THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

COMPLETE LAWN CARE, INC., *et al.* Plaintiffs v. **MONTGOMERY COUNTY, MARYLAND** Defendant	Civil Action No.: **427200-V**
ANITA GOODMAN, *et al.* Plaintiffs v. **MONTGOMERY COUNTY, MARYLAND** Defendant	Civil Action No.: **427253-V**

Opinion

The issues in these two consolidated cases arise out of a possible conflict between Maryland state law and Montgomery County Bill 52-14 ("the Ordinance") which will prohibit the use of certain pesticides on private and County-owned properties throughout Montgomery County. This Court has been asked to give permanent injunctive relief and issue a declaratory judgment clarifying whether the Ordinance is impliedly preempted by Maryland pesticide laws. If the Ordinance is not impliedly preempted by Maryland laws, the Court must decide whether the Ordinance is in conflict with Maryland state pesticide regulations. In this evaluation, the Court must determine whether the Ordinance furthers the underlying purposes of the Maryland pesticide legislation.

These cases were filed in the Circuit Court for Montgomery County on November 21 and 22, 2016 respectively and were later consolidated (DE #12). In case number 427200-V, the plaintiffs are Complete Lawncare, Inc., Patricia Eng, Green Gardens, Inc., Conrad Hocking, Integrated Plantcare Inc., Jessica Fox, Rowlandscapes Corp., Paul Vilk, Michele Cropp. Patricia Lynch, Super Lawns, Inc., Hessie Harris, Newsom Seed, Inc., and Responsible Industry for a Sound Environment, a Committee of Croplife America. These plaintiffs represent seven Montgomery County residents and six local businesses, as well as the trade association for those who make, distribute, and sell the pesticide products prohibited by the Ordinance. In case number 427253-V, the plaintiffs include County residents Anita Goodman and Stuart Cohen, a state-licensed applicator, Joel Owen, who is also President of Plaintiff Lancaster Landscapes, Inc., a full-service landscape management company. Further, Trugreen Limited Partnership, a local lawn care services company, and Scotts Company, LLC, the world's largest marketer of branded consumer lawn and garden products, are also bringing the action. Montgomery County, Maryland is the Defendant in both cases.

The Defendant Montgomery County filed a Motion for Summary Judgment on January 13, 2017 and Plaintiffs, in turn, filed Cross Motions for Summary Judgment on February 17, 2017. The challenged sections of the Ordinance are scheduled to take effect January 1, 2018, and the Plaintiffs ask for a declaratory judgment and the entry of permanent injunctive relief before the bewitching hour. The parties waived discovery, stipulated that there were no factual disputes, and understand that whoever prevails on their summary judgment is "winner take all." Oral argument on the motions was held on May 17, 2016, and the Court took the matter under advisement (DE # 33).

A court properly grants summary judgment when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Md. Rule 2-501. *See Mohammad v. Toyota Motor Sales, U.S.A., Inc.*, 179 Md. App. 693, 701 (2008). A material fact is one which will somehow affect the outcome of the case. *Friedman & Fuller, P.C. v. Funkhouser*, 107 Md. App. 91, 99 (1995).

No genuine dispute of material fact has been raised by either party regarding the content and effect of the Ordinance. Therefore, summary judgment is appropriate in this case.

DISCUSSION

All pesticide use in the United States is regulated through the Environmental Protection Agency ("the EPA") by the Federal Insecticide, Fungicide, and Rodenticide Act ("the FIFRA"). 7 U.S.C. § 136, *et seq.* (1996). According to the FIFRA, "no person in any State may distribute or sell to any person any pesticide that is not registered" by the EPA. *Id.* at § 136a(a). Originally enacted in 1947 as a licensing and labeling statute, the FIFRA has grown into a "comprehensive regulatory statute" that governs the registration, labeling, and sale of pesticides in both intrastate and interstate commerce.[1] *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). Through the FIFRA, the EPA conducts comprehensive safety reviews and controls the use of individual pesticides through a federal registration process. Additional restrictions on the sale and use of pesticide products beyond those imposed by the EPA are allowed through FIFRA. 7 U.S.C. § 136v. All Maryland pesticide law must comply with the FIFRA.

A. Maryland State Regulations and Enforcement

Maryland formally entered the pesticide regulation business in 1973 when the General Assembly enacted the Maryland Pesticide Registration and Labeling Law (Md. Code Agric. §§ 5-101–5-114) and the Pesticide Applicator's Law (Md. Code Agric. §§ 5-201–211). The Maryland Department of Agriculture ("the MDA") has codified and implemented these laws in detailed regulations found in the Code of Maryland Regulations ("COMAR") sections 15.05.01.01–15.05.01.20. *See* A.G. Op. No. 88-0006, at 2, n.2. Altogether, the breadth covered by this legislation is extensive. Once a pesticide enters the "Free State," it encounters a pervasive regulatory scheme which controls its sale, transport, storage, packaging, labeling, and use.

The Maryland Secretary of Agriculture ("the Secretary") has been entrusted with the authority to enforce pesticide regulation under both the Maryland Pesticide Registration and Labeling Law and Pesticide Applicator's Law. Md. Code Ann. Agric. § 5-104; § 5-204(1). The Secretary's powers and duties include, but are not limited to, the power to "[a]dopt rules and

[1] The FIFRA was originally enacted to replace the Insecticide Act of 1910, which was the federal government's first attempt at pesticide regulation. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984).

regulations governing the storage, sale, distribution, exchange, use, and disposal of any pesticide and its container." Md. Code Ann. Agric. § 5-204(1). The Secretary makes the final determinations as to the sale and use of pesticides in Maryland. The Secretary's determinations are ultimately based on the requirements of Maryland law, the pesticide's federal registration, and the scientific research and investigation work completed by both the EPA and the MDA. Md. Code Ann. Agric. § 5-104; § 5-105(h).

