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April 1, 2015

The Honorable Kirill Reznik  
225 House Office Building  
Annapolis, Maryland 21401-1991

Dear Delegate Reznik:

You have asked for advice concerning whether Agriculture Article ("AG"), Title 5, Subtitles 1 and 2 would preempt Montgomery County Bill 52-14. While the matter is not completely clear, it is my view that the general ban on application of non-essential pesticides may well be preempted, but that other parts most likely would not be.

Montgomery County Bill 52-14 makes numerous changes to existing Montgomery County ordinances governing pesticides, and adds some new provisions. It requires the County Executive to include a list of "non-essential pesticides" in regulations, which is to include all pesticides that receive certain ratings from the federal Environmental Protection Agency, the Ontario, Canada, Ministry of the Environment, and the European Commission. The regulations are also to contain a list of invasive species that may be detrimental to the environment in the County.

The bill also makes changes to the sign requirements for pesticide application with respect to placement and visibility of the signs. The existing requirements apply only to commercial applicators. In addition, the bill adds a similar sign requirement for property owners and tenants who apply pesticides on an area of more than 100 square feet.

The bill bars application of a non-essential pesticide to a lawn. The term lawn applies to mowed expanses generally, and includes athletic fields, but not golf courses. Exceptions are made for applications to control weeds listed in the County provision on weeds, to control invasive species, or pest control while engaged in agriculture, and for the maintenance of a golf course. In addition, it provides that an exception may be granted on request, if it is shown that there are no available alternatives, that the application will not violate federal or State law, and that the application is necessary to protect human health or prevent significant economic damage. An exception may also be granted on an emergency basis for pest outbreaks that pose a threat to human health or are likely to cause significant economic damage.

The bill also bars the use of a non-essential pesticide or neonicotinoid on County property, except larvicide or rodenticide as a public health measure to reduce the spread of disease vectors.

This prohibition is subject to exceptions similar to those applicable to public use of non-essential pesticides. The prohibited pesticides can also be used if the Director of the County Department of Environmental Protection determines, after consultation with other officials that the use of the pesticide is necessary to protect human health or prevent imminent and significant economic damage and that no reasonable alternative is available. This determination must be reported to the County Council within 30 days.

Finally, the bill would require the Department of Environmental Protection to adopt an integrated pest management program for property owned by the County and would require the County Executive to implement a public outreach and education campaign before, during and after implementation of these provisions.

Montgomery County regulation of pesticides dates back to 1985, when the County adopted point of sale notification requirements and sign requirements related to commercial application of pesticides. In 1985, this office opined that this ordinance was preempted by the Federal Insecticide, Fungicide, and Rodenticide Act. 70 *Opinions of the Attorney General* 161 (1985).<sup>1</sup> The federal district court for Maryland and the Fourth Circuit followed suit. *Montgomery Pest Control v. Montgomery County*, 646 F. Supp. 109 (D. Md. 1986); *Maryland Pest Control Association v. Prince George's County*, 822 Md. 55 (4th Cir. 1987). Ultimately, the Supreme Court disagreed, holding that federal law permitted pesticide regulation by local jurisdictions as well as by the State itself. *Wisconsin Public Intervenor v. Mortier*, 501 US 597, 607-608 (1991).

In the 1985 Opinion, Attorney General Stephen H. Sachs also addressed whether State law would not preempt the Montgomery County ordinance and concluded that it would not. The Opinion stated that the objective of both State law and the ordinance was the safe use of pesticides. *Id.* at 5. Moreover, the Opinion found no express preemption and also found that the pesticide law did not so comprehensively regulate in the area that a court would be compelled to find preemption by implication. *Id.* Finally, the Opinion concluded that "there are no State regulations requiring lawn care businesses to post warning signs or to compel pesticide dealers to give customers safety information; hence there is no conflict between Bill No. 26-85 and State law." *Id.* Since that time, however, Maryland law has changed significantly, and it now regulates signs and requires that information be supplied to consumers. Chapter 302 of 1987, adding AG, § 5-208. Moreover, the proposed ordinance significantly expands County law. Thus, the 1985 Opinion does not settle the issue raised here.

As reflected in the 1985 Opinion, there are three ways in which State law may preempt a local law: 1) preemption by conflict; 2) express preemption; and 3) implied preemption. *Talbot*

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<sup>1</sup> This opinion also concluded, however, that the regulation of the safe use of pesticides is plainly within the authority granted to Montgomery County under the Express Powers Act. 70 *Opinions of the Attorney General* at 163.

