

CONDOMINIUMS

LOCAL GOVERNMENT—CONSUMER PROTECTION—PREEMPTION—CONFLICT—LOCAL LEGISLATION REGULATING MEETING AND VOTING PROCEDURES OF COUNCIL OF UNIT OWNERS NOT PREEMPTED BY STATE LAW

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On behalf of the Mayor and City Council of Rockville, you have asked for our opinion on the validity of certain county legislation, recently enacted by the Montgomery County Council, which governs the meetings and election procedures of "home owners' associations": Chapter 54 of the Laws of Montgomery County 1982 ("Chapter 54") [to be codified as Chapter 24B, Montgomery County Code]. This legislation regulates the meeting and voting procedures of the governing entities of such forms of housing as cooperatives, condominiums, and planned unit developments. A substantially similar municipal ordinance is currently under consideration by the Mayor and Council of Rockville.¹ You inquire specifically whether such local legislation, to the extent that it regulates councils of unit owners of condominiums, is preempted by the Maryland Condominium Act, Title 11 of the Real Property Article of the Maryland Code ("Condominium Act" or "Act").

For the reasons given below, it is our opinion that the Condominium Act does not preempt the authority of local jurisdictions to regulate the meeting and voting procedures of the councils of unit owners of condominiums if—as here—the local regulation is "for the protection of a consumer" within the meaning of, and does not "conflict with", the Condominium Act. Chapter 54 is, therefore, not preempted.

¹ Chapter 54 provides that it "shall not be effective in any incorporated municipality which by law has authority to enact a law on the same subject [unless the] incorporated municipality adopts this Chapter and requests the County to enforce the adopted provisions thereof within its corporate limits". §24B-8 of the Montgomery County Code.

I

County Home Owners' Association Law

Chapter 54, which became effective on July 26, 1982, added provisions to the County Code that regulate the meeting and electoral procedures of "home owners' associations" and their subdivisions (for example, a board of directors). The term "home owners' association" is defined as follows:

"*'Home owners' association'* means any private organization of persons owning or occupying residential units which has the authority, by virtue of its organizational documents, to impose on such units, or upon their owners or occupants, any fee or fees in connection with the provision of services for the benefit of all or some of the units, owners or occupants. A home owners' association *includes any council of unit owners of a condominium, a cooperative housing corporation, the organization of owners of a planned unit development, or the organization of owners of a town sector-zoned community, whether any of the above is a nonprofit or for profit corporation or unincorporated association, but does not include any organization in which membership is strictly voluntary and not a condition of owning or occupying the unit.*" §24B-1 of the Montgomery County Code (emphasis added).

Chapter 54 imposes several restrictions on the meeting procedures of these home owners' associations. For example, all of an association's meetings—as well as the meetings of its subdivisions, such as a board of directors—must be "[o]pen to all owners or occupants of units of the association, their guests and any representative of the news media", unless any of several specified grounds for closing a meeting is satisfied. §24B-3(a)(2) and (4) of the Montgomery County Code.²

The legislation also regulates the associations' voting procedures in certain respects. For example, one provision sets conditions for the validity of absentee ballots. §24B-4(b).

² In this respect Chapter 54 bears a marked resemblance to the State Open Meetings Law. See Article 76A, §§10, 11, and 12 of the Maryland Code. See also note 3 below.

Under the "Penalties" section of the legislation, an association that violates any of these requirements "shall be subject to injunctive or other appropriate action or proceeding". §24B-6. Moreover, Chapter 54 creates a cause of action for damages "for an injury or loss sustained as the result of a violation of this Chapter". §24B-7.

II

State Condominium Act

A. *Introduction*

The Condominium Act (Title 11 of the Real Property Article) provides the framework within which condominiums in this State are established and operated. In particular, a condominium's "council of unit owners" is a legal entity constituted and defined by §11-109 of the Condominium Act.³ The council of unit owners, in turn, is authorized to "delegat[e] . . . any power of the council of unit owners to a board of directors, officers, managing agent, or any other person for the purpose of carrying out the responsibilities of the council of unit owners". §11-109(b).