The Secretary also has the authority to halt the sales of a pesticide if the pesticide is found to transgress any aspect of the subtitle. This authorization is expressly meant for pesticides which cause "unreasonable adverse effects to humans, animals, or the environment." *Id.* at § 5-108. To avoid such violations, the MDA ensures compliance with state law by collecting and analyzing samples of pesticide products, inspecting devices, containers and application equipment, and by inspecting pesticide retailers. *Id.* at § 5-205. To ensure that enforcement coincides with federal standards, the Secretary has entered into a cooperative agreement with the EPA. MDA 2015 Annual Report, at 63. Under this agreement, the MDA completes routine inspections of pesticide use and periodically observes pesticide application to ensure uniformity in federal and state standards. *Id.* Clearly, Maryland prioritizes compliance with the federal standards set by the FIFRA under the EPA.

B. Maryland State Pesticide Law Application

In order to track and maintain its pesticide use, the State of Maryland, through the Maryland Registration and Labeling Law, requires every pesticide sold in Maryland to be registered in the State of Maryland and for its label to be individually approved by the EPA. Md. Code Ann. Agric. §§ 5-105. The Maryland registration process begins with an application submitted to the Secretary. *Id.* With every pesticide application, a distributor must submit a comprehensive annual registration statement to the MDA. *Id.* This annual statement must be approved by the MDA prior to distribution. *Id.* Once approved by the MDA, the Secretary then reviews the pesticide application, which must consist of the following: the EPA's approved label for the pesticide, the directions for the pesticide's use, the statements of every claim made about the pesticide, and sometimes the complete toxological, environmental, and health effects data for the pesticide. *Id.* at §§ 5-105(a–b), (f).[2] Once approved, the MDA is responsible for the implementation of any imposed registration requirements. *Id.* at §§ 5-105(f); 5-107; 5-108; 5-112. Each pesticide's registration must be renewed annually. *Id.* at §§ 5-105(a), (c). As of 2015, the MDA had 12,710 registered pesticides. MDA 2015 Annual Report at 70.

The Agricultural Article of the Maryland Code, section 5-109 regulates pesticide labeling. The Secretary has adopted registration and labeling requirements that parallel those imposed by the EPA. Md. Code Ann. Agric. § 5-104. A person cannot distribute, sell, offer to sell, or even transport an unlabeled pesticide in the State of Maryland. *Id.* at § 5-109. A pesticide product label is a detailed document that identifies the specific sites where the product may be legally applied, and provides precise application directions for applying the product. 40 C.F.R. § 156.10(i)(2); Md. Code Agric. §§ 5-101(q), 5-109. These labels are very thorough and often exceed ten pages with exhaustive directions about the conditions and restrictions regarding the use of each individual product. Among the directions provided on the label, it includes the areas where the pesticide is approved for use and how to affect that use safely. Md. Code Agric. §§ 5-109. All pesticide use in Maryland must be conducted "in strict accordance" with the detailed use

[2] This can include information on all tests conducted on the pesticide in support of the registrar's claim and all test results requested by the Secretary. *Id.* at §§ 5-104(b)(4).

directions provided on the MDA-registered label of each pesticide product. *Id.* at § 5-210; COMAR 15.05.01.02(B)(2). Product labels are attached to both commercial and consumer products. I'm told bedtime pesticide label reading is a certain cure for insomnia.

To this end, Maryland divides its pesticides into two usage categories: general and restricted. General use pesticides are available for wide-scale public distribution, while restricted use pesticides may only be applied by a "certified" applicator with a "licensed" business of "registered" employees. *See id.* at §§ 5-201(r); 5-207. The Maryland Applicator's Law states that the MDA shall "establish the conditions and appropriate areas for application of any pesticide," which includes, "[p]rescrib[ing], when necessary, the time and conditions under which a pesticide may be sold, distributed... or used in different areas of the State." *Id.* at §§ 5-204. This regulates all the licensing, permitting, and certification of pesticide applicators in the state. *Id.* at §§ 5-206.

All pest control businesses, applicators, consultants, and their employees must be registered in order to legally operate. *Id.* The use of restricted pesticides is reliant upon certified applicators, as "[e]ach commercial application of a pesticide shall be under the supervision of a certified pest control applicator or certified public agency applicator who is responsible and liable for the application." *Id.* at § 5-209. In order to register in Maryland, an individual must pass a state-run education, licensing, and certification program. *Id.* at §§ 5-206–7. Each one of a pest control businesses' employees must be registered by MDA. And successfully complete the MDA training program. Md. Code Agric. §§ 5-207(j)(1), 5-209.1. Registration certificates require annual and periodic renewal, depending on the applicator's business sector. *Id.* at §§ 5-207(a).

