MEMORANDUM

June 9, 2015

TO: Transportation, Infrastructure, Energy and Environment Committee

FROM: Josh Hamlin, Legislative Attorney

SUBJECT: Letters from Assistant Attorney General Kathryn M. Rowe to Delegates Kirill Reznik and Kumar Barve, RE: possible preemption of Bill 52-14, Pesticides – Notice Requirements – Non-Essential Pesticides – Prohibitions

By letter to the Honorable Kirill Reznik dated April 1, 2015, Assistant Attorney General Kathryn M. Rowe of the Office of Counsel to the General Assembly provided advice on whether State law would preempt Montgomery County Bill 52-14. Ms. Rowe's view is "that the general ban on application of non-essential pesticides may well be preempted, but that other parts most likely would not be." Ms. Rowe sent a very similar letter, dated May 21, 2015, to Delegate Kumar Barve, with a somewhat more forceful conclusion. In the May 21 letter, which contained essentially the same analysis as the April 1 letter, Ms. Rowe concluded: "It is my view that, to the extent that the bill bars application of a non-essential pesticide to a lawn, subject to certain exceptions, it is likely to be found to be preempted."

As a general proposition, Council staff concurs with the view that "a court could conclude" that the County is preempted under State law from prohibiting the cosmetic use of pesticides on lawns, but believes that such a conclusion is far from certain. Indeed, given the existing Maryland case law, as well as the legislative history of the State pesticide law, staff believes that a very strong argument against implied preemption can be made. As such, staff does not agree with Ms. Rowe's modified conclusion, that preemption of a County prohibition of the application of certain pesticides in certain places is "likely."

Ms. Rowe's initial conclusion did not address the *probability* of a finding of preemption with regard to Bill 52-14, but only its *possibility*. In her second letter, she does speak to the probability, as noted above. However, the discussion provided by the entirety of both letters (virtually identical in each) does not clearly indicate the likelihood that a *Maryland* Court would conclude that the County is preempted from implementing any of the Bill's provisions. Ms. Rowe examined pesticide regulation-related implied preemption cases from other jurisdictions and a described the provisions of State law regulating pesticides. With regard to the cases from other jurisdictions, she notes that "[t]he 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." The different preemption tests applied by the

various states and the different types of attempted local regulation, as well as, and perhaps more importantly, the different state pesticide regulation laws held to preempt local regulation, all combine to greatly limit the instructive value of these cases.

Significantly, neither of Ms. Rowe's letters discuss how Maryland courts have applied the implied preemption doctrine, nor do they discuss significant aspects of the legislative history of Maryland's pesticide law. Staff believes that such discussion is critical to assessing the likelihood of a finding that the County is impliedly preempted from prohibiting the use of certain pesticides on certain areas in the County. The following discussion of implied preemption law in Maryland, and important General Assembly actions related to the pesticide law, lead staff to believe that, should the County enact Bill 52-14 prohibiting the application of certain pesticides, a finding of implied preemption would be possible, but not necessarily "likely."

Background

The regulation of pesticides is the shared responsibility of federal, state, and local governments. This shared approach, known as "environmental federalism," is consistently applied among several federal environmental protection laws,[1] and has evolved largely over the last 50 years.

At the national level, the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") is the primary vehicle for pesticide regulation. FIFRA was enacted in 1947, and has evolved from being primarily a labeling statute to become a somewhat more broad regulation. In 1972, administration of FIFRA was transferred to the newly created Environmental Protection Agency ("EPA"), which is responsible for classifying pesticides based on a review of the scientific evidence of their safety and impact on the health of individuals and the environment. FIFRA also requires EPA to maintain a registry of all but "minimum risk" pesticides.[2] In addition to the classification and registry of pesticides, FIFRA provides a uniform national standard for labeling pesticides. FIFRA does not comprehensively regulate pesticides, however, and does not include public notice or permit requirements for the use of pesticides.

Under FIFRA, the states are the primary enforcers of pesticide use regulations, and FIFRA expressly authorizes states to enact their own regulatory measures concerning the sale or use of any federally registered pesticides in the state, provided the state regulation is at least as restrictive as FIFRA itself. In Maryland, pesticides are regulated by the Maryland Department of Agriculture, through the enforcement of Subtitles 1 and 2 of Title 5 of the Agriculture Article of the Maryland Code.[3] Maryland law and regulations generally create a pesticide registration and labeling regime at the state level, and a licensing program for applicators of certain pesticides. Title 5 does not

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[1] The 1972 Federal Water Pollution Control Act, the 1986 amendments to the Safe Drinking Water Act, the Toxic Substances Control Act, the Resource Conservation and Recovery Act, and the Oil Pollution Control Act of 1990 all provide for state and local regulatory roles.