While there are no provisions specifically applicable to the meetings or election of these other entities, their powers and procedures necessarily are set by and derive from the underlying powers and procedures of the council of unit owners itself. In this regard, the Condominium Act does contain provisions that specifically concern the meeting and electoral procedures of the council of unit owners. For example, a council meeting "may not be held on less than 10 nor more than 90 days written notice delivered or mailed to each unit owner". §11-109(c)(3). The Act, however, contains no restriction on the

³ It has been suggested that, because State law "creates" each council of unit owners and assigns it a governance role, a council is a "public body" within the meaning of the State Open Meetings Law and, consequently, its meetings may be regulated by local governments in accordance with that law. See Article 76A, §§8(g) and 15 of the Maryland Code. However, the Open Meetings Law applies only to entities that conduct public business, not to those—such as a condominium's council of unit owners or, for another example, a corporation's board of directors—that merely superintend private property and private interests.

discretion of a council or its delegated entity to meet in closed session. With respect to voting procedures, the Act provides that proxy ballots may be used, but generally limits their effectiveness to 180 days. §11-109(c)(5).

There is no direct conflict or inconsistency between these provisions and any of the more extensive requirements in Chapter 54. Nevertheless, §11-109(c) of the Condominium Act and Chapter 54 do concern the same subject matter. Therefore, as your inquiry suggests, we must examine those provisions of the Condominium Act that govern the extent to which the Act preempts local law. Until 1981, the Act generally allowed localities to regulate condominiums, if the local law applied equally to comparable types of property. However, a 1981 amendment to the Act expanded the Act's preemption of local law.

B. Provisions Before 1981

Until the 1981 amendment, the Condominium Act contained three provisions that, together, delineated the permissible scope of local legislation. Former §11-120(b) [now §11-122(b)] read as follows:

“No county, city, or other jurisdiction may enact any law, ordinance, or regulation which would impose a burden or restriction on a condominium that is not imposed on all other property of similar character not subjected to a condominium regime. Any such law, ordinance, or regulation is void.”

Another section, former §11-127(a) [now §11-141(a)], provided that:

“The provisions of this title are in addition and supplemental to all other provisions of the public general laws, the public local laws, and any local enactment in the State.”

Finally, former §11-127(c) [now §11-141(c)] provided as follows:

“If the application of the provisions of this title conflict with the application of other provisions of the public general laws, public local laws, or any lo-

cal enactment, in the State, the provisions of this title shall prevail.”

In *Rockville Grosvenor, Inc. v. Montgomery County*, 289 Md. 74 (1980), the Court of Appeals construed these provisions to “reject [the] contention that the [Act] has resulted in a total preemption of the subject matter”. 289 Md. at 93. Instead, the Court noted, “there are conceivably many nondiscriminatory local laws which could apply to condominiums”, and such laws were not preempted by the Act. 289 Md. at 92–93. The Court then analyzed whether the provisions of the county enactment in question conflicted with provisions of the Condominium Act. 289 Md. at 93–100.

C. *The 1981 Amendment*

At the 1981 Session of the General Assembly, the Condominium Act was amended by Chapter 246, Laws of Maryland 1981, to add two new sentences to the end of former §11–120(b)—redesignated as §11–122(b):

“Except as otherwise expressly provided in §§11–130, 11–138, 11–139, and 11–140 of this title, the provisions of this title are statewide in their effect. Any law, ordinance, or regulation enacted by a county, city, or other jurisdiction is preempted by the subject and material of this title.”⁴

In our opinion, this language unmistakably expands the scope of State preemption. Prior to the 1981 amendment, the Condominium Act generally *permitted* local legislation concerning condominiums; such legislation need only have been non-discriminatory and nonconflicting. Now, however, after the 1981 amendment, the Condominium Act generally *preempts* local legislation. It is no longer sufficient that local law be non-discriminatory and nonconflicting. If the local law concerns a “subject” or “material” addressed by a provision in the Condo-

⁴ Despite the fact that §11–122 as a whole is captioned “Zoning and building regulations”, only subsection (a) of that section specifically applies to local zoning and building regulations. Subsection (b) of the section, on the other hand, applies to other kinds of regulation as well. See *Rockville Grosvenor v. Montgomery County*, 289 Md. at 89–92.

minium Act, the local law is preempted, unless it is also within one of the four enumerated exceptions.⁵

As we have discussed above, the Condominium Act contains provisions on the subject of meetings and voting procedures. Thus, Chapter 54, on the same subject, is preempted unless one of the exceptions applies.

