OFFICE OF THE COUNTY ATTORNEY

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July 21, 2005

To: Joseph Beach,
Assistant Chief Administrative Officer

Elizabeth Davison, Director
Department of Housing and Community Affairs

Via: Marc Hansen, Chief *MPH*
Division of General Counsel

From: Vickie L. Gaul *VLG*
Associate County Attorney

RE: Bill No. 21-05: Condominiums – Conversion of Rental Housing – Extended Leases

Bill 21-05 proposes to amend the County's condominium conversion law found in Chapter 11A of the Montgomery County Code. Specifically, the amendment would provide an opportunity for a newly defined category of persons, "developmentally disabled," to obtain a lifetime tenancy when an apartment building is converted to a condominium. Currently, County law extends this economic benefit only to senior citizens and handicapped citizens. Because this expansion of the category of persons entitled to an extended tenancy conflicts with State law, the County can not offer a lifetime tenancy to the developmentally disabled. Instead, the developmentally disabled may receive an extended lease term at the time of the conversion for a maximum period of three years.

Consistent with State law, both current law and the Bill provide that those persons entitled to a life tenancy must meet a certain income test. Implementing enabling authority in State law to expand the category of those entitled to a 3 year tenancy, the Bill provides for an extended 3 year tenancy for the developmentally disabled without regard to any income test—adding to the current category of senior citizens and handicapped citizens who are already entitled to the 3 year tenancy without regard to income eligibility. Although this provision does not raise an issue under the preemption by conflict doctrine, we have not discerned any rationale for eliminating an income eligibility requirement in the context of a program that extends an economic benefit, and therefore are concerned whether such a scheme would survive an equal protection challenge.

Finally, State law requires the County to make certain legislative findings that a rental housing emergency exists as a condition of exercising legislative authority in this field. Therefore, we recommend that Bill 21-05 be amended to include the legislative finding required

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by State law.

BACKGROUND

"Montgomery County is a home rule county, having adopted a charter pursuant to Article XI-A of the Maryland Constitution." *Haub v. Montgomery County*, 353 Md. 448, 450 (1999). Home rule enables a county to enjoy a significant amount of self-governance by transferring from the State to the county the power to enact local laws on a wide variety of subjects, as enumerated by the Legislature in the Express Powers Act. *Ritchmount Partnership v. Board of Supervisors of Elections,* 283 Md. 48, 57 (1978). Included among these express powers is the authority to pass such laws as may be deemed expedient in maintaining the peace, good government, health and welfare of the county. MD. ANN. CODE ART. 25A, §5(S). This provision is a general-welfare clause or general-grant-of-power clause. *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151, 161 (1969). It gives charter counties a wide array of legislative and administrative powers over local affairs and is to be liberally construed. *Ritchmount Partnership*, 283 Md. at 57; *Montgomery Citizens League*, 253 Md. at 161-62.

Nevertheless, the State, by public general law, may preempt a county local law in one of three ways: (1) preemption by conflict; (2) express preemption; or (3) implied preemption. *See Holiday Point Marina Partners v. Anne Arundel County*, 349 Md. 189, 209 (1998); *Allied Vending, Inc. v. City of Bowie*, 332 Md. 279 (1993). Express preemption exists when a county law or ordinance "deal[s] with matters which are part of an entire subject matter on which the Legislature has expressly reserved the right to legislate." *County Council for Montgomery County v. Montgomery Association*, 274 Md. 52, 59 (1975). Implied preemption – sometimes called preemption by occupation – arises "when the General Assembly has acted with such force that an intent by the State to occupy the entire filed must be implied." *Id.* Preemption by conflict is an application of the principle – embodied in the Charter Home Rule Article of the Maryland Constitution – that local laws that conflict with public general laws are invalid. *Id. See also East v. Gilchrist*, 296 Md. 368 (1983).

The State, with limited exceptions, has expressly preempted the county in the regulation of condominiums by governing all aspects of establishing, transferring and governing condominiums. *See generally* MD. REAL PROPERTY CODE ANN. §11-101, *et seq.* (commonly referred to as the Maryland Condominium Act) and specifically § 11-122 . The State has expressly authorized local governments to exercise control over very limited areas of condominium regulation, including:

§11-130(d): "A county . . . may adopt laws or ordinances for the protection of a consumer to the extent and in the manner provided for under §13-03 of the Commercial Law Article."