*County v. Skipper*, 329 Md. 481, 487-488 (1993). Preemption by conflict arises when a local law 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. *Id.* at 487 n. 4. With respect to either express or implied preemption, “the focus of the inquiry must be on whether the General Assembly has manifested a purpose to occupy exclusively a particular field.” *Ad+Soil, Inc. v. County Commissioners*, 307 Md. 307, 324 (1986). In this case it is clear that Maryland does not have express preemption in this area, though many states apparently do. See Memorandum from Josh Hamlin, Legislative Attorney, to the Montgomery County Council dated October 24, 2014, on Bill 52-14.

Most of the cases that have looked at State preemption in the context of the regulation of pesticides have found preemption. Most of these rely on field preemption. The cases are not as helpful as they could be, however, because different states apply different tests as to preemption, and, of course, the types of regulation that have been attempted at the local level vary greatly. See *Syngenta Seeds, Inc. v. County of Kauai*, 2014 WL 4216022 (D. Haw. Aug. 25, 2014) (local ordinance regulating application of restricted use pesticides held preempted by the “global or comprehensive mechanism for regulating pesticide licensing, sales, use, and enforcement within the State.”); *Pesticide Public Policy Foundation v. Village of Wauconda, Ill.*, 622 F.Supp. 423, 432 (N.D. Ill. 1985) (ordinance requiring user of pesticides to register and obtain local license preempted by statute setting out “an extensive, detailed, and comprehensive regulatory scheme for the use of pesticides within the State.”) *Village of Lacona v. State, Dept. of Agr. and Markets*, 858 N.Y.S.2d 833 (2008) (local regulation of field application of pesticides preempted where State official has been given exclusive jurisdiction “in all matters pertaining to the distribution, sale, use, and transportation of pesticides.”); *Minnesota Agr. Aircraft Ass’n v. Township of Mantrap*, 498 N.W.2d 40, 42 (Minn. App. 1993) (express preemption); *Town of Wendell v. Attorney General*, 476 N.E.2d 585 (1985) (local law requiring notice of proposed application and hearing to determine whether it presents a threat to health, the environment, or safety was preempted because it would “prevent the achievement of the identifiable statutory purpose of having a centralized, Statewide determination of the reasonableness of the use of a specific pesticide in particular circumstances.”); *Ames v. Smoot*, 471 N.Y.S.2d 128 (1983) (local regulation on aerial spraying of pesticides preempted by state law vesting “jurisdiction in all matters pertaining to the distribution, sale, use, and transportation of pesticides . . . exclusively in the Commissioner of Environmental Conservation.”); *Town of Salisbury v. New England Power Company*, 437 A.2d 281, 282 (N.H. 1981) (local restriction on the use of chemical defoliants preempted by comprehensive regulatory scheme); *Long Is. Pest Control Assn. v. Town of Huntington*, 341 N.Y.S.2d 93 (1973) (requirement that pesticides be registered with town before use or sale preempted by state law occupying the field of pesticide regulation). The only exception I have found is *Central Maine Power Co. v. Town of Lebanon*, 571 A.2d 1189 (Me. 1990). In that case, the court found that a local review process for certain types of pesticide use that was more stringent than state law did not frustrate the purposes of state law and thus was not preempted. *Id.* at 1195. That case, however, also involved a statute that expressly preserved some local authority.

To start with the easy part, it is my view that the County, like any other property owner, has the right to determine how to deal with pests on its property, so long as the decision does not violate the law. I believe that this is the case even if it is found that the State has occupied the field of regulating pesticides, unless the State law expressly requires or prohibits certain actions on the part of local jurisdictions. Thus, the provisions of the proposed ordinance that prohibit the use of certain pesticides on county property except in certain circumstances, and the requirement that an integrated pest management program be developed for use on county property are not preempted.<sup>2</sup> It is also my view that it is within the power of a charter county to require the County Executive to implement a public education and outreach program on pretty much any subject. The other provisions of the bill raise more difficult problems.

