

IN THE COURT OF APPEALS OF MARYLAND

September Term, 2019, No. 144

COA-PET-0144-2019

ANITA GOODMAN, et al.,

Petitioners,

v.

MONTGOMERY COUNTY, MARYLAND,

Respondent.

APPEAL FROM THE CIRCUIT COURT FOR MONTGOMERY COUNTY
(427200V - THE HONORABLE TERRANCE J. MCGANN)

**ANSWER TO PETITIONS FOR WRIT OF CERTIORARI OF
AMICUS CURIAE ANNE ARUNDEL COUNTY, MARYLAND**

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ANSWER TO PETITIONS FOR WRIT OF CERTIORARI

Amicus Curiae, Anne Arundel County, Maryland (“Anne Arundel County”), by and through undersigned counsel, pursuant to Maryland Rules 8-303(d) and 8-511(c)(2)(A), and with the consent of all parties to participate, hereby answers and opposes the Petitions for Writ of Certiorari filed by Anita Goodman, et al. and Complete Lawn Care, et al. (collectively referred to as “Petitioners”), and states as follows:

I. INTERESTS OF AMICUS CURIAE

Anne Arundel County, like every other local jurisdiction in this State, has an interest in the outcome of this matter. If this Court were to overturn a well-settled and longstanding line of preemption law, it could negatively impact the scope of the governing authority of all local governments, including Anne Arundel County. The potential weakening of a local government’s ability to legislate and regulate on subjects that should not be considered preempted by State law affects Anne Arundel County as well as all other local jurisdictions.¹

II. STATEMENT OF THE CASE

Anne Arundel County has nothing additional to add.

III. STATEMENT OF THE FACTS

Anne Arundel County has nothing additional to add.

¹ This case is about much more than pesticides, as it could affect any topic upon which a local jurisdiction may govern. Anne Arundel County also has an interest in the specific subject matter because it has a local law pertaining to the application of pesticides. ANNE ARUNDEL COUNTY CODE, § 14-1-105(b) (requiring an Integrated Pest Management Plan that meets or exceeds the standards of the Maryland Pesticide Registration and Labeling Law and provides for the use of only the “least toxic pesticides” for all County parks and athletic fields).

IV. QUESTIONS PRESENTED IN PETITIONS FOR CERTIORARI

Anne Arundel County will address the questions presented in the Anita Goodman, et al. Petition for Writ of Certiorari, which are:

1. Whether state law impliedly preempts the Montgomery County pesticide law.
2. Whether state law preempts the Montgomery County pesticide law by conflict.

V. ARGUMENT

The Court of Special Appeals (“CSA”) issued an opinion on May 2, 2019 in the matter titled *Montgomery County v. Complete Lawn Care, Inc.* (No. 1203, Sept. Term 2017), 240 Md. App. 664 (2019),² finding that Bill Number 51-14 enacted by Montgomery County (the “Montgomery County law”) was not preempted by MD. CODE ANN., AGRIC., § 5-101, *et seq.* and § 5-201, *et seq.* (the “Maryland Pesticide Registration and Labeling Law” or “the State law”). The CSA found that the “State has not prohibited local governments from regulating pesticides in the manner addressed by [Montgomery] County.” Slip Op., p. 47.

Review by certiorari is not desirable or in the public interest because the CSA was correct in its holding and did not contradict the prior precedent of this Court on preemption. *See* Maryland Rule 8-303(b)(1)(G). There are many cases addressing the exact preemption issues presented in the Petitions, and there is no need for this Court to consider the issue yet again. The current dispute is merely the application of the specific facts of this case to existing law. This Court should deny the Petitions.

² The case is cited herein as “Slip Op”.
{00271829.DOCX; 1}

A. **There is no need for this Court to grant certiorari to consider the well-settled issue of implied preemption**

The CSA did not apply an incorrect standard when it found that there was no implied preemption, and it did not contradict this Court's precedent. The CSA's opinion was based on the extensive precedent in the well-settled area of law surrounding implied preemption. The CSA accurately applied the precedent on implied preemption and the issue does not need to be re-visited by this Court.

Although the subject matter of the alleged preemption (pesticides) may be one this Court has not specifically addressed, this case is like any other of the many that both the CSA and this Court have considered in determining whether a local jurisdiction is preempted from enacting a law. The only thing different in this case versus the other preemption cases is the subject matter. There is no need for this court to issue yet another opinion in the area of implied preemption where the question can be resolved (and was resolved by the CSA) by applying the well-established precedent and analysis that this Court has already set forth.

