

## MARYLAND

### CONSTITUTIONAL AND STATUTORY PROVISIONS

#### **Maryland Constitution**

- MD. CONST. art. XI-A, § 1. Charter boards.

[Establishes procedure for the adoption of a home-rule charter by Baltimore city and any county.]

- MD. CONST. art. XI-A, § 1A. Alternate procedure for adoption of charter by counties.

The procedure provided in this section for adoption of a charter may be used in any county in lieu of the procedures provided in Section 1 of this Article, and a charter adopted pursuant to this section has the effect of a charter adopted in accordance with the provisions of Section 1. The board of county commissioners of any county at any time may appoint a charter board. Said charter board shall be registered voters and shall consist of an uneven number of members, not fewer than five or more than nine. The board of county commissioners shall appoint a charter board within thirty days after receiving a petition signed by five percent of the registered voters of the county or by ten thousand voters of the county, whichever is the lesser number. If additional charter board members are nominated by petitions signed by three percent of the registered voters of the county or by two thousand registered voters, whichever is the lesser number, delivered to the board of county commissioners within sixty days after the charter board is appointed, the board of county commissioners shall call a special election not less than thirty or more than ninety days after receiving petitions, unless a regular election falls within the designated period. The appointees of the board of county commissioners and those nominated by petitions shall be placed on the ballot in alphabetical order without party designation. The voters may cast votes for, and elect a number of nominees equal to the number of charter board members originally selected by the board of county commissioners, and those so elected are the charter board. The charter board, within 18 months from the date of its appointment, or if there was an election for some of its members, within 18 months from the date of the election, shall present a proposed charter for the county to the board of county commissioners, which shall publish it at least twice in one or more newspapers of general circulation in the county within thirty days after it is presented. The charter shall be submitted to the voters of the county at a special or regular election held not earlier than thirty days or later than ninety days after publication of the charter. If a majority of the votes cast for and against the adoption of the charter are in favor of its adoption, the charter shall become effective as the charter of the county on the thirtieth day after the election or such later date as shall be specified in the charter.

- MD. CONST. art. XI-A, § 2. Grant of express powers.

The General Assembly shall by public general law provide a grant of express powers for such County or Counties as may thereafter form a charter under the provisions of this Article. Such

express powers granted to the Counties and the powers heretofore granted to the City of Baltimore, as set forth in Article 4, Section 6, Public Local Laws of Maryland, shall not be enlarged or extended by any charter formed under the provisions of this Article, but such powers may be extended, modified, amended or repealed by the General Assembly.

- MD. CONST. art. XI-A, § 4. Enactment of local laws prohibited on subjects covered by express powers.

From and after the adoption of a charter under the provisions of this Article by the City of Baltimore or any County of this State, no public local law shall be enacted by the General Assembly for said City or County on any subject covered by the express powers granted as above provided. Any law so drawn as to apply to two or more of the geographical sub-divisions of this State shall not be deemed a Local Law, within the meaning of this Act. The term "geographical sub-division" herein used shall be taken to mean the City of Baltimore or any of the Counties of this State.

- MD. CONST. art. XI-E, § 3. Power of Home Rule.

Any such municipal corporation, now existing or hereafter created, shall have the power and authority, (a) to amend or repeal an existing charter or local laws relating to the incorporation, organization, government, or affairs of said municipal corporation heretofore enacted by the General Assembly of Maryland, and (b) to adopt a new charter, and to amend or repeal any charter adopted under the provisions of this Article.

- MD. CONST. art. XI-F, § 1.

For the purposes of this Article, (1) "code county" means a county which is not a charter county under Article 11A of this Constitution and has adopted the optional powers of home rule provided under this Article; and (2) "public local law" means a law applicable to the incorporation, organization, or government of a code county and contained in the county's code of public local laws; but this latter term specifically does not include (i) the charters of municipal corporations under Article 11E of this Constitution, (ii) the laws or charters of counties under Article 11A of this Constitution, (iii) laws, whether or not Statewide in application, in the code of public general laws, (iv) laws which apply to more than one county, and (v) ordinances and resolutions of the county government enacted under public local laws.