[2] Minimum risk pesticides are a special class of pesticides that are not subject to federal registration requirements because their ingredients, both active and inert, are *demonstrably* safe for the intended use. Information about EPA's treatment of minimum risk pesticides can be found at: http://www.epa.gov/oppbppd1/biopesticides/regtools/25b/25b-faq.htm

[3] Subtitle 1 is entitled the "Maryland Pesticide Registration and Labeling Law." Subtitle 2 is the "Pesticide Applicator's Law."

include any express preemption language, nor does it expressly authorize the use of any particular pesticides. In 2011, the Office of the County Attorney opined that, as a general matter, the County may regulate pesticides in a manner at least as restrictive as, and consistent with, federal and State law. Specifically, the opinion expressed the view that the County could enact a local ban on the use of the pesticide methyl bromide.[4]

The authority of local governments to regulate pesticides was the subject of significant litigation in the 1980s, with a County law struck down as preempted by FIFRA. In *Maryland Pest Control Assn. v. Montgomery County, Maryland*, 646 F. Supp. 109 (D. Md. 1986), the U.S. District Court held that FIFRA preempted the County's local law imposing pesticide posting and notice requirements. The Court held that if Congress had wanted to include local governments in the regulation of pesticides, it would have expressly done so. However, in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991), the U.S. Supreme Court held, contrary to the *Maryland Pest Control Assn.* decision, that a unit of local government has the power, under FIFRA, to regulate pesticides within its own jurisdiction, provided that the local regulation is at least as restrictive as, and consistent with, FIFRA and any applicable state law. Since *Mortier* was decided, many states have expressly preempted local jurisdictions from regulating pesticides, but Maryland is one of nine states which permit local regulation. The County currently imposes certain notice, storage, handling, and consumer information requirements in Chapter 33B of the County Code, and Bill 52-14 would add certain additional notice requirements, and would prohibit the use of certain pesticides on County property and certain private property.

Preemption of local pesticide regulation

Federal Law on Local Regulation of Pesticides

As noted above, the question of whether local jurisdictions are permitted to regulate pesticides under federal law was settled by the Supreme Court in *Wisconsin Public Intervenor v. Mortier*. A brief discussion of the *Mortier* decision is helpful in providing context for considering local pesticide regulation generally.

On June 21, 1991, the Supreme Court unanimously decided in *Wisconsin Public Intervenor v. Mortier* that FIFRA did not preempt local regulation of pesticides. In doing so, the Court reversed the holdings of two lower courts, explaining that FIFRA, while a comprehensive regulatory act, left open to the states and localities the power to supplement federal pesticide regulation. Moreover, the Court reiterated its standard of "clear and manifest purpose" when inferring congressional intent in preemption cases. In *Mortier*, the Court discussed and rejected each of the ways by which federal law could preempt state or local laws: (1) where a federal law expressly preempts state or local law; (2) where the federal law so pervasively occupies the field that state or local supplemental action must be precluded; (3) where federal and state or local laws conflict; and (4) where a state or local law stand as an obstacle to the fulfillment of federal goals. The Court, in its analysis of FIFRA's statutory language, could not find that Congress had indicated a "clear and manifest purpose" to preempt local regulation:

[4] Memorandum to Councilmember Roger Berliner from Associate County Attorney Walter E. Wilson, dated October 25, 2011, which is attached to this memorandum.

> FIFRA nowhere seeks to establish an affirmative permit scheme for the actual use of pesticides. It certainly does not equate registration and labeling requirements with a general approval to apply pesticides throughout the Nation without regard to regional and local factors like climate, population, geography, and water supply. Whatever else FIFRA may supplant, it does not occupy the field of pesticide regulation in general or the area of local use permitting in particular.