In determining whether there is an implied preemption, it is necessary for the reviewing court to review the laws at issue, and determine if the State has comprehensively legislated in the area at issue with the assistance of considering several different factors. In the absence of express preemption (of which there is none in this case), a County may be preempted by implication when a local law "deals with an area in which the State Legislature has acted with such force that an intent by the State to occupy the entire field must be implied." Slip Op., pp. 27-28 (citing *County Council of Prince*

George's County v. Chaney Enters. Ltd. P'ship, 454 Md. 514 (2017), *reconsideration denied* (Aug. 24, 2017), 454 Md. at 541; *Talbot County v. Skipper*, 329 Md. 481 (1993), 329 Md. at 488).

The primary indicia of the State's intent to preempt an entire field of law is the "comprehensiveness with which the General Assembly has legislated the field." *Allied Vending, Inc. v. City of Bowie*, 332 Md. 279 (1993), 332 Md. at 299. There is no particular formula in determining whether there is implied preemption, but as stated by the CSA, this Court has laid out seven factors that could aid in an implied preemption finding.³ Slip Op., p. 28.

In a lengthy in-depth opinion analyzing the precedent of this Court, including the various factors already laid out by this Court, the CSA correctly found that the General Assembly "has not intended to preempt the entire field of pesticide regulation." Slip Op., p. 29. This conclusion included a thorough review of the legislative history of the Maryland Pesticide Registration and Labeling Law, as well as a discussion of the "Amendment Rejection Theory". Slip Op., pp 29-39. The CSA also determined that a

³ These factors include "whether local laws existed prior to the enactment of the state laws governing the same subject matter; whether the state laws provide for pervasive administrative regulation; whether the state law expressly provides concurrent legislative authority to local jurisdictions or requires compliance with local ordinances; whether a state agency responsible for administering and enforcing the state law has recognized local authority to act in the field; and whether the particular aspect of the field sought to be regulated by the local government has been addressed by the state legislation." Slip Op., p 28); *citing Allied Vending*, 332 Md. at 299 (internal quotations omitted).

“multi-tiered regularity process” would not invite chaos and confusion if both the State law and the Montgomery County law were to stay in place. Slip Op., p 39.⁴

The Maryland Pesticide Registration and Labeling Law and the Montgomery County law regulate different conduct. The Maryland Pesticide Registration and Labeling Law focuses on the registration and labeling of pesticides, and licensing of pesticide applicators. The Montgomery County law prohibits the application of pesticides in certain areas, including lawns, playgrounds, recreation and children’s facilities. The State law does not specifically govern the application of pesticides to lawns, playgrounds, recreation or children’s facilities. The Montgomery County law does not overlap or contradict the State law and does not prohibit conduct that the State law specifically authorizes. Rather, the Montgomery County law creates an additional safeguard for the use of pesticides in certain locations.

The CSA correctly concluded that there was no indication of the State’s intent to regulate the “entire field” of pesticides and that Montgomery County was not impliedly preempted from enacting the Montgomery County law. Slip Op., p. 29. For these reasons, the Court should deny the Petitions for Certiorari.

B. There is no need for this Court to grant certiorari to consider the well-established issue of conflict preemption

The CSA made no error in its finding that the Montgomery County law was not preempted by conflict. The CSA applied the correct standard as previously set forth by

⁴ Additionally, as noted below in the discussion regarding conflict preemption, the CSA discussed the critical area laws and noted that counties have enacted pesticide regulations pursuant to the critical area programs. See Slip Op., p. 44, 46-47; *infra* pp. 6-7.
{00271829.DOCX; 1}

this Court and there is no need for the Court to grant certiorari to consider an area of law that has plenty of existing precedent.

As stated by the CSA, “[t]he crux of conflict preemption is that ‘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.’” Slip. Op., p. 23 (quoting *Ad + Soil, Inc. v. County Comm’rs of Queen Anne’s County*, 307 Md. 307, 335 (1986) (emphasis in original)). The CSA correctly found that the State law is the floor, “above which the County may provide further health and safety restrictions” (the ceiling). Slip Op., p. 25.