The applicator certification process is lengthy and time consuming, and the process differs depending on the category of maintenance the applicator is attempting to complete. All applicators are trained in Integrated Pest Management principles, a program whose key goal is to minimize pesticide use and potential risks associated with pesticide use. *See* Md. Code, Agric. § 5-208.1(a)(6) (this deals specifically with pest management in Maryland schools). This program requires passing a written exam, based on a 250-page manual in order to qualify for one of thirteen diverse categories of pest control use, including "turf and lawn pest control" and "ornamental plants and shade trees." *Id.* at §§ 5-207(a), (c); COMAR 15.05.01.08. The certification required for these specifications differ by category. *Id.* at §§ 5-207(a). Maybe this is why neighborhood children sell lemonade on the street corner and not pesticides.

Notably, the pesticide applicator law contains a special provision that governs the application of pesticide in school buildings or on school grounds. *Id.* at §§ 5-208.1. This provision requires county school boards to develop an "integrated pest management system approved by the Secretary" that complies with standards set by the MDA. *Id.* Comprehensive notification requirements ensure that parents, students, and employees are forewarned before pesticide application. *Id.* at §§ 5-208.1(f)–(l). Specifically, the integrated pest management system aims to balance the shared goals of "keep[ing] pests from causing economic, health related, or aesthetic injury," "[m]inimiz[ing] the use of pesticides," and "[m]inimiz[ing] the risk to human health and the environment associated with pesticide applications. *Id.* at §§ 5-208.1(a)(6). State regulation has been promulgated to regulate pesticide use in local areas, including schools. Thus, a child can ride a school bus with no seat belt, but may risk suspension and if he brings a pesticide in his pocket for "show and tell."

The Secretary has also adopted detailed regulations to enforce Maryland law at the local level, set forth in COMAR 15.05.01.01–20. These regulations codify the above laws by

"generally provid[ing] for the use and sale of pesticides, the licensing and testing of persons who apply pesticides, standards for the handling and storage of pesticides, and the grounds for license revocation." *See* A.G. Op. No. 88-0006, at 2, n.2. The MDA's implementation of these regulations allows for Maryland to present a "single face [of] pesticide enforcement" to the public. Joseph Bartenfelder (Acting Secretary, Maryland Department of Agriculture), Written Testimony to Montgomery County Council re Bill 52-14 (Feb. 6, 2015).

C. The County Ordinance

On October 6, 2015, the Montgomery County Council, by a 6-3 vote, adopted Bill 52-14, the Ordinance, which creates a new set of restricted pesticides and bans their usage on private and County-owned properties throughout Montgomery County (with limited exceptions).[3] Specifically, the Ordinance prohibits any person from using a Maryland state "registered pesticide" other than a Montgomery County "listed pesticide" on any lawn, playground, mulched recreation area, or children's facility (and their grounds).[4] Montgomery County Code §§ 33B-10(a). Restrictions on pesticide use on County property became effective on July 1, 2016, while the Ordinance on private property will become effective on January 1, 2018. *Id.* § 33B-3. The purpose of the Ordinance is "to protect the health of children, families, pets, and the environment." *Id.* at § 33B-1(8).

"Registered pesticides" include any pesticide registered by the EPA and labeled pursuant to the FIFRA "for lawn, garden, and ornamental sites or areas." *Id.* at § 33B-2. The "registered pesticides" refer to those pesticides that the MDA has registered and permitted for use. A "listed pesticide," or a pesticide exempt from the Ordinance, is limited to a product with "active ingredients that are recommended by the National Organic Standards Board (the NOSB).[5] Specifically, these are pesticides designated as "minimum risk pesticides" by FIFRA section 25(b). *Id.* Essentially, the new law bans nonessential cosmetic pesticides, and recommends consumer remedies that include cinnamon, citronella, garlic, and mint. *Id.* Unfortunately, I don't think it includes those electric bug zappers.

The Ordinance is, however, subject to a list of nine exceptions. These include the approved use of pesticides in areas such as agricultural land. *Id.* at § 33B-10(b). Maryland registered pesticide use is also allowed to control invasive species and other organisms that

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[3] Plaintiffs here are only challenging the ban on the use of registered pesticides on private property, and the Court reserves its judgment on the question to private property without visiting the issue of County-owned property. *See* Plaintiff's Anita Goodman's Complaint at 88 and Plaintiff Complete Lawncare's Complaint at paragraph 60). The Ordinance became effective as to County-owned land on July 1, 2016.

[4] I do not think we have yet reached the day when we need an expert to tell people what a lawn is, but in the event the urban sprawl of the District has paved over more green space than I appreciated, a lawn is defined as "an area of land, except agricultural land, that is: (1) mostly covered by grass, other similar herbaceous plays, shrubs, or trees; and (2) kept trim by mowing or cutting." *Id.* at § 33B-2.

[5] A listed pesticide is "(1) a pesticide that has active ingredients of which are recommended by the National Organic Standards Board (NOSB) pursuant to 7 U.S.C. § 6518, as amended, and published as the National List ay 7 C.F.R. §§ 205.601 and 205,602; or (2) a pesticide designated a "minimum risk pesticide under the [FIFRA] § 25(b) and listed in 40 C.F.R. § 152.25(f)." *Id.* at § 33B-2.

threaten the health of trees or shrubs. *Id.* Private golf courses, or land "maintained exclusively for sporting use" are also exempt from the Ordinance's pesticide restrictions. *Id.*

To make sure that local consumers stay abreast of the new changes in the Montgomery County pesticide regulations, the Ordinance requires retailers selling pesticides to "make available to a person who is buying pesticide: (a) notice signs and supporting information that are approved by the Department; (b) the product label or other information that FIFRA requires for sale of the pesticide. *Id.* at § 33B-3. Before they are posted, these notices must be approved by the Department of Environmental Protection. Through these notices, the Ordinance delegates the explanation of its regulatory changes to retailers. In turn, the retailers are required to steer customers towards the County's listed pesticide products. *Id.* Failure to comply with this or any other provision under the Ordinance constitutes a Class C violation of County law and is subject to penalties. *Id.* § 33B-6.