501 U.S. 597, 613-14.

Following the *Mortier* decision, pesticide proponents and opponents mobilized for activity on federal and state levels. Bills were introduced in both the Senate and the House of Representatives to amend FIFRA to expressly preempt state and local regulation, though neither passed. At the state level, coalitions made up of pesticide industry and agricultural representatives worked to get state legislatures to pass legislation preempting local pesticide regulation. Notably, in Maryland, bills were introduced in the House of Delegates and the Senate to expressly preempt local pesticide regulation in 1992, 1993, and 1994, but none were enacted.[5]

Implied Preemption Law in Maryland

In resolving questions of preemption of local legislation, Maryland courts have recognized "three grounds on which otherwise valid local legislation might be invalidated because of State legislation concerning the same matter: (1) ordinances which conflict with public general law, (2) ordinances which deal with matters which are part of an entire subject matter on which the General Assembly has expressly reserved unto itself the right to legislate, and (3) ordinances which deal with an area in which the General Assembly has acted with such force that an intent to occupy the entire field must be implied." *McCarthy v. Board of Education of Anne Arundel County*, 280 Md. 634, 639 (1977). It appears that Ms. Rowe bases her conclusion that the prohibition on the use of non-essential pesticides on lawns could be preempted on the doctrine of implied preemption set forth in (3) above. In any event, the Maryland pesticide law contains no language expressly preempting local jurisdictions from any area of pesticide regulation, and there has been no assertion made that the prohibition in Bill 52-14 would conflict with State law. As such, the focus of the discussion below is on the doctrine of implied preemption.

The Maryland Court of Appeals, in *Mayor and City Council of Baltimore v. Sitnick & Firey*, 254 Md. 303 (1969),[6] articulated the "concurrent powers theory," first applied in *Rossberg v. State*, 111 Md. 394 (1909), which allows local legislation in certain fields where the State legislature has acted if the local jurisdictions are otherwise empowered to legislate on the subject. The *Sitnick* Court surveyed prior Court decisions, and described the concurrent powers theory succinctly: "a political subdivision may not prohibit what the State by general public law has permitted, but it may prohibit what the State has not *expressly* permitted." 254 Md. at 317

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[5] 1992: HB 762/ SB549 - Pesticides - Uniform Regulation. 1993: SB 429 – Pesticides – Regulation. 1994: HB 948/SB 481 – Uniform Regulation of Pesticides.

[6] In *Sitnick*, the Court of Appeals held that a Baltimore City ordinance establishing minimum wage standards higher than the standard set by State law was not invalid under the theory that the State had preempted the field of minimum wage regulation, but was valid on the basis of the City's exercise of "concurrent power." The *Sitnick* Court articulated the doctrine of concurrent power, and contrasted it with the concept of implied preemption.

(emphasis supplied). The Court recognized, however, that "there may be times when the [State] legislature may so forcibly express its intent to occupy a specific field of regulation that the acceptance of the doctrine of pre-emption by occupation is compelled. . ." *Id.* at 323.

The Court has had many opportunities since *Sitnick* to consider whether the State had so forcibly expressed its intent to occupy a particular field of regulation so as to preempt local enactments in that field. In these cases, the Court has exercised the necessary caution observed by Judge Finan in *Sitnick*, avoiding a broad application of implied preemption that would render home rule virtually worthless. *Id.* In its post-*Sitnick* implied preemption analyses, the Court has sought to divine the legislature's intent, with "the primary indicia of a legislative purpose to preempt an entire field of law [being] the comprehensiveness with which the General Assembly has legislated in the field." *Ad+Soil v. County Commissioners of Queen Anne's County*, 307 Md. 307, 328 (1986). Under this cautious approach, there have been only six distinct instances where a finding of implied preemption has resulted in the invalidation of a local law in Maryland since the *Sitnick* decision in 1969.[7]

In *County Council for Montgomery County v. Montgomery Association*, 274 Md. 52 (1975), the Court of Appeals invalidated a Montgomery County law regulating the campaign finance practices of candidates for County Executive and the County Council. The Court held that "the matter of election campaign financing was intended to be completely occupied by state law, to the exclusion of any local legislation on the subject . . ." *Id.* at 60. After reviewing the State constitutional provisions setting for the legislature's duty of protecting the electoral process in Maryland and the State Election Code, the Court concluded that the General Assembly "has enacted a comprehensive plan for the conduct of elections in Maryland" and in particular "has enacted detailed provisions governing the financing of election campaigns in this state." *Id.* at 64.[8] In so holding the Court noted the "chaos" that would result from dual systems of campaign finance regulation, saying that allowing local regulation in the field of campaign finances "would inevitably lead to utter confusion" *Id.* at 64. The Court noted that its holding was "in no way inconsistent with concurrent powers theory set forth in *Rossberg* and *Sitnick* cases." *Id.* at 65.