## **Maryland Statutes**

Maryland's voluminous laws on local government were re-organized in 2013 and are now codified within an article denominated "Local Government." The unannotated version of the article extends for 611 pages.

## HOME RULE STRUCTURE, INCLUDING IMMUNITY FROM STATE LEGISLATIVE PREEMPTION

Passed in the early twentieth century, Article XI-A of the Maryland constitution grants to Maryland counties and the city of Baltimore, which operates as an independent city not part of any county, the option of adopting home rule charters.<sup>1</sup> Baltimore availed itself of this option in 1918,<sup>2</sup> and eleven of Maryland's twenty-three counties have adopted charters.<sup>3</sup> Article XI-A, § 2, of the Maryland Constitution requires the General Assembly to adopt legislation granting express powers to charter counties, and the General Assembly has done so by the enactment of the Express Powers Act.<sup>4</sup> The other twelve counties are non-charter, "commissioner counties," with more limited powers under the constitution.<sup>5</sup> Among these twelve, six have adopted a "code" form of home rule by which powers emanate solely from state statute.<sup>6</sup> State law specifies that charter and code counties exercise broad police powers so long as consistent with state law,<sup>7</sup> although some exceptions to these powers are articulated.<sup>8</sup> With respect to charter counties, the Court of Appeals has hinted, without expressly deciding, that matters related to the form of county government as enshrined in a county charter may not be preempted by state legislation.<sup>9</sup> Such provisions must, however, be consistent with the state constitution.<sup>10</sup>

A 1954 constitutional amendment, Article XI-E of the state constitution, authorized home rule for other municipalities besides Baltimore.<sup>11</sup> The amendment by its own terms speaks not of

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<sup>1</sup> See *City of Baltimore v. Sitnick & Firey*, 255 A.2d 376, 378 n.3 (Md. 1969) (discussing MD. CONST. ART. XI-A).

<sup>2</sup> *Id.*

<sup>3</sup> See Maryland Manual On-Line, Local Government, available at <http://msa.maryland.gov/msa/mdmanual/01glance/html/county.html>.

<sup>4</sup> See e.g. *McCrory Corp. v. Fowler*, 570 A.2d 834 (Md. 1990); *Eastern Diversified v. Montgomery Cty.*, 570 A.2d 850, 852 (Md. 1990); *Cheeks v. Cedlair Corp.*, 415 A.2d 255, 257 (Md. 1980); *Cty. Comm'rs v. Supervisors of Elec.*, 63 A.2d 735, 739 (Md. 1949).

<sup>5</sup> See Maryland Manual, *supra* note 3 (listing commissioner counties).

<sup>6</sup> *Id.*

<sup>7</sup> MD. CODE ANN. LOCAL GOV'T § 10-206 (2017) ("(a) A county council may pass any ordinance, resolution, or bylaw not inconsistent with State law that: (1) may aid in executing and enforcing any power in this title; or (2) may aid in maintaining the peace, good government, health, and welfare of the county. (b) A county may exercise the powers provided under this title only to the extent that the powers are not preempted by or in conflict with public general law."); *Tyma v. Montgomery Cnty.*, 801 A.2d 148, 153 (Md. 2002) ("[C]ounties enjoy full legislative power . . . and statutory power to pass all ordinances they deem expedient under the police power under the police power limited only by . . . the laws of the State . . ."); see also *City of Baltimore v. Sitnick & Firey*, 255 A.2d 376, 378 (Md. 1969) ("recogni[zing] the general proposition that Baltimore City" possesses "police powers").

<sup>8</sup> E.g., *id.* § 10-206(c) (prohibiting county council from regulating alcohol).

