invoked by municipal laws. See Houlton Citizens' Coalition v. Town of Houlton, 175 F.3d 178, 188-89 (1st Cir. 1999).

Accordingly, an ordinance requiring the placement of warning labels on gas pump handles containing information about the environmental effects of burning fossil fuels likely will not discriminate against interstate commerce.

iii. The Suggested Ordinance Will Likely Regulate Evenhandedly and Have Only Incidental Effects on Interstate Commerce.

"When a state statute regulates evenhandedly and has only incidental effects on interstate commerce, that statute will be upheld unless the burden on interstate commerce is clearly excessive in relation to the putative local benefits." Pharm. Research and Mfrs. of Am., 249 F.3d at 83 (internal quotation marks omitted). In analyzing a statute that regulates evenhandedly, courts balance the following factors: (1) the nature of the putative local benefits advanced by the statute; (2) the burden the statute places on interstate commerce; and (3) whether the burden is "clearly excessive" as compared to the putative local benefits. Id. at 83-84.

Here, the suggested ordinance will regulate evenhandedly as it will apply to all gas station operators in the City, and will only have an incidental effect on commerce as the ordinance will not discriminate against interstate commerce. The "putative local benefit" will be reducing pollution and protecting the environment, which, as previously noted, is a substantial governmental interest. The only burden that will arguably be imposed by this law will be its possible effects on the profits of gas station operators and their franchisors (if applicable), which is not enough to support an argument that a law violates the Commerce Clause. See id. at 83. Thus, this burden arguably will not be "clearly excessive" when compared to the benefit advanced by the ordinance.

Accordingly, in balancing these factors, a court will likely determine that the suggested ordinance does not violate the Dormant Commerce Clause.

C. The Suggested Ordinance Likely Will not be Preempted by Federal Law.

The only federal laws and regulations we have found that concern the placement of signs and/or labels on gas pumps are 15 U.S.C. §§ 2801-2841, 16 CFR 306, 40 CFR 80.35, 80 CFR 80.1501 and 26 CFR 48.4082-2. First, 15 U.S.C. §§ 2821-2824 governs petroleum marketing practices. In particular, 15 U.S.C. § 2822(c) requires retailers of "automotive fuel" to display "at the point of sale to ultimate purchasers of automotive fuel, the automotive fuel rating of such fuel . . . ." Additionally, pursuant to 15 U.S.C. § 2823(c), the Federal Trade Commission promulgated 16 CFR 306, which includes requirements related to the certification and labeling of fuel ratings. Of note, 16 CFR 306.10 requires the placement of fuel rating labels on gas pumps, and 16 CFR 306.12 establishes the specifications of said labels. Next, 40 CFR 80.35 and 40 CFR 80.1501 were promulgated by the Environmental Protection Agency, and require specific statements to be posted on gas pumps that dispense oxygenated gas and ethanol blended gas, respectively. 26 CFR 48.4082-2 was promulgated by the Internal Revenue Service, and requires fuel retailers, if applicable, to display a notice concerning the use of dyed diesel fuel.

It is unlikely that a City ordinance requiring the placement of labels on fuel pump handles providing information about the effects of burning fossil fuels on the environment will be preempted by any of these federal laws. First, the only one of these laws that contains an express

preemption provision is 15 U.S.C. §§ 2801-2841. See Grant's Dairy—Maine, LLC v. Comm'r of Me. Dept. of Agric., Food & Rural Res., 232 F.3d 8, 15 (1st Cir. 2000) (stating express preemption principles). More specifically, 15 U.S.C. § 2824(a) states:

> To the extent that any provision of this subchapter applies to any act or omission, no State or any political subdivision thereof may adopt or continue in effect, except as provided in subsection (b) of this section, any provision of law or regulation with respect to such act or omission, unless such provision of such law or regulation is the same as the applicable provision of this subchapter.