It is not mandatory that all municipalities within Montgomery County adopt the restrictions set forth in the Ordinance. Instead, any of the County's nineteen municipalities have the right under § 1-203(e) to opt in or out of the Ordinance. *Id.* Currently, only ten municipalities have opted-in to the Ordinance, leaving the Ordinance currently inapplicable to the remaining nine municipalities.

D. County Notice of Potential Preemption

The legislative history of the Ordinance is rife with pressing portents of preemption. Before adopting the Ordinance, members of the Maryland House of Delegates requested legal advice from the Attorney General as to whether the bill was preempted by state law. The Attorney General replied in two letters, sent on April 1, 2015 (to Delegate Kirill Reznik) and May 21, 2015 (to Delegate Kumar P. Barve). While these two letters were not binding law and their semantic content differed slightly, the impetus of the Attorney General's message was clear: "the general ban on application of non-essential pesticides may well be preempted," and further, "a court could conclude that the provision would interfere with the purposes of these State provisions, as well as the goal of achieving uniformity." (April 1, 2015 Attorney General Letter to Delegate Kirill Reznik).

Maryland's Assistant Secretary of Agriculture, Carol Holko, also believed that the Ordinance would cause confusion in Montgomery County, citing the "[t]wo layer[s] of strict pesticide regulation [that] already exist in Maryland. Carol Holko (Assistant Secretary, Plant Industries and Pest Management, Maryland Department of Agriculture), Written Testimony to Montgomery County Council re Bill 52-14 (January 15, 2015).

On the same day, the County's Acting Director of the Department of Environmental Protection, Kathleen Boucher, testified that "individuals with detailed knowledge in these areas are not available within County government," and surmised that the average citizen would not be able understand when the proposed exceptions to the Ordinance would apply. Kathleen Boucher (Acting Director, Montgomery County Department of Environmental Protection), Written Testimony to Montgomery County Council re Bill 52-14 (Jan. 15, 2015).

The Acting Secretary, Joseph Bartenfelder, also warned against the potential confusion the Ordinance would cause to applicators and residents in Montgomery County. Joseph Bartenfelder (Acting Secretary, Maryland Department of Agriculture), Written Testimony to Montgomery County Council re Bill 52-14 (Feb. 6, 2015). Subject to these warnings, the Bill then went through several new drafts that eventually constituted the current version of the Ordinance.

The Bill passed by a 6-3 vote among the County Council. Notably, Isiah Leggett, the County Executive and a former law professor, declined to sign the law due to concerns about the Bill's possible preemption. He stated, "I am concerned about the opinions of an Assistant Attorney General regarding whether a ban on the use of certain pesticides in the County would be preempted by state law. Undoubtedly, this measure will be taken to court, and the result there is quite uncertain." Memo. from Isiah Leggett, Cty. Exec., Montgomery Cty. Council, at 1. (Oct. 19, 2015). How prophetic he was. He also noted that an "outright ban on the use of certain pesticides will be confusing to residents and businesses in the County, and will make enforcement of the law challenging." *Id.*

To summarize, the City Council received warnings about the Ordinance's possible preemption from the Office of Maryland Attorney General, the MDA, the County Executive, and the County's own Department of Environmental Protection before finally electing to pass it with minimal revisions.

ARGUMENT

Plaintiffs argue that the Ordinance both impliedly and directly conflicts with Maryland state law, specifically with the Pesticide Registration and Labeling Laws (Md. Code Ann. Agric. §§ 5-101–114), Pesticide Applicator Laws (Md. Code Ann. Agric. §§ 5-201–5-211), and the regulations adopted by the MDA (COMAR 15.05.01.01–.20). They believe that the comprehensive framework of state regulations span the entire legal field of pesticide use. They argue that the registration, labeling, and application regulations promulgated by the State of Maryland allow the use of the prohibited pesticides, and that the Ordinance fails to further the underlying purposes of Maryland pesticide legislation, as it conflicts with Maryland's fundamental goal to achieve uniformity in federal and state pesticide regulation.

Montgomery County responds by alleging that the State Pesticide laws contain scant regulation regarding the use or application of pesticides. They maintain that the State has only regulated pesticide use in three ways: (1) by prohibiting the use of non-registered pesticides, (2) by limiting the use of restricted pesticide to certified applicators, and (3) by requiring that pesticides be used in accordance with their labels. Among these three fields of pesticide use regulations, the County notes that no State regulation has been passed that dictates what pesticides may be applied to a lawn or areas that children frequent. The County posits that legislative dearth leaves this field open for the County to pass non-conflicting laws that promote the Maryland's fundamental purpose of safe and effective pesticide use.