The Court in *McCarthy v. Board of Education of Anne Arundel County* considered an Anne Arundel County law directing the County board of education, a State agency, to make rules and enter contracts to provide transportation to children attending private, non-profit schools in the County and directing the County Council to appropriate funds to pay the costs of providing such transportation. The *McCarthy* Court invalidated the law, finding that "the field of education has

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[7] Two other cases also found implied preemption of local regulation, but without a separate analysis. In *Montgomery County Board of Realtors v. Montgomery County*, 287 Md. 101 (1980), the Court struck down a Montgomery County law imposing a tax on real property in the County on the amount by which the taxable value of the property, at the date of a transfer, exceeded the assessed valuation of the property. The Court examined the State law's "detailed scheme for the assessment and levy of taxes," and held that "[b]ecause the scheme of taxation here is in direct conflict with [State law], the County Council was without power to enact it." *Id.* at 110. The Court also noted, without separate discussion, held that the General Assembly had fully occupied the field of property tax assessment and levy. *Id.* In *Soaring Vista Properties, Inc. v. Board of County Commissioners of Queen Anne's County, 356 Md. 660 (1999),* the Court invalidated a county law regulating sewage sludge utilization, applying its holding in *Talbot County v. Skipper*, 329 Md. 481 (1993) that local regulation in the field of sewage sludge utilization was impliedly preempted by virtue of the "comprehensive" State regulatory scheme.

[8] The State Election Code is codified as the Election Law Article, with Title 13 comprehensively regulating campaign finance.

been preempted by the General Assembly, thus rendering local enactments affecting boards of education void." 280 Md. at 638. The Court reviewed the long history of statewide provision and regulation of public and private education, and surveyed the existing State education law, and deemed it an "excellent example of what the Court had in mind in *Baltimore v. Sitnick & Firey* when it referred to the fact that the General Assembly might 'so forcibly express its intent to occupy a specific field of regulation that the acceptance of the doctrine of preemption by occupation is compelled . . .'" *Id.* at 650-51 (quoting *Baltimore v. Sitnick & Firey* 254 Md. 303, 323).[9]

In *Howard County v. Potomac Electric Power Company*, 319 Md. 511 (1990), the Court found that the General Assembly had expressed its intent to occupy completely the field of public utility service. In the case, Howard County and Montgomery County each sought to enforce its respective zoning ordinance against a utility that had obtained a certificate of public convenience and necessity from the Public Service Commission ("PSC") to construct a high-voltage, overhead transmission line in the counties. The Court reviewed the PSC's broad authority over public utilities, and noted that: (1) the State law "states with particularity that the PSC shall have *final authority* over the granting of construction permits for overhead transmission lines in excess of 69,000 volts," *Id.* at 524 (emphasis supplied), (2) the imposition of conflicting conditions associated with high-voltage overhead transmission lines could generate confusion, *Id.* at 527, and (3) allowing local authority over the construction of a transmission line providing service statewide could permit the local jurisdiction to regulate the utility "in a manner that may be antithetical to the interests of the rest of the state." *Id.* at 527-28.[10]

The Court in *Talbot County v. Skipper*, 329 Md. 481 (1993) found an intent to fully occupy the field of sewage sludge utilization, invalidating a Talbot County law which required a land owner to record certain information in the County land records before applying sewage sludge to the land under a State permit. The Court concluded that the General Assembly "has enacted a very comprehensive scheme regulating all aspects of sewage sludge utilization in Maryland." *Id.* at 481. It is important to note that the State sewage sludge utilization law at issue in *Skipper* had been recently amended in response to an earlier Court of Appeals upholding a local zoning law against a preemption challenge. In that case the Court found that the State law governing sewage sludge utilization operations was "far from comprehensive." *Ad+Soil, supra,* 307 Md. at 328.

In *Allied Vending v. City of Bowie*, 332 Md. 279 (1993), the Court invalidated ordinances enacted by the City of Takoma Park and the City of Bowie that required State-licensed cigarette vending machines to also obtain a license (or permit) from the respective cities, and restricted the placement of the machines to locations not generally accessible to minors. The Court found that the General Assembly had enacted "comprehensive provisions governing the appropriate licenses necessary to sell cigarettes in Maryland at wholesale, retail, over-the-counter, and through cigarette vending machines." *Id.* at 288-89. The Court noted that "[p]rior to the enactment of the ordinances, the licensing of cigarette vending machines was accomplished exclusively in accordance with [State law]." *Id.* at 288. Further, the Court found the city laws in question "would

[9] Education in Maryland is governed via the Education Article.
[10] Public utilities in Maryland are regulated via the Public Utilities Article.

be tantamount to a ban on cigarette vending machines in locations in which the State has granted vendors a license to operate those machines." *Id.* at 303.