D. Exceptions from Preemption/Consumer Protection

Three of the enumerated exceptions are plainly inapplicable to the legislation at issue here: §11-138 authorizes a local government to provide itself with a right of first refusal to purchase rental facilities that would otherwise be converted to condominiums; §11-139 authorizes a local government to provide itself with a right of first refusal to purchase up to 20% of the units in rental facilities that are undergoing conversion to condominiums; and §11-140 authorizes local governments to declare rental housing emergencies during which tenants in buildings undergoing conversion have certain additional rights. None of these sections is applicable to Chapter 54 or the proposed Rockville ordinance.

The only potential authorization for the local legislation in question is §11-130, which, in subsection (d), provides as follows:

“A county or incorporated municipality, or an agency of any of those jurisdictions, may adopt laws or ordinances for the protection of a consumer to the extent and in the manner provided for under §13-103 of the Commercial Law Article.”

⁵ The bill ultimately enacted as Chapter 246 originally contained an additional clause in the last sentence of §11-122(b): “Any law, ordinance, or regulation enacted by a county, city, or other jurisdiction is preempted by the subject and material of this title, *unless the local law, ordinance, or regulation is not inconsistent with the provisions of this title.*” (Emphasis added.) Had the emphasized clause survived, §11-122(b) would merely have preserved preexisting law, for the Act has from its inception declared that the Condominium Act prevails in the event of conflict with other State or local laws. §11-141(c). However, the emphasized clause was deleted by amendment. This change underscores the General Assembly’s intention that §11-122(b) preempt any local law, even if not inconsistent with the Act, unless one of the enumerated provisions applies.

Title 13 of the Commercial Law Article is the Consumer Protection Act. Under §13–103 of that Act, a locality “may adopt, within the scope of its authority, more stringent provisions not inconsistent with the provisions of [the Consumer Protection Act]”.

Thus, Chapter 54 is a permissible exception under §11–130 of the Condominium Act only if (i) it is “for the protection of a consumer” within the meaning of §11–130 and (ii) it is “more stringent” in its protection than the Consumer Protection Act.⁶

For purposes of §11–130, “‘consumer’ means an actual or prospective purchaser, lessee, assignee or recipient of a condominium unit”. §11–130(b). This definition plainly applies at least to the *initial acquisition* of a unit: a “consumer” is one who is acquiring—whether by purchase, lease, or otherwise—an interest in “a condominium unit”. The harder question is whether the definition of “consumer” in §11–130(b) also applies to transactions that occur *after* the individual has acquired his or her interest in the unit and are not part of the acquisition process itself.

We believe that the term “consumer” may fairly be understood as having been intended to encompass unit owners and residents of a condominium to the extent that their transactions are, in effect, a continuing consequence of the acquisition of “a condominium unit”. That is, when someone acquires a condominium unit, he or she, as a direct and inevitable result of the acquisition, enters into a continuing relationship, involving a series of transactions, with one entity: the council of unit owners.

Acquisition of a condominium unit—the act that defines a “consumer” under §11–130(b)—entails a commitment to acquire a range of goods and services from or through the council of unit owners.⁷ We think that the General Assembly can reasonably be understood to have recognized this fact and to have intended, in §11–130, to permit local consumer protection regulation of this aspect of condominium acquisition.

⁶ Under §13–103 of the Consumer Protection Act, the local regulation must also be “not inconsistent with” the Consumer Protection Act. Chapter 54 raises no issue in this respect.

⁷ These goods and services might affect enjoyment of the individual unit (e.g., hot water), of the common elements (e.g., landscaping), or of both (e.g., security).

Chapter 54 protects these consumers primarily through the device of disclosure. Much as the Condominium Act itself relies on required disclosures to protect a potential purchaser of a condominium unit (*see, e.g.*, §11–126), so Chapter 54 requires disclosure, through an open meetings requirement, of the council of unit owners' various activities—including in particular its decision-making regarding the provision of services and the use of the owners' fees. Likewise, we take it that the provisions of Chapter 54 on voting procedures are intended to protect “consumers” in a condominium by assuring that decisions affecting them are made by officers who have been elected fairly and openly.⁸

Finally, the provisions of Chapter 54 are “more stringent” than the provisions of the Consumer Protection Act. Nothing in the Consumer Protection Act affords to unit owners or condominium residents the kind of disclosure about condominium transactions that Chapter 54 requires.