The Express Powers Act, cited by the Defendant, authorizes charter counties to "pass any ordinance, resolution, or bylaw not inconsistent with State law that (1) may aid in executing and enforcing any power in this title; or (2) may aid in maintaining the peace, good government, health, and welfare of the county."[6] Md. Code, Local Gov't § 10-206. Relying on the Court of Appeals' decision in *Snowden v. Anne Arundel County*, the Defendant believes that charter counties may legislate beyond the powers expressly enumerated in the Express Powers Act. Defendant notes that this law has previously applied to the County regulation of apartment rentals, landlord-tenant affairs, public accommodations, towing, and domestic partner benefit laws. 295 Md. 429, 432 (1983). They now feel emboldened to regulate some fields of pesticide use. In other words, Montgomery County believes their law-making ability should function as water and fill any open crevice left by the State with impunity.

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[6] Montgomery County became a charter county in November 1948.

In *Wisconsin Public Intervenor v. Mortier*, the Supreme Court held that whether a locality under the FIFRA has authority to regulate pesticides is governed by state law. 501 U.S. 597 (1991). In general, localities may not pass laws where the subject matter is preempted by state law. "The doctrine of pre-emption is grounded upon the authority of the General Assembly to reserve for itself exclusive dominion over an entire field of legislation concern." *AD + Soil, Inc. v. County Comm'rs of Queen Anne's County*, 307 Md. 307, 324 (1986). The General Assembly may reserve dominion over a legislative field by passing a comprehensive framework of regulations.

In resolving questions of preemption of local legislation, the Court of Appeals has held that "[s]tate law may preempt local law in one of three ways: (1) preemption by conflict, (2) express preemption, or (3) implied preemption." *Worton Creek Marina, LLC v. Claggett*, 381 Md. 499, 512 (2004) (quoting *Talbot County v. Skipper*, 329 Md. 481, 487-88 (1993)); *Allied Vending, Inc. v. City of Bowie*, 332 Md. 279, 297-98 (1993). Plaintiffs argue in the instant case that the Ordinance is preempted impliedly and by conflict.

A. Implied Preemption

A local law is impliedly preempted when it "deal[s] with an area in which the Legislature has acted with such force that an intent by the State to occupy the entire field must be implied." *Skipper*, 329 Md. at 488 (quoting *Cty. Council for Montgomery Cty. v. Montgomery Ass'n.,* 274 Md. 52, 59 (1975)). Under the doctrine of implied preemption, if the state legislature expresses its intent to occupy an entire field of legislation, no local legislation in that field is permitted..While no particular formula exists for finding a legislative intent to preempt a field by implication, the Maryland Court of appeals has indicated that in deciding whether a field has been impliedly preempted, the inquiry should focus on whether "the General Assembly has manifested a purpose to occupy exclusively a particular field." *E. Star, LLC v. County Comm'rs of Queen Anne's Cty.*, 203 Md. App. 477, 486 (2012) (internal quotation and citation omitted). To determine whether the General Assembly manifested a purpose to occupy the field, the Court considers whether "the comprehensiveness with which the General Assembly has legislated the field." *Allied Vending,* 332 Md. at 299. This "comprehensiveness" of legislation is judged in isolated "fields" of regulation. The boundaries defining a field are trickier to identify:

> [E]ven where the General Assembly so comprehensively covers an area that an intent to occupy the field generally is implied, the General Assembly may also intend to leave some specific matters in that world open to local legislation. In this situation, local legislation regarding those specific matters is obviously not preempted.

Holiday Marina Partners v. Anne Arundel Cty., 349 Md. 190, 213 (1998). Where a field is not comprehensively litigated, a County may freely legislate.

The Court has ruled on issues of local preemption in a number of contexts. In *State v. Phillips,* the Maryland Court of Special Appeals ("COSA") concluded that a proposed Baltimore City ordinance that required a gun owner to report the loss of a firearm by theft was not preempted, holding that "the State has not so extensively regulated the field of firearm use, possession, and transfer that all local laws related to firearms are preempted. 210 Md. App. 239, 281 (2013).

Conversely, in *Allied Vending*, the court found that where state law governed the scope of licenses, required recordkeeping, and regulated how cigarettes were packaged and displayed, the field was preempted. The Court held that the field of cigarette vending was sufficiently comprehensive to manifest an intent to prevent local regulation in the same area. 332 Md.

289-301. Similarly, in *Altadis U.S.A., Inc. v. Prince George's County*, Maryland law regulating the sale and distribution of tobacco products including the number of tobacco products that could be sold to a consumer at a time, was found to impliedly preempt local regulation of cigar sales. 431 Md. 307-8; 316-19 (2013).

The General Assembly has manifested a purpose to preempt exclusively the entire field of pesticide use. The State of Maryland has already established comprehensive pesticide use regulations in Maryland Registration and Labeling Law, Maryland Applicator's Law, and their corresponding COMAR regulations. These statutes regulate every facet of pesticide use in the State of Maryland. Maryland's comprehensive program of pesticide regulation occupies the field of pesticide *use* and thus impliedly preempts the Ordinance. Maryland law dictates precisely where, when, and how each and every pesticide it has authorized may be used, and all of these use instructions can be found on the specially authorized product label on each individual pesticide container.

The General Assembly has expressly delegated authority to interpret and enforce the pesticide regime of Maryland to the Secretary of the MDA. Unlike in *State v. Phillips* (the Maryland gun owner requirement preemption case) where specific areas in the field were left open for local regulation, here, with the way the General Assembly has dominated pesticide use and expressly given it to the Secretary, no room is left for more regulation. 210 Md. App. at 281.