The most recent Maryland case in which a local law was invalidated on the basis of implied preemption is *Altadis U.S.A., Inc. v. Prince George's County*, 431 Md. 307 (2013). In striking down two Prince George's County laws regulating the sale of certain cigars, the *Altadis* Court held that state law occupies the field of regulating the packaging and sale of tobacco products, including cigars, and thus impliedly preempts local regulation. The Court applied its holding in Allied Vending, and noted that particularly important was a provision in State law *expressly authorizing* a State-licensed seller to sell or distribute up to 20 single cigars. The invalidated County laws generally disallowed the sale of inexpensive single cigars, and the Court found this "tension" between state and local laws to reinforce the preemption conclusion. *Id.* at 318-19. Also, the Court found noteworthy the fact that the General Assembly had considered, but not enacted, bills banning the sale of single cigars, saying "[t]he General Assembly's rejection of bills imposing the same requirements as the local legislation is significant in a preemption analysis." *Id.*

In contrast to these cases, the Court has found concurrent authority in cases where it has not found a comprehensive State regulatory scheme within a particular field of legislation. *See, Ad+Soil, supra*; *Sitnick, supra*; *City of Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, (1979); *National Asphalt Pavement Assn. v. Prince George's County*, 292 Md. 75 (1981); *Board of Child Care of the Baltimore Annual Conference of the Methodist Church, Inc. et al. v. Harker*, 316 Md. 683 (1989). In these cases, the Court has upheld local regulation within a field also regulated by the State.

Preemption of Local Pesticide Regulation in Other States

In her letters to Delegates Reznik and Barve, Ms. Rowe cites a number of decisions from other jurisdictions in which local regulation of pesticides has been found to be preempted by State law. As previously noted, Ms. Rowe acknowledged the limitation on their utility, as the determinations are dependent on different standards for finding preemption, and differences in the State and local laws in question. To the extent that these decisions may be instructive, many are clearly distinguishable from the law and facts that are the subject of this analysis. Several of the cited cases have no bearing on any implied preemption analysis, as the State laws in question *expressly* preempt local pesticide regulation.[11] Others involve state laws more clearly directing a more comprehensive statewide, uniform system of regulation.[12]

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[11] *See, Village of Lacona v. State, Dept. of Agriculture and Markets*, 858 N.Y.S.2d 833 (2008); *Ames v. Smoot*, 471 N.Y.S.2d 128 (1983); and *Long Is. Pest Contol Assn v. Town of Huntington*, 341 N.Y.S.2d 93 (1973): all three of these cases held that local jurisdictions were preempted from regulating pesticides where New York State law provided that "jurisdiction in *all* matters pertaining to the distribution, sale, use and transportation of pesticides, is by this article vested *exclusively* in the commissioner." (emphasis supplied). *See also, Minnesota Agr. Aircraft Assn v. Township of Mantrap*, 498 N.W.2d 40 (Minn. App. 1993) in which the court held a local law regulating aerial spraying of pesticides preempted by State law including the following provision: "Except as specifically provided in this chapter, the provisions of this chapter preempt ordinances by local governments that prohibit or regulate any matter relating to the registration, labeling, distribution, sale, handling, use, application, or disposal of pesticides. It is not the intent of this section to preempt local responsibilities for zoning, fire codes, or hazardous waste disposal."

[12] The court in *Pesticide Public Policy Foundation v. Village of Wauconda, Ill.*, 622 F.Supp. 423 (N.D. Ill. 1985) found a comprehensive regulatory scheme in a State law with a clearly stated purpose "to regulate in the public interest the labeling, distribution, use and application of pesticides as herein defined," *Id.* at 427, and in which "[t]hree different

Bill 52-14's Non-essential Pesticide Prohibition

Local regulation of pesticides generally, in a manner more stringent than federal or State law, is consistent with the *Mortier* decision and the concurrent powers doctrine outlined in *Baltimore v. Sitnick & Firey*. Bill 52-14 is intended to do just this: regulate the type and location of pesticide applications where the State has not done so at all. As drafted, the Bill would, among other things, generally[13] prohibit the application of pesticides designated "non-essential" on lawns[14] in the County. Non-essential pesticides would be so designated because they are: (1) designated as "carcinogenic or "likely to be carcinogenic" by the EPA; (2) classified as a "restricted use pesticide" by the EPA; (3) classified as a "Class 9" pesticide by the Ontario, Canada, Ministry of the Environment; or (4) classified as a "Category 1 Endocrine Disruptor" by the European Commission. Bill 52-14's prohibition would apply to a large number of chemical pesticides used for lawn care, but would not prohibit the use of all pesticides on lawns, nor would it limit pesticide application *other than* on lawns.