Accordingly, we conclude that local legislation such as Chapter 54, which is designed for the protection of individual unit owners in a relationship that is an integral element of their acquisition of a unit—i.e., in their relationship with the council of unit owners—is “for the protection of a consumer” within the contemplation of §11–130(d). Chapter 54, a more stringent form of consumer protection than is contained in the Consumer Protection Act, is therefore within the exception found in §11–130 of the Condominium Act and, as such, is not preempted.

III

Conclusion

In summary, it is our opinion that the Maryland Condominium Act does not preempt the authority of local jurisdictions to regulate the meeting and voting procedures of councils of unit

⁸ Chapter 54 contains the following statement of legislative findings and purpose: “The County Council finds that numerous home owners' associations deliver services and exercise powers which correspond in many respects to municipal service and that there exists a need for clear procedures to assure the open conduct of such bodies.” §24B–2.

owners if—as in the case of Chapter 54 of the Laws of Montgomery County 1982—the local regulation is “for the protection of a consumer” within the meaning of the Condominium Act and the local regulation does not “conflict with” that Act.

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APPENDIX

[*Editor's Note:* Since the issuance of this Opinion, the General Assembly enacted Chapter 562 (S.B. 893), Laws of Maryland 1983, for the purposes of, among other things, requiring advance notice of certain meetings of councils of unit owners and boards of directors, requiring all meetings of councils of unit owners to be open, and permitting meetings of boards of directors to be closed only for specified purposes. These new provisions are codified in §§11–109(c) and 11–109.1 of the Condominium Act (Title 11 of the Real Property Article).

The impact of this legislation on existing local laws is discussed in Bill Review Letter (S.B. 893) from Stephen H. Sachs, Attorney General, to Harry Hughes, Governor (May 17, 1983). That letter, with minor editorial corrections, is reproduced below:]

May 17, 1983

The Honorable Harry Hughes
Governor of Maryland
State House
Annapolis, Maryland 21401

Re: Senate Bill 893

Dear Governor Hughes:

We have reviewed and hereby approve Senate Bill 893 for constitutionality and legal sufficiency. In so doing, we wish to point out the impact of this legislation on existing public local law.

Senate Bill 893 expressly requires meetings of a condominium's board of directors or its council of unit owners to be open. In specified circumstances, closed meetings of a board of directors are authorized—for example, during the discussion of matters concerning employees and personnel; consultation with legal counsel; or during investigation into possible criminal misconduct. With regard to all other meetings, the bill provides that all unit owners be (i) notified in a timely fashion and (ii) allowed access to the governing board's deliberative and decision-making process.¹

In 67 *Opinions of the Attorney General* 13 (1982), we evaluated similar local legislation enacted by the Montgomery County Council. The local law, Chapter 54 of the Laws of Montgomery County 1982 ("Chapter 54"), regulates the meeting procedures of homeowners' associations, including the meetings of any condominium board of directors or council of unit owners. We observed in our Opinion that, if local legislation concerns a "subject" or "material" addressed by a provision in the Condominium Act, the local law is preempted, unless it is within one of the four exceptions enumerated in §11-122(b) of the Real Property Article ("RP" Article). 67 *Opinions of the Attorney General* at 17-18.² We then found Chapter 54 to be within one such exception, because the local legislation was, within the meaning of that exception, both (i) "for the protection of a consumer", and (ii) "more stringent" in its protection than the Consumer Protection Act. *Id.* at 19-20.³

¹ Senate Bill 893 also specifies various items to be included in the annual proposed condominium budget, and it details the procedure for budget adoption and amendment.

² Section 11-122(b) states, in relevant part:

"Except as otherwise expressly provided in §§11-130, 11-138, 11-139, and 11-140 of this title, the provisions of this title are statewide in their effect. Any law, ordinance, or regulation enacted by a county, city, or other jurisdiction is preempted by the subject and material of this title."

³ RP §11-130(d) provides:

"A county or incorporated municipality, or an agency of any of those jurisdictions, may adopt laws or ordinances for the protection of a consumer to the extent and in the manner provided for under §13-103 of the Commercial Law Article."

Under CL §13-103, a locality "may adopt, within the scope of its authority, more stringent provisions not inconsistent with the provisions of [the Consumer Protection Act]".

Thus, we concluded, the extensive disclosure requirements of Chapter 54 were not preempted by the Maryland Condominium Act.

At the time we rendered that Opinion, the Condominium Act contained no restriction on the discretion of a board of directors or council of unit owners to meet in closed session. However, as amended by Senate Bill 893, the Condominium Act now would place significant restrictions on the meetings of condominium boards or councils. These restrictions differ from those of Chapter 54 in several salient respects.