<sup>9</sup> *Ritchmount P'ship v. Bd. of Supervisors of Elections for Anne Arundel Cty.*, 388 A.2d 523, 529-30 (Md. 1978) ("[I]n adopting a home rule charter the people have the right to make provision therein for any form of government they deem suitable . . . so long as they do not . . . run afoul of the letter and spirit of the Federal and State Constitutions. Their right to adopt a particular form of government, in contradistinction to the power to enact local legislation, is in no way dependent on legislative authorization or enactment.").

<sup>10</sup> *Bd. of Supervisors of Elections of Anne Arundel Cty. v. Smallwood*, 608 A.2d 1222 (Md. 1992) (holding that "the voters of a charter county cannot reserve to themselves the power to initiate legislation because such initiative conflicts with the terms" of the state constitution).

<sup>11</sup> See MD. CONST. art. XI-E.

power but of charters, with more detail regarding municipal powers laid out in state statute. In particular, state law grants the legislative body of a municipality the power to:

- (1) assure the good government of the municipality;
- (2) protect and preserve the municipality's rights, property, and privileges;
- (3) preserve peace and good order;
- (4) secure persons and property from danger and destruction; and
- (5) protect the health, comfort, and convenience of the residents of the municipality.<sup>12</sup>

In addition to this broad grant, the Act enumerates a non-exhaustive list of powers that municipalities may exercise.<sup>13</sup> The amendment includes limitations on municipal taxing authority.

Aside from the charter county structural matters, Maryland's home-rule entities otherwise operate subject to state law.<sup>14</sup> Despite the different statutory and constitutional sources for home-rule authority for Baltimore, other cities, and counties, the Maryland courts apply a unified doctrine of preemption to all local ordinances. The Court of Appeals of Maryland (the state's highest court) has articulated a fairly standard approach to preemption.<sup>15</sup> It purports to recognize three ways in which state law may preempt local law: express preemption, preemption by conflict, or implied preemption.<sup>16</sup> Rather than group conflict and field preemption under the "implied" preemption umbrella, Maryland refers to "preemption by conflict" as its own class and refers to what other courts call "field preemption" as "implied preemption."<sup>17</sup>

The Maryland courts have stated that preemption by conflict occurs when a local ordinance "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."<sup>18</sup> The Court of Appeals has at times tempered its application of this test by noting that local ordinances are invalid only when they prohibit something that state law "expressly" permits.<sup>19</sup> Applying this version of the "prohibit/permit" test, the Maryland courts have upheld a Baltimore ordinance that imposed penalties for possession of cocaine on top of state laws that penalized only the sale of cocaine,<sup>20</sup> and a Baltimore ordinance that required tavern owners to pay a higher minimum wage even though

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<sup>12</sup> MD. CODE ANN. LOCAL GOV'T § 5-202 (2017).

<sup>13</sup> *Id.* §§ 5-203 to 218.

<sup>14</sup> *E.g.*, MD. CONST. ART. XI-A § 3 (noting that general laws of state shall control when in conflict with ordinances of Baltimore City); MD. CODE ANN. LOCAL GOV'T § 10-206(b) (2017) ("A county may exercise the powers provided under this title only to the extent that the powers are not preempted by or in conflict with public general law.").

<sup>15</sup> *See* Penn. Adver. of Baltimore, Inc. v. Mayor and City Council of City of Baltimore, 862 F. Supp. 1402, 1420 (D. Md. 1994) (noting that Maryland's preemption doctrine is "[a]nalogous to Federal law").

<sup>16</sup> *Allied Vending, Inc. v. City of Bowie*, 631 A.2d 77, 86 (Md. 1993).

<sup>17</sup> *Id.* at 86-87.

<sup>18</sup> *Talbot County v. Skipper*, 620 A.2d 880, 882-83 n.4 (Md. 1993).

<sup>19</sup> *Boulden v. Mayor & Comm'rs of Town of Elkton*, 535 A.2d 477, 480 (Md. 1988).