While State pesticide law comprehensively regulates pesticide registration and labeling in the State, and establishes a scheme of required certifications and licenses, nothing in Subtitles 1 and 2 of the Agriculture Article *expressly* permits the application of any pesticides to lawns, as would be prohibited by Bill 52-14. None of Bill 52-14's provisions relate to pesticide regulation and labeling. The Bill does not affect the licensing and certification of commercial pest control applicators in the State, nor does it establish a parallel County licensing program.

Three of the Maryland cases in which local laws were found to be impliedly preempted involved fields of regulation in which the applicable State law filled an entire Article of the Maryland Code: Elections,[15] Education,[16] and Public Utilities.[17] In these fields, the regulation is unquestionably comprehensive, a fact demonstrated by the sheer volume of State law in the field. Ms. Rowe's summary of the provisions of Maryland's pesticide laws (Agriculture Article, Title 5, Subtitles 1 and 2) may support a conclusion that the registration and labeling of pesticides and the licensing of commercial pesticide applicators are the exclusive province of State regulation. However, they give no indication that the General Assembly has comprehensively regulated the field of pesticide regulation generally. While MD Agriculture Code, Section 5-204, does give the

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State bodies are involved in pesticide regulation, each administering the statutory provisions within their own area of expertise . . ." *Id.* at 430. The holding also turned, in part, on the local jurisdiction's status as a "non-home rule unit." The decision of the Court in *Syngenta Seeds, Inc. v. County of Kauai*, 2014 WL 4216022 (D. Haw. Aug. 25, 2014) was rooted, at least in part in Hawaii's "statewide constitutional concern for agriculture." *Id.* at 8. Also, the comprehensive nature of the Hawaii law is evidenced in its mandate that State Board of Agriculture "establish a system of control over the distribution and use of certain pesticides and devices purchased by the consuming public." *Id.*

[13] The Bill includes a number of exceptions, including applications for the control of noxious weeds, invasive species, agricultural purposes, and maintenance of golf courses.

[14] "Lawn" is defined in existing County law as Lawn means an area of land, except agricultural land, that is:

(1) mostly covered by grass, other similar herbaceous plants, shrubs, or trees; and

(2) kept trim by mowing or cutting.

Bill 52-14 would amend this definition to include playing fields and expressly exclude gardens.

[15] *County Council for Montgomery County v. Montgomery Association*, 274 Md. 52 (1975).

[16] *McCarthy v. Board of Education of Anne Arundel County*, 280 Md. 634, 639 (1977).

[17] *Howard County v. Potomac Electric Power Company*, 319 Md. 511 (1990).

Secretary a number of duties related to regulating the use of pesticides, neither the law nor regulations establish a regulatory regime that can reasonably be considered comprehensive.[18]

The two most recent implied preemption cases[19] involved local attempts to restrict the sale of tobacco products, where sellers are licensed by the State. In the first of these, *Allied Vending v. City of Bowie*, the Court of Appeals invalidated municipal ordinances in Bowie and Takoma Park that required municipal permits for cigarette vending machines, with extremely restrictive provisions governing eligibility for the permits. Sellers using cigarette vending machines are required to have a State-issued, *location-specific* license, and the Court found the duplicative, and more restrictive, municipal permitting regime amounted to a *de facto* ban on activity directly licensed by the State. Bill 52-14 would not have this effect; State-licensed commercial pesticide applicators would still be permitted to work in the County under authority of their license, but with public health-based limitations on which pesticides[20] they could use on lawns. Also, beyond lawn applications, Bill 52-14 does not restrict pesticide use at all.

The other tobacco case, *Altadis U.S.A., Inc. v. Prince George's County*, the Court extended its holding in *Allied Vending*, finding that the State preempted local regulation of the field of packaging, sale, and distribution of tobacco products. 431 Md. 307, 316. As in *Allied Vending*, the Court relied heavily on the "tension between State law and local law" in its holding. *Id.* at 318. In *Altadis*, the preempted local law had the effect of prohibiting an activity that the State law expressly authorized. *Id.* As already discussed, Bill 52-14 would not have this effect.