The General Assembly has tasked the MDA with enforcing these use requirements. The MDA does so in part by conducting a vigorous course of training, testing, and licensing on all individuals who *use* and store the restricted pesticides it has approved. The scope of these use regulations are akin to those tobacco regulations in *Altadis* and *Allied Vending*. With both tobacco and pesticides, Maryland has so minutely regulated all overlapping aspects of the fields. Pesticides labeling, registration, and application requirements are congruous to the thorough packaging and sales regulations in the tobacco industry. 431 Md. 307 (2013). Furthermore, Maryland has enacted a number of specific regulations on pesticide use that wreaks of comprehensiveness and occupies the terrain from Worster County to Garrett County.

Maryland regulates "how" each pesticide can be used through its labeling laws. These 12,500 different pesticide labels are extraordinarily specific and detail extensively the conditions for pesticide use in a variety of contexts, ranging from the types of protective equipment required to the maximum amount of pesticide that can be applied to a given area. The comprehensive and specific information on each individual label includes information about where the pesticides may be used, directions regarding allergies, and the protection of others. All pesticide use in Maryland must be conducted in "strict accordance" with this product label. COMAR 15.05.01.02(B)(2).

Maryland counties have an insatiable appetite to tamper with existing state laws. The counties have tried to hijack a portion of the existing field of law in the following areas: tobacco, shellfish beds, waste incinerators, guns, sewage sludge application, licensure for heating system repair, fortune-telling, traffic regulations, and minimum wage. The Court appreciates Montgomery County's creativity in trying to establish a set of regulations that only apply to those from birth to their eighteenth birthday. However, federal and state laws apply to all persons, and it is a biological fact of life that all children are members of the *homo sapiens* class. The County Council can be reassured that the General Assembly has not rendered Montgomery County Neverland and its children "lost" boys and girls.

Furthermore, the State has explicitly shown that legislation of pesticides in relation to children fall within their legislative jurisdiction. In Maryland Agricultural Code section 5-208.1,

in 1998, the State of Maryland passed the "Pesticide application in schools" statute which specifically authorized counties to create action plans to protect children in school areas. The implications of this action are two-fold. First, it suggests that there is in fact legislation specifically within the County's proposed field, directed at the protection of children and impliedly preempting the Ordinance. Second, the fact that the legislature explicitly promulgated regulations that authorize counties to contribute to plans related to children and their pesticide exposure (which have been on the books for nearly twenty years) suggests that the State held the authority to legislate on this issue and that Maryland counties did not have the power to make rules in this field beforehand. Thus, the idea that the state has legislative power over the larger field of pesticide regulation is further supported, especially with regard to the protection of children. *Id.*

If the Court allows Montgomery County's Ordinance to survive it will act as a local "veto" on the State and federal use rules on pesticide. The Ordinance's survival essentially allows the Montgomery County Council to dismiss all the vetting and testing of the State's pesticide registration, the extensive labeling regime, and the thorough training required to apply and use restricted pesticides. Just as in *New Pulaski*, a moratorium on cosmetic pesticides is a blunt rejection of the state's comprehensive pesticide use regime, and it is impliedly preempted. *Id.* at 232. In light of Maryland's broad regulatory scheme on pesticide use, the Ordinance exceeds the County's power. From the commercial application process to the minute details of each individual label, the General Assembly has regulated the entire field and, therefore, has evinced clear legislative intent to unilaterally control pesticide use throughout the state.

1. *Allied Vending* Secondary Factors

When the comprehensiveness of state regulation is the primary indicator of implied preemption, courts have also considered seven "secondary" factors related to history, policy, and other uses bearing on the relationship between states and localities ("Secondary Factors"). *Allied Vending*, 332 Md. at 299-300. If there is no ambiguity in the language of the statutory construction, these factors need not be considered. *See Proctor v. Washington Metro. Area Transit Auth.,* 412 Md. 691, 714 (2010). Nevertheless, these factors can be a helpful guide to understanding implied preemption. The factors are as follows: 1) "whether local laws existed prior to the enactment of state laws governing the same subject matter," 2) "whether the state laws provide for pervasive administrative regulation," 3) "whether the local ordinance regulates an area in which some local control has traditionally been allowed," 4) "whether the state law expressly provides concurrent legislative authority to local jurisdictions or requires compliance with local ordinances," 5) "whether a state agency responsible for administering and enforcing the state law has recognized local authority to act in the field," 6) "whether the particular aspect of the field sought to be regulated by the local government has been addressed by the state legislation," and 7) "whether a two-tiered regulatory process existing if local laws were not pre-empted would engender chaos and confusion." *Allied Vending*, 332 Md. at 299-300.

In regards to the first of the Secondary Factors, this court finds that the County cites no local laws regarding pesticide use which existed before state law. Therefore, this Secondary Factor weighs in favor of the State.

Second, Maryland state laws do not provide for pervasive administrative regulation. On the contrary, Maryland state laws have endowed enforcement powers to the MDA and the Secretary. Where local administrations have been given enforcement opportunities, it has primarily been done so explicitly. *See* Md. Code Agric. § 5-208.1. This Secondary Factor also weighs in favor of implied preemption by the State.

Third, the local ordinance does not regulate an area in which some local control has traditionally been allowed, because as discussed above, no known local regulation has existed on pesticide use before the Ordinance. This Secondary Factor too weighs in favor of implied preemption by the State.