<sup>20</sup> *Rossberg v. State*, 74 A. 581 (Md. 1909).

they were exempt from the state’s minimum wage law.<sup>21</sup> On the other hand, citing conflict, Maryland courts have invalidated local ordinances prohibiting evictions of tenants whose leases had expired where state law expressly permitted such evictions;<sup>22</sup> a county ordinance establishing a right of first refusal for tenants of apartments being converted to condominiums where state law expressly permitted conversion;<sup>23</sup> and a county ordinance that allowed for compensation in employment discrimination claims beyond that allowed by state law.<sup>24</sup> Although some of the home rule provisions make local authority contingent on “general law,” there does not appear to be any jurisprudence in Maryland weighing whether a law is sufficiently general so as to preempt legally a local enactment.

The key to conflict analysis for the Maryland Court of Appeals is how clearly state law has expressly permitted the activity to be prohibited or curtailed by local ordinance.<sup>25</sup> When express permission is clearer, the local ordinance is more likely to be invalid. In this sense, “conflict” preemption in Maryland collapses into express preemption.<sup>26</sup>

In applying field – or “implied” – preemption, the Maryland courts have considered a variety of factors. In a seminal case on the issue, *Allied Vending, Inc. v. City of Bowie*, the Maryland Court of Appeals noted that although “there is no particular formula” for determining implied preemption, the most important factor is “the comprehensiveness with which the General Assembly has legislated the field.”<sup>27</sup> Among the “secondary factors” are:

- 1) “whether local laws existed prior to the enactment of the state laws governing the same subject matter;”
- 2) whether state law “provides for pervasive administrative regulation”;
- 3) whether the local ordinance regulates in an “area in which some local control has traditionally been allowed”;
- 4) “whether state law expressly provides concurrent legislative authority . . . or requires compliance with local ordinances”;
- 5) whether a state agency responsible for the field has authority to act locally;
- 6) whether the particular aspect of the field sought to be regulated has been addressed by state legislation; and
- 7) whether regulation by both the state and local entities “would engender chaos and confusion.”<sup>28</sup>

Under this test, local tobacco regulation has not fared well.<sup>29</sup>

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<sup>21</sup> *City of Baltimore v. Sitnick & Firey*, 255 A.2d 376 (Md. 1969).

<sup>22</sup> *County Council v. Investors Funding*, 312 A.2d 225 (Md. 1970); *Heubeck v. City of Baltimore*, 107 A.2d 99 (Md. 1954).

<sup>23</sup> *Rockville Grosvenor, Inc. v. Mont. Co.*, 422 A.2d 353 (Md. 1980).

<sup>24</sup> *Berretta USA Corp. v. Santos*, 712 A.2d 69 (Md. App. 1998).

<sup>25</sup> *Boulden*, 535 A.2d at 480.

<sup>26</sup> See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 263 (2000) (noting that the distinction between “express” and “implied” preemption is often elusive).

<sup>27</sup> 631 A.2d 77, 87 (Md. 1993) (citation omitted).

<sup>28</sup> *Id.*

One final note on preemption is that outside of the city of Baltimore, there may sometimes be a conflict between city and county law. When this occurs, the county ordinance will prevail in the absence of specific state law to the contrary.<sup>30</sup>

## CONCLUSION

In sum, home rule in Maryland is complicated by the several sources of local authority in the state constitution, the special status of Baltimore city, and the voluminous state laws further delineating local authority. Despite these wrinkles, Maryland largely follows the legislative model of home rule.

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<sup>29</sup> *Id.* (striking down Bowie's limitations on vending machines); *Altadis U.S.A., Inc. v. Prince George's Cty., Md.*, 65 A.3d 118 (Md. 2013) (finding that county ordinances requiring cigars to be sold in packages of at least five cigars were invalid because the state had preempted the field).

<sup>30</sup> *Mayor & Council of Forest Hts. v. Frank*, 435 A.2d 425, 436 (Md. 1981).