Of the Maryland cases finding implied preemption, *Talbot County v. Skipper*, 329 Md. 481 (1993) is probably the closest to being analogous to the current situation, in that the local law in question burdened the exercise of an activity permitted by the State under State law. A key distinction, however, is that the relevant State law in *Skipper*, MD Environmental Code § 9-237, expressly "authorizes the permit holder to utilize sewage sludge according to the terms of the permit." *Id.* at 483. As noted above, there is no such corollary provision in the State pesticide law; nowhere does the law grant authority to apply particular pesticides. Also, the Court in *Skipper* found indications of intent to preempt local regulation of sewage sludge utilization in the fact that the General Assembly had expressly provided for local government action in certain aspects of sewage sludge utilization, but not others. The Court reasoned that when express local authority is provided in some, but not all areas of a law, in areas "where the state statute has not authorized local government involvement, the Legislature likely contemplated that the regulation would be exclusively at the state level." 329 Md. at 492. In contrast, the State pesticide law makes no provision, one way or the other, for local regulation of pesticide use. Finally, and perhaps more importantly, the regulatory scheme that the *Skipper* Court found sufficiently comprehensive to preempt local legislation had been substantially amended in response to the finding in *Ad+Soil* that the law was "far from comprehensive . . ." *Ad+Soil, Supra 307 Md.* at 328.

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[18] MD Agriculture Code § 5-208.1 does require integrated pest management systems in public schools and school grounds, which, in combination with the Court's prior holding that the State has fully occupied the field of education (*see, McCarthy v. Board of Education of Anne Arundel County, supra)* would likely preempt the County from regulating pesticide use in public schools and on public school grounds.

[19] *Allied Vending v. City of Bowie*, 332 Md. 279 (1993) and *Altadis U.S.A., Inc. v. Prince George's County*, 431 Md. 307 (2013).

[20] The definition of pesticide under State law (MD Agriculture Code § 5-201) is very broad and, like the County definition, includes pesticides that would <u>not</u> be categorized as "non-essential" under Bill 52-14's provisions.

Amendments to State law since the County enacted existing pesticide law.

Local regulation of pesticides in Maryland is not widespread, but it is not new. Montgomery County has had laws in place regulating pesticide application for nearly 30 years.[21] A 1986 law requires commercial pesticide applicators ("custom applicators") to provide certain information to new customers prior to applying pesticides, and to post signs indicating that a pesticide has been applied to the lawn.[22] Also, since 2000, the County has imposed certain storage, handling, and display requirements on retail sellers of pesticides.[23] In fact, the ultimately enacted County notice and signage bill prompted a 1985 opinion of the Maryland Attorney General. 70 *Md. Op. Atty. Gen.* 161 (1985). In that opinion, then-Attorney General Stephen H. Sachs opined that proposed County bill was preempted by FIFRA,[24] but that the bill "would not conflict with, or be preempted by, State law." *Id.* At 163. The Attorney General determined that "[a]lthough State law regulates some aspects of pesticide application, it neither addresses the matters covered by Bill No. 26-85 nor ousts local jurisdictions of authority to act in this field." *Id.*

In her letters to Delegates Reznik and Barve, Ms. Rowe acknowledges the 1985 opinion, and asserts that it "does not settle the issue raised here." Ms. Rowe points out that "[s]ince that time, Maryland law has changed significantly, and it now regulates signs and requires that information be supplied to customers."[25] The fact that the State law has changed significantly since the Prince George's and Montgomery Counties began regulating pesticides is in itself significant, because the lack of reference to preexisting local law is a factor to consider in deciding whether the General Assembly intended to preempt a particular field. Generally, when the legislature fails to mention preexisting local laws, the General Assembly has shown an intent *not* to preempt. *See, Ad+Soil, supra,* 307 Md. at 333; *Sitnick, supra,* 254 Md. at 322; *Annapolis Waterfront Co., supra* 284 Md. at 393; *National Asphalt, Supra,* 292 Md. at 79; *Harker, Supra,* 316 Md. at 698. Although it enacted provisions very similar to existing local laws in Prince George's and Montgomery Counties, the General Assembly made no mention of these laws. While certainly not dispositive, the General Assembly's silence with regard to existing local pesticide regulation strengthens an argument that the legislature has intended to leave discretion to local jurisdictions in the regulation of pesticide application.

Failed attempts to expressly preempt in 1992, 1993 and 1994.

