

Court Strikes Down Montgomery County Portions of the Healthy Lawn Act in Bill 52-14

By

The Circuit Court of Montgomery County, MD has permanently enjoined enforcement of portions of a Montgomery County Ordinance called the “Healthy Lawns Act” that banned “cosmetic” uses of pesticides on private property. These provisions were found by the Court to be preempted by Maryland pesticide law and in conflict with the objectives of Maryland’s pesticide regulatory scheme. The Ordinance’s ban on the “cosmetic” use of pesticides on County-owned land was not challenged.

The Ordinance at issue, Bill 52-14, was adopted by the Montgomery County Council on October 6, 2015 and was scheduled to go into effect as to private land on January 1, 2018. The Ordinance bans the use of chemical pesticides on lawns, gardens and ornamental sites and areas (collectively, “cosmetic” uses). Organic pesticides recommended by the National Organic Standards Board and pesticides designated “minimum risk” by the U.S. Environmental Protection Agency, however, are exempt from the ban. The Ordinance also contains several exceptions, allowing the use of chemical pesticides to control invasive species, as well as on agricultural land, and on golf courses and other recreational areas. Notably, the Ordinance did not mandate that all municipalities within Montgomery County adopt the ban. Rather, each of the County’s 19 municipalities were given the right to opt in or out of the Ordinance. Only 10 municipalities elected to opt in.

The Ordinance was promptly challenged on preemption grounds by numerous private lawn care companies, trade associations, and other businesses and individuals. This was not unexpected. During debate, serious questions were raised whether the proposed Ordinance was preempted by state law. The Maryland Attorney General opined that a “general ban on application of non-essential pesticides may well be preempted.” Maryland’s Assistant Secretary of Agriculture warned that the Ordinance would cause confusion and cited the two layers of strict pesticide regulation – at the federal and state level—that already exist.

Courts recognize three doctrines by which state law may preempt local law: express preemption, implied preemption, and conflict preemption. Express preemption applies when a state law explicitly prohibits local governments from regulating in the same area. Implied preemption applies when state law is so comprehensive that an intent to “occupy the entire field” is implied. Conflict preemption arises when local law works at cross-purposes with state law.

In an opinion by Judge Terrance McGann dated August 3, 2017, the Circuit Court ruled that the Ordinance is preempted under both implied preemption and conflict preemption. As to implied preemption, the Court cited the detailed and extensive pesticide regulatory program administered by the Maryland Department of Agriculture (MDA) pursuant to Maryland’s Pesticide Registration and Labeling Laws and Pesticide Applicator Laws. Among other things, Maryland law requires that all pest control businesses, applicators, consultants, and their employees be registered with the State. In order to register, an individual must pass a state-run education, licensing, and certification program. This training program includes instruction on Integrated Pest Management (“IPM”) principles, which emphasize minimizing the use of pesticides and reducing potential risks. Maryland law also requires county school boards to develop IPM programs approved by MDA to govern the use of pesticides in and around schools. Based on these and other provisions of Maryland pesticide law, the Court concluded that “Maryland’s comprehensive program of pesticide regulation occupies the field of pesticide use and thus impliedly preempts the Ordinance.” (Emphasis in original.)

The Court also found that the Ordinance conflicts with Maryland pesticide law, because it prohibits conduct that is affirmatively authorized by the State, i.e., the use of pesticides on lawns and gardens that the MDA has registered and approved for such use. Further, the Court found that the Ordinance frustrates an objective of Maryland pesticide law – to promote uniformity in pesticide regulatory requirements.

The Montgomery County Council currently is in recess until September, but the lead sponsor for the Ordinance, County Councilmember George Leventhal, has expressed disappointment with the Court’s

decision and indicated he will be reviewing legal options