The fourth factor evaluates whether the state law expressly provides concurrent legislative authority to local jurisdictions. The Express Powers Act gives Montgomery County some authority, but at best, this authority is only over "conditions detrimental to health" and to provide for the health and welfare of the County. Md. Code, Local Gov't §§ 10-328; 10-206. No express provision expressly gives the County authorization to legislate on pesticide use or regulation. This hardly gives any semblance of concurrent powers between the State and County's legislative authority. The Local Government Article's language is vague and overbroad, thus, one would have to strain to find that this Secondary Factor weighed in favor of the County.

The fifth factor asks whether a state agency responsible for administering and enforcing the state law has recognized local authority to act in the field. All evidence is explicitly to the contrary in Maryland. In fact, the MDA has openly resisted the local regulation of pesticides and has repeatedly sought explicit regulatory language prohibiting such conduct from the General Assembly. Thus, this Secondary Factor weighs in favor of implied preemption by the State.

The sixth factor examines whether the particular aspect of the field sought to be regulated by the local government has been addressed by the State legislation. The State has made specific regulations as to the use of pesticides on school grounds in section 5-208.1 of the Maryland Agricultural Article. The Defendant argues that no particular aspect of the field at issue has been addressed by State pesticide law.. However, given the State's comprehensive legislation as to registration, labeling, and application of pesticides, the particular aspect (usage) has been comprehensively addressed by the State in several separate regards. The sixth Secondary Factor supports implied preemption by the State.

The County Executive indirectly addressed the seventh and final factor when he commented that it is likely that a two-tiered regulatory system would cause significant confusion and chaos in both application and enforcement of local laws. The Court finds that it would also run the risk of divergence from EPA standards. In this case, regulation by the County runs the risk of a three-tier regulatory system (federal, state, and local), which would be confusing to both consumers and distributors alike. This seventh and last Secondary Factor corroborates implied preemption by state regulation.

After examination of all the Secondary Factors in the light most favorable to the County, this Court concludes that six out of seven factors definitively corroborate implied preemption by state regulation.

B. Conflict Preemption

When a local government ordinance conflicts with a public law enacted by the General Assembly, the State law preempts the local ordinance, and the local ordinance is rendered invalid. *See Worton Creek Marina, LLC v. Claggett*, 381 Md. 499, 512 (2004). Montgomery County has the authority to adopt ordinances "only to the extent that [they] are not preempted by or in conflict with public general law." Md. Code, Local Gov't § 10-206(b). The Maryland Court of Appeals has used the verbal test and the functional test to determine whether laws are preempted by conflict. *Hart*, 395 Md. at 408-10. The functional test has been the predominant test of conflict preemption in Maryland for the past fifteen years; the verbal test is all but

obsolete. *See City of Balitimore v. Sitnick*, 254 Md. 303, 320 (1969); *Mayor and City Council of Baltimore v, Hart*, 395 Md. 394, 414 (2006).

The "functional test," as recognized in *Mayor & City Council of Baltimore v. Hart*, examines whether allegedly conflicting laws fulfill the same function by promoting a common underlying purpose. 395 Md. 394, 408-409 (2006). *See City of Baltimore v. Sitnick*, 254 Md. 303 (1969) (Baltimore City's $1.25 minimum wage was found not violate Maryland state $1.00 minimum wage law because both ordinances accomplished precisely the same purpose, prohibiting the payment of substandard wages); *Mayor and Alderman of City of Annapolis Waterfront Co.*, 284 Md. 383, 391-93 (1979) (provision of city charter that permitted city to consider certain factors in the construction of wharves and piers was not in conflict with state law that did not identify those factors because the city charter provision was consistent with the purpose of the law). "If local law is in furtherance of the public general law's function, then the local law is valid without regard to any verbal conflict." *Hart,* 395 Md. at 408–9 (quoting J. Scott Smith, *State and Local Legislative Powers: An Analysis of the Conflict and Preemption Doctrines in Maryland,* 8 U. Balt. L. Rev. 300 (1979)). The local ordinance must seek to "accomplish precisely the same purpose as does the state law," and if it does, it is deemed valid. *City of Baltimore v. Sitnick*, 254 Md. 303, 321 (1969).

Montgomery County finds support for their argument in *East Coast Welding & Construction Company v. Refrigeration, Heating & Air Conditioning Board,* in which the court upheld a county licensing scheme that imposed requirements for boiler and pressure vessel repairs beyond those required by state law. 72 Md. App. 69, 527 (1987). The state regulation allowed any approved organization to make boiler and pressure vessel repairs, and the Court upheld the County's ordinance which required an additional examination and license.

Similarly, the Court utilized the functional test in *Mayor and City Council of Baltimore v. Hart* to uphold a Baltimore City Police Department regulation which required an emergency vehicle to come to a full stop at a stoplight (rather than just slow down as was required by state law). This regulation did not cause a conflict of laws because the function of the State law was to facilitate the safe operation of emergency vehicles, and the city regulation provided for "arguably, a higher standard." 395 Md. 394, 409 (2006).

The Ordinance flunks the functional test because it conflicts with the Maryland pesticide statutes and their implementation of regulations. The Ordinance prohibits the use of registered pesticide products that Maryland law permits, and in doing so, it simultaneously undermines the express purpose of State law to promote uniformity between Maryland pesticide requirements and those adopted by EPA and other states. The Ordinance prohibits and frustrates an activity intended to be permitted by State law. Maryland's Agricultural Article permits Montgomery County residents to apply registered pesticides to their lawn and expressly licenses state-certified applicators to use and apply these pesticides. Under the Ordinance, section 33B-10, "a person must not apply a registered pesticide other than a listed pesticide [...] to a lawn." The County Ordinance does not add guidelines for use; to the contrary, it expressly prohibits the use of an entire category of products affirmatively permitted by the State.