As previously discussed, existing State law covers pesticide registration and labeling, the licensing and certification of pest control consultants and applicators, and IPM in schools, but is

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[21] Prince George's County enacted notice and signage requirements for pesticide applicators in 1985, and the Town of Manchester, Maryland in Carroll County has, since 1979, had the following local ordinance:
§ 147-11. Pesticides, herbicides and fungicides.
It shall be unlawful to apply a pesticide, herbicide or fungicide within the Town limits of Manchester without receiving permission therefor from the Mayor and Council 30 days in advance of application. Notice of date of application shall be posted in areas to be sprayed 10 days in advance of actual application. Notices of application shall be posted less than 100 yards apart. Any person applying a pesticide on any area of 10,000 square feet or less shall be exempt from the provisions of this section.

[22] 1986 L.M.C., ch. 38, § 1, codified as §§ 33B-1 through 33B-4.

[23] 2000 L.M.C., ch. 34, § 1, codified as § 33B-5.

[24] This position was, as previously discussed, rejected by the U.S. Supreme Court in *Mortier*.

[25] Chapter 302, 1987 Laws of Maryland, added MD Agriculture Code § 5-208, imposing notice and signage requirements very similar to those enacted by Montgomery County a year earlier.

far from comprehensive when it comes to the *use* of pesticides. The General Assembly must have been aware of this when it considered post-*Mortier* local preemption bills in 1992, 1993 and 1994. In implied preemption cases, courts have sought to divine the *intention* of the legislature in enacting the potentially preemptive law. *See, Ad+Soil, supra*, 307 Md. at 328. The consideration of these bills evidences the legislature's understanding that the State law was not so comprehensive as to impliedly preempt local regulation of pesticides, and their decision not to enact any of these bills supports a conclusion that the General Assembly intended *not to preempt* local regulation.

In 1992, House Bill (HB) 762 and Senate Bill (SB) 549 were considered by the General Assembly. The bills would have broadly preempted local pesticide regulation, and would have given the Secretary of Agriculture "sole authority over the regulation of pesticide application and notification" and would have required the Secretary to "by regulation, adopt uniform requirements to implement the purposes of this subtitle." The bills would have allowed local laws in effect on October 1, 1992 to remain in effect as written, and would have provided for locality-specific pesticide regulation in the Secretary's "sole discretion." HB 762 was adopted by the House of Delegates, but did not pass the Senate.

In 1993, the approach was refined somewhat, with the proposed legislation, SB 429, giving the Secretary of Agriculture "general authority over the regulation of pesticides." The bill still would have greatly curtailed local pesticide regulation, requiring any more stringent local regulation to be considered and approved by a "Review Board" consisting of the Secretaries of Agriculture, Environment, and Natural Resources. To approve such regulation, the Review Board would have to find that the "further [local] regulation is necessary for the protection of the public health, safety, and welfare." In 1993, SB 429 was adopted by the Senate, but failed in the House.

A final attempt at express preemption was made in 1994, with HB 948 and SB 429 including provisions similar to their immediate predecessors in 1993. The Review Board would have expanded to five members, with the addition of the Secretaries of Economic and Employment Development and Health and Mental Hygiene. The 1994 bills would also have required a showing of a "special local need for more stringent regulation" to be approved by the Review Board. HB 948 was adopted by the House, *but only after amendments that would have expressly excluded Montgomery County from the preemptive provisions*. The bill, however, did not pass the Senate and did not become law.

As these bills show, in the early 1990s, immediately post-*Mortier*, the General Assembly believed that local jurisdictions in the State were empowered to regulate pesticide *application and* notification. Three times, the General Assembly considered legislation to restrict this local authority, and three times it decided not to do so.[26] Considering that no substantial provisions have been added since that time to expand the authority of the Secretary of Agriculture over pesticide regulation or to limit local authority, the legislative history gives a solid indication that the legislature has viewed its law as not restrictive of more stringent local pesticide regulation, both before and after 1992-1994.

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[26] Ironically, if the 1994 bill as adopted by the House had passed the Senate, this entire discussion would likely be unnecessary, because the resulting law would have, by expressly "un-preempting" Montgomery County from the limits on local authority, effectively granted the County the authority it is now considering asserting.

Conclusion

While true that such action *could* be found to be impliedly preempted, it is far from certain that a court would find the County preempted from banning the use of certain pesticides in certain places, with certain exceptions. Such a finding would go beyond what Maryland appellate courts have held in local preemption cases, and would mark a departure from the "concurrent power" doctrine articulated by the Court of Appeals in *Sitnick*, and adhered to since 1969. Further, the failed attempts at express preemption in the early 1990s seem to be evidence of the General Assembly's understanding that the law was not preemptive, and an expression of intent not to preempt more restrictive local regulation of pesticides. While acknowledging the risk of an adverse determination, staff believes that the Council is on solid ground proceeding with the Bill's current provisions.