Agriculture Article, Title 5, Subtitles 1 and 2 contain the State law on pesticides. Section 5-104(b) provides that the Secretary of Agriculture (“the Secretary”) may determine whether any pesticide is highly toxic to humans and may subject pesticides to the provisions of § 5-105 of the subtitle, which requires registration of each brand or product name of a pesticide before it is distributed in the State and allows the Secretary to require the submission of toxicological, environmental, or health effects data that he or she finds appropriate as well. Section 5-104(c) authorizes the Secretary to adopt, after public hearing, the rules and regulations of the appropriate agency of the United States government relating to pesticides, if the rules and regulations are applicable to and conform with the primary standards in the subtitle. The introductory language of this provision explains that “[u]niform 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.”<sup>3</sup> Subtitle 1 also contains requirements about packaging and labeling, and permits the Secretary to issue a stop sale order if a violation is found to cause unreasonable adverse effects to humans, animals, or the environment, or is in violation of federal pesticide laws or regulations. AG §§ 5-106 and 5-108.

Agriculture Article, Subtitle 2 requires the Secretary to adopt regulations governing the storage, sale, distribution, exchange, use, and disposal of pesticides and containers, § 5-204(1),

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<sup>2</sup> To the extent that the integrated pest management provision is applied to county property that is being used for a school, the program would also have to comply with the “uniform standards and criteria” developed by the State Department of Agriculture under AG § 5-208.1(c).

<sup>3</sup> The court in *Ames v. Smoot*, 471 N.Y.S.2d 128 (1983) relied on a similar provision in New York law in finding that local regulations were preempted, saying “If the enhancement of national uniformity is a significant target of article 33, it would be a peculiar interpretation to view the statute as permitting New York's 62 counties, 929 towns, 556 villages and 62 cities (see NY St Legis Manual, 1980-1981, pp 956-1007) to adopt their own regulatory schemes concerning the use of pesticides within their geographical limits.” See also *Pesticide Public Policy Foundation v. Village of Wauconda, Ill.*, 622 F.Supp. 423, 430 (N.D. Ill. 1985).

prescribe, when necessary, the time and conditions under which a pesticide may be sold, distributed, exchanged, or used in different areas of the State, § 5-204(2), provide that extremely hazardous pesticides may be sold, distributed, exchanged, or applied only when special permission first is obtained from the Secretary, § 5-204(3), define the formulations and establish the conditions and appropriate areas for application of any pesticide, § 5-204(4), and establish guidelines and regulations for the application of pesticides and require the keeping and submission of records, § 5-204(5) and (8). Subtitle 2 also regulates the information to be provided to customers when the pesticide is applied, § 5-208(a) and the placement and nature of signs to be posted when pesticides are applied, § 5-208(c). The law also classifies cyclodiene termiticides as restricted pesticides. AG § 5-210.5(b).

This law is in many ways similar to some of those that have been found to preempt local law by implication. It is not clear, however, that it should be read to have that result, at least not with all of the provisions of Bill 52-14.

A portion of Bill 52-14 requires the County Executive to make a list of non-essential pesticides and a list of invasive species. There is no similar requirement imposed on the Secretary or any other State official. Moreover, this provision is necessary to implement the prohibition of the use of non-essential pesticides on County property, which is not preempted. As a result, it is fair to conclude that this provision is not preempted.

The bill also adds a sign requirement for property owners and tenants who apply pesticides on an area of more than 100 square feet. The State law relating to signs applies only to licensees and public agency permittees. AG § 5-208(c)(1). Licenses are issued to places of business that engage in the business of pest control or pest control consulting. AG § 5-207(e). A public agency applicator is a person employed by a unit of federal, State, county or local government or any training institution which is engaged in pest control. AG § 5-201(p). Thus, it does not apply to property owners and tenants. As a result, this provision would not conflict with State law and does not regulate in an area that has clearly been occupied by State law.

Finally, the bill bars application of a non-essential pesticide to a lawn, subject to certain exceptions. This is, in my view, the provision that is most likely to be found to be preempted. As noted above, the Secretary has the power to regulate the sale, distribution, and use of pesticides, to set the time and conditions under which a pesticide may be sold or used in different areas of the State, to limit the sale and application of extremely hazardous pesticides, and establish the conditions and appropriate areas for application of any pesticide. The Secretary also may, “[f]or purposes of uniformity and in order to enter into cooperative agreements, adopt use classification and other pertinent pesticide regulation provisions that are established by the U.S. Environmental Protection Agency.” AG § 5-204(13). It is my view that a court could conclude that this provision would interfere with the purposes of these State provisions, as well as the goal of achieving uniformity.

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April 1, 2015  
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Sincerely,

A handwritten signature in black ink, appearing to be 'K. M. Rowe', with a long horizontal flourish extending to the right.

Kathryn M. Rowe  
Assistant Attorney General

KMR/kmr  
reznik09.wpd