Allowing Montgomery County to regulate the use of pesticides in certain locations does not conflict with the pesticide labeling, distribution, or application regulations of the State. To be sure, the Montgomery County law does not prohibit conduct that Maryland law expressly authorizes. Rather, it puts further restrictions on the use of pesticides in certain locations. This is not a conflict, but is a further regulation authorized by a local jurisdiction to provide for further health and safety restrictions. *Id.*

Of note, the CSA also acknowledged that other State laws, including the Chesapeake and Atlantic Coastal Bays Critical Area Program, MD. CODE ANN., NAT. RES., §§ 8-1801 through 8-1817, require local jurisdictions to develop agricultural programs to include best management practices, including the control of pesticides, “to protect the productivity of the land base and enhance water quality”. *Id.* (quoting COMAR 27.01.06.02(E)). The CSA reasoned that the State would not have required the

jurisdictions within the Critical Area to develop pesticide control practices for water quality and safety purposes if the Maryland Pesticide Registration and Labeling Law prohibited County governments from enacting such rules. Slip Op., p. 27. Similarly, the CSA noted that the Environment Article of the Maryland Annotated Code, the Federal Clean Water Act and Montgomery County’s National Pollutant Discharge Elimination System Municipal Separate Storm Sewer System Permit (“NPDES MS4”)⁵ all encompass programs to reduce pollutants, which include reducing use of pesticides. *Id.*

The CSA engaged in a well-reasoned analysis based on the well-settled area of law of conflict preemption, which this Court does not need to address again. Should the Court reconsider the application of the preemption law in this case, extensive disruption would occur to the myriad of local jurisdiction regulatory laws. For these reasons, this Court should deny the Petitions for Certiorari.

VI. CONCLUSION

For the foregoing reasons, this Court should deny the Petitions for Certiorari.

/s/ Kelly Phillips Kenney _____

Kelly Phillips Kenney

⁵ Anne Arundel County’s NPDES permit is almost identical to Montgomery County’s. {00271829.DOCX; 1}

CERTIFICATION OF WORD COUNT & COMPLIANCE WITH RULE 8-112

1. This answer contains 2,075 words, excluding the parts of the answer exempted from the word count by Rule 8-503.

2. This answer complies with the font, spacing, and type size requirements stated in Rule 8-112. Specifically, this brief has been prepared using 13-point, proportionally spaced Times New Roman font.

/s/ Kelly Phillips Kenney

Kelly Phillips Kenney

CERTIFICATE OF COMPLIANCE AND SERVICE

I HEREBY CERTIFY, that this submission does not contain any confidential information and on this 26th day of June, 2019, the foregoing Answer to Petitions for Writ of Certiorari of *Amicus Curiae*, Anne Arundel County, Maryland was served via first-class mail, postage prepaid, to:

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VERBATIM TEXT

ARTICLE 14. RECREATION AND PARKS / TITLE 1. IN GENERAL / § 14-1-105.

Integrated Pest Management Plan.

§ 14-1-105. Integrated Pest Management Plan.

(a) **Definition.** For purposes of this section, “least toxic pesticide” means a substance not listed by the United States Environmental Protection Agency as a pesticide in Toxicity Category I or II, a carcinogen, or an inert ingredient of toxicological concern.

(b) **Plan required.** An Integrated Pest Management Plan that meets or exceeds the standards required for school playgrounds and athletic fields under the Agriculture Article of the State Code and provides for the use of only the least toxic pesticides available is required for all County parks and athletic fields.

(c) **Notice of plan.** The Department shall:

(1) post a copy of the Department’s Integrated Pest Management Plan and any proposed updates to the Plan on the County website; and

(2) post a notice of the Plan at each County park and athletic facility that shall include:

(i) a statement that explains the Integrated Pest Management Plan and lists any pesticide that may be used as part of the Plan;

(ii) the street address, website address, and telephone number for the Department for questions regarding the Integrated Pest Management Plan; and

(iii) a statement that the Department maintains the product label or material safety data sheet of each pesticide used by the Department, that the label or data sheet is available for review, and that the Department may be contacted for additional information and comment.

(d) **Notification prior to application.** At least 24 hours before a pesticide is applied at a park or athletic facility, the Department shall post a notice at the park at which the pesticide is to be applied. The notice shall include:

(1) the common name of the pesticide;

(2) the location of the application;

(3) the planned date and time of application;

(4) any United States Environmental Protection Agency warning regarding exposure to the pesticide to be applied;

(5) a brief description of potential adverse effects based upon the material safety data sheet of the pesticide to be applied; and

(6) a notice that weather conditions or other circumstances may cause the actual date of application to be postponed to a later date or dates, for which notice will be provided if the date is more than 14 days after the planned application date.

(e) **Emergency pest control.** A pesticide may be applied without prior notification only if an emergency pest situation exists. Within 24 hours after an emergency pesticide application, the Department shall post at the park a notice that a pesticide was applied for emergency pest control. The notice shall include:

(1) the common name of the pesticide applied;

(2) the approximate location of the application;

(3) the date of application; and

(4) the reason for the emergency application.

(Bill No. 64-12)

Editor's note: Section 2 of Bill No. 64-12 provides that this section shall take effect on July 1, 201[3.]