The few federal cases that have interpreted this provision in the context of preemption have recognized that 15 U.S.C. § 2824(a) preempts state laws only where a state law imposes requirements related to fuel rating disclosures and labeling. See Alvarez v. Chevron Corp., 656 F.3d 925, 934-35 (9th Cir. 2011); Johnson v. MFA Petroleum Co., 10 F. Supp. 3d 982, 990 (W.D. Mo. 2014); VP Racing Fuels, Inc. v. Gen. Petroleum Corp., 673 F. Supp. 2d 1073, 1082-83 (E.D. Cal. 2009). Here, the suggested City ordinance likely will not be preempted by 15 U.S.C. § 2824(a) as the information to be displayed in the warning labels will not concern fuel grade disclosures and labeling, and will be unrelated to a fuel's grade. Cf. VP Racing Fuels, Inc., 673 F. Supp. 2d at 1083.

Further, there likely will not be a conflict between the proposed City ordinance and any of the above referenced federal laws as it is doubtful that the ordinance will impose obligations on gas station operators that will make compliance with both the ordinance and the federal laws impossible. See Grant's Dairy—Maine, LLC, 232 F.3d at 15 (stating conflict preemption principles). Additionally, the regulatory schemes of each of the above referenced federal laws likely are not pervasive enough to warrant an inference that Congress did not intend states or municipalities to supplement them. Id. (stating field preemption principles).

D. The Suggested Ordinance Likely will not be Preempted by Massachusetts Law.

The only Massachusetts laws we have found that reference the placement of signs and/or labels on gas pumps are G.L. c. 94, §§ 295A-295CC, which governs the sale of gas in Massachusetts, and the regulations promulgated pursuant to these statutory sections, 202 CMR 2.06. In particular, G.L. c. 94, § 295C requires the placement of signs indicating the price of gas on gas "pump[s] or "other dispensing device[s]," and 202 CMR 2.06(1)-(2), (6) and (8)-(15) establish signage requirements related to: (1) the grade of gas; (2) whether cash or credit cards are accepted as payment; (3) whether gas pumps are located on multiple sides of a "dispensing device"; (4) alcohol content in fuel; and (5) pumps that dispense biodiesel and/or biomass diesel.

Nothing in G.L. c. 94, § 295C or 202 CMR 2.06 expressly limits the types of signs and/or labels that can be placed on gas pumps. Rather, G.L. c. 94, § 295C states: "No sign, advertising material or other display or product that is placed upon, above or around a pump or dispenser shall directly or indirectly obscure the [required] posted price sign . . . ." Accordingly, there does not appear to be any Massachusetts statute or regulation that will prohibit or preempt the City from enacting an ordinance requiring the placement of warning labels on gas pump handles. See

Yetman v. City of Cambridge, 7 Mass. App. Ct. 700, 702 (1979) (discussing preemption principles); School Comm. of Boston v. City of Boston. 383 Mass. 693, 701 (1981) (same).

CONCLUSION

Under current federal and state laws, it appears that the City would not be prohibited from enacting an ordinance requiring gas station operators to place warning labels on gas pump handles that contain information about the effects the burning of fossil fuels have on the environment. Notably, it appears there are no federal or state laws that will preempt this type of ordinance. Additionally, this type of ordinance likely will not violate the Commerce Clause.

The language mandated by the suggested ordinance will likely be considered compelled commercial speech and therefore, the ordinance will be subject to the protections of the First Amendment. Whether the ordinance will violate the First Amendment will depend on the specific language that is required to be included in the warning label. If the mandated language is "purely factual and uncontroversial," the ordinance likely will not be found to violate the First Amendment.

If the ordinance mandates warning labels that contain non-factual and/or controversial information, the ordinance will be reviewed under a stricter standard. Given the uncertainty of current federal precedent, however, it is not clear whether a court would analyze this type of ordinance under intermediate scrutiny or strict scrutiny. If a court applies intermediate scrutiny, the ordinance will likely pass constitutional muster. If a court applies strict scrutiny, the ordinance will likely be found to violate the First Amendment.

Very truly yours,

Nancy E. Glowa

NEG/smm