1. **The Ordinance Conflicts with State Law by Prohibiting Conduct that is Affirmatively Authorized by the State, Specifically the Use of Registered Pesticides.**

The County argues that the function of the Maryland pesticide laws are to ensure the safe use of pesticides. To this end, the Defendant posits that no conflict exists "because the State Pesticide Laws simply establish a minimum standard for the application of pesticides and the

County Pesticide Laws." Further, the County states that the Ordinance is "consistent with the purpose of the State Pesticide Laws, which safeguard the public health, safety, and welfare by ensuring the safe use of pesticides." *Id.* at 22. Montgomery County is promoting safety to mask an unwarranted banner for exclusion. To borrow loosely from Lucretius, "one man's prohibition is another man's limitation."

The County is not adding an additional standard for the same ultimate purpose. Rather, the Ordinance makes a unilateral sweeping determination of a new vision for pesticide use and regulation at the expense of consumer clarity and autonomy. In response, the Defendant argues that because the Pesticide law does not completely ban the use of pesticides throughout the County and has included a thorough list of exceptions, the Ordinance is not in conflict with the law. This situation, the County represents, is distinguishable from *Mayor and Council of Forest Heights v. Frank*, in which a municipal ordinance completely banned fortunetelling, which conflicted with a county law allowing the practice. 291 Md. 331 (1981). But a ban with exceptions is still a ban, and the regulated activity is not any less in conflict with the law. Actually, the Ordinance blatantly prohibits products and conduct that have been affirmatively approved and licensed by the State. The application of higher than "minimum risk" pesticides to private lawns solely for cosmetic purposes is clearly authorized by state law, and the County's limited exceptions cannot overcome this subterfuge. The prohibition of pesticides by the County that are allowed by the State of Maryland is a conflict of laws, and the Ordinance is preempted by conflict.

2. Uniformity between Federal and State Legislation fails the Functional Test.

The conflict test seeks to determine the underlying *function* of the pesticide statutes. The function of the pesticide statutes is to provide safe pesticide application that coincides with E.P.A. standards. While the Ordinance claims to promote greater pesticide safety, its chaotic application is a blow to the uniformity of laws between the federal and state governments.

The Ordinance exceeds the County's authority by frustrating the explicit State law goal of promoting uniformity in pesticide regulatory requirements. *See* Md. Code, Agric. §§ 5-104(c), §§ 5-204(13). Both the Registration and Labeling Law and the Pesticide Applicator Law contain express provisions emphasizing the overall intention to keep pesticide legislation uniform. *See id.* at § 5-104(c); § 5-204.

> Uniform pesticide requirements between the several states and the federal government are desirable to avoid confusion that endangers the public health and that results from diverse requirements, particularly relating to the labeling and coloring of pesticides and to avoid increased costs to the people of the State due to the necessity of complying with diverse requirements for manufacturing and selling pesticides. Consequently, the Secretary after public hearing may adopt the rules and regulations of the appropriate agency if the United States government relating to pesticides, if the rules and regulations are applicable to and conform with the primary standards established by this subtitle.

Id. at § 5-104(c). Here, the legislature has prioritized uniformity and explained its policy rationale in doing so. To avoid confusion from diverse requirements that endanger public health and increased manufacturing and selling costs, uniformity has specifically been identified by the legislature as a primary purpose for adopting pesticide rules that work with the EPA. The Ordinance does not promote these maxims.

The opt-out provision, which the Ordinance allows, has the potential to create diverse requirements that litter stores city by city in Maryland with poisonous precedents. Though less effusive, Maryland Agriculture Article, section 5-204 also promotes State law uniformity:

> The Secretary, by suitable administrative procedures including public hearings, if appropriate, shall: [. . .] (13) For purposes of uniformity and in order to enter into cooperative agreements, adopt use classifications and other pertinent pesticide regulation provisions that are established by the U.S. Environmental Protection Agency.

By generally banning the use of registered pesticides, the Ordinance prohibits and frustrates activity that is intended to be permitted by State law, which conflicts with, and is thus, preempted by State law. The County's Ordinance flouts decades of State primacy in ensuring safe and proper pesticide use, undermines the State's system of comprehensive and uniform product approval and regulation, and prohibits products and conduct that have been affirmatively approved and licensed by the State.

For these reasons, and pursuant to Maryland Code, Courts and Judicial Procedure §§ 3-406 and §§ 3-409, this Court issues a Declaratory Judgment stating that the County Bill 52-14 is unlawful and preempted by Maryland law. **WHEREFORE it is this** 3rd **day of** August, 2017, hereby

ORDERED that Plaintiffs' Motions for Summary Judgment (DE # 17 and #19) are hereby **GRANTED**; and it is further

ORDERED that Defendant's Motion for Summary Judgment (DE # 11) is hereby **DENIED**; and it is further

ORDERED that Bill 52-14 as it regards the use of pesticides on private property, shall not take effect, and Plaintiffs are entitled to permanent injunctive relief from the enforcement of these sections.

Terrence J. McGann

TERRENCE J. McGANN, Judge
Circuit Court of
Montgomery County, Maryland