For example, proposed RP §11-109(c) would require notification of a meeting to be sent to each unit owner at least 10 days before the meeting. Chapter 54, on the other hand, merely requires 72 hours of public notice. Similarly, proposed RP §11-109.1 lists certain situations in which closed meetings would be permitted; these exceptions concern activities unrelated to the routine provision of condominium services or use of the unit owners' fees. Chapter 54, on the other hand, allows a condominium board or council to close its meetings under other circumstances as well—i.e., for reasons that would not be permitted by the proposed public general law.⁴ Here, the legislative policy behind an open meetings requirement—that business affecting a given community should be performed in an open and public fashion—would be contravened by additional local justifications for closure.

⁴ Specifically, Senate Bill 893 and Chapter 54 each authorize closed meetings for purposes of: (i) discussing matters pertaining to employees and personnel; (ii) protecting the privacy or reputation of individuals in matters not related to the council of unit owners' business; (iii) consulting with legal counsel; (iv) consulting with staff personnel, consultants, attorneys, or other persons in connection with pending or potential litigation; (v) investigative proceedings concerning possible or actual criminal misconduct; (vi) complying with a specific constitutional, statutory, or judicially imposed requirement protecting particular proceedings or matters from public disclosure; or (vii) on an individually recorded affirmative vote of two-thirds of the board members present, for some other exceptional reason so compelling as to override the general public policy in favor of open meetings.

In addition, Chapter 54 authorizes closed meetings for: acquisition of capital items previously specifically approved as part of a published budget adopted in an open meeting; short-term investments of funds of the home owners' association in liquid assets, if authorized by an investment policy previously adopted in an open meeting; conducting collective bargaining negotiations or considering associated matters; or discussions concerning public security, including the deployment of personnel and the development and implementation of emergency plans.

The Montgomery County ordinance in effect permits that which State law would prohibit with regard to the meeting procedures of a condominium's governing entity. To that extent, the ordinance conflicts with the public general law. In such cases, the local law is inapplicable. *See Rockville Grosvenor, Inc. v. Montgomery County*, 289 Md. 74, 96-99 (1980); *City of Baltimore v. Sitnick*, 254 Md. 303, 317 (1969); *Rosberg v. State*, 111 Md. 394, 416 (1909).⁵ The Condominium Act is similarly explicit. RP §11-141(c) states:

"If the application of the provisions of this title conflict with the application of other provisions of the public general laws, public local laws, or any local enactment, in the State, the provisions of this title shall prevail."⁶

The legislative history of Senate Bill 893 also indicates the General Assembly's intent to supersede local legislation in this particular area. In response to a suggestion that local governments be permitted to have discretion in requiring notice, the Chairman of the Governor's Commission on Condominiums answered: "The Commission should try to make the law as uniform as possible statewide." *See Governor's Commission on Condominiums, Cooperatives and Homeowners' Associations, Proposed Minutes* (Feb. 8, 1983). This concern reflects an ongoing effort to legislate for the protection of Maryland citizens as a whole. *See Report of the Governor's Commission to Study*

⁵ We do not address here whether or to what extent local legislation may adopt more stringent provisions than those specified in the public general law—e.g., whether a county may require open meetings where the General Assembly has authorized closure.

⁶ We note, however, that Chapter 54 contains a severability clause. In pertinent part, Section 2 reads:

"The provisions of this Act are severable and if any provision, sentence, clause, section, word or part thereof is held . . . invalid . . . or inapplicable to any person or circumstance, such . . . invalidity . . . or inapplicability shall not affect or impair any of the remaining provisions, sentences, clauses, sections, words or parts of the Act or their application to other persons or circumstances."

Thus, the remainder of Chapter 54 is viable, notwithstanding any invalidation of that portion concerning the meeting procedures of a condominium board of directors or council of unit owners.

the Laws Covering Condominiums (1981) at 8, 9; Report of the Condominium Revision Committee of the Real Property, Planning and Zoning Section of the Maryland State Bar Association, *reprinted in* the 1980 Cumulative Supplement to the Real Property Article at 98.

In conclusion, we believe Senate Bill 893 is constitutional and legally sufficient. If signed into law, this public general legislation will supersede conflicting public local laws of the type discussed above.

Very truly yours,

Stephen H. Sachs
Attorney General