§11-138(b): "A county . . . may provide, by local law or ordinance, that a rental facility [a building with at least 10 or more dwelling units] may not be granted to a purchaser unless the county . . . has first been offered in writing the right to purchase the rental facility on substantially the same terms and conditions offered by the owner to the purchaser." §11-138(b)(1). Further, the county has a specified time within which to purchase the rental facility (§11-138(b)(2)) and if

the county purchases the rental facility "it shall retain or provide for the retention of the property as a rental facility for at least 3 years from the date of acquisition" (§11-138(b)(4)).

§11-139(a): "A county . . . may provide by local law or ordinance, that a unit in a rental facility occupied by a tenant . . . may not be granted unless the county . . . has first been offered in writing the right to purchase the unit at the same price and on the same terms and conditions initially offered for that unit to any other person." §11-139(a)(1). However, the county has a specified time within which to purchase one or more units (§11-139(a)(3)) and it may not purchase more than 20 percent of the units in the condominium (§11-139(b)).

§11-140(b): "A county . . . may, by legislative finding, recognize and declare that a rental housing emergency exists in all or parts of its jurisdiction and has been caused by the conversion or rental housing to condominiums." To make a declaration of a rental housing emergency, the county must consider and makes findings as to all of the criteria enumerated in §11-140(b).

§11-140(c): Upon the finding and declaration of a rental housing emergency, a county may, "by the enactment of laws, ordinances and regulations . . . (1) Grant to a designated family[1] as defined under §11-137 of this title a right to an extended lease for a period in addition to that period provided for in §11-137 of this title. The right to an extended lease may not, in any event, result in a requirement that a developer set aside for an extended lease more than 20 percent of the total number of units.

(2) Otherwise extend any of the provisions of §11-137 of this title except that : (i) More than 20 percent of the total number of units may not be required to be set aside; and (ii) The term of an extended lease for any family made a designated family by a county . . . may not exceed 3 years."

Copies of all local laws passed pursuant to these provisions must be forwarded to the Secretary of State "within 30 days of the enactment of [the] law or ordinance . . . ." §11-130(e); §11 138(f); §11-139(d); and §11-140(d).

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[1] §11-137 includes a definition for "designated household" but not "designated family." However, both terms are synonymous. In 1982, the Maryland Condominium Act was amended to change, among other things, the term "designated family" in §11-137 to "designated household." Although the terminology changed, the definition remained the same, but a corresponding change from "designated family" to "designated household" has never been made to §11-140. *See Laws of Maryland* 1982, ch. 836. Both terms were defined in 1982 as: "any of the following households: (i) A household which includes a senior citizen; or (ii) A household which includes a handicapped citizen; provided that (iii) The senior citizen or the handicapped citizen has been a member of the household for a period of at least 12 months preceding the notice [concerning the conversion of the condominium]."

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ANALYSIS

Under the authority of §11-140, Bill 21-05 proposes to expand the category of persons eligible for extended tenancies to include the "developmentally disabled;"[2]

The first threshold that must be crossed when the County takes action under §11-140 is that there must be a "legislative finding, recogniz[ing] and declar[ing] that a rental housing emergency exists in all or parts of [the County that] has been caused by the conversion of rental housing to condominiums." In determining whether a rental housing emergency exists, the County is required to "consider and make findings as to: (1) The nature and incidence of condominium conversions; (2) The resulting hardship to and displacement of tenants; and (3) The scarcity of rental housing." *See* §11-140(b). This legislative finding should be included as an uncodified provision of Bill 21-05. Although §11A-1 of the County Code specifically enumerates a number of findings concerning the scarcity of rental housing because of condominium conversions, these findings were made in 1982 when Chapter 11A was first enacted, so a current analysis and legislative finding is required concerning the conditions found in 2005.

If there is a legislative finding that a rental housing emergency exists, the County has the legal authority under §11-140(c)(2) to expand the definition of designated family to include the developmentally disabled. However, the County's authority to provide extended tenancies to those included within the County's expanded definition is expressly limited by §11-140(c)(2)(ii) to a tenancy of no more than 3 years: "The term of an extended lease for any family made a designated family by a county . . . may not exceed 3 years." The County's authority to provide for lifetime tenancies (or any tenancy greater than 3 years) is expressly limited to the senior citizens and handicapped citizens included within the definition of designated family under §11-137 of the Maryland Condominium Act. Therefore, while the County, in Bill 21-05, may expand the definition of designated family to include the developmentally disabled, the County is expressly preempted from offering them an extended tenancy exceeding 3 years in length.

Bill 21-05 also proposes a method for prioritizing those designated families who wish to obtain extended three year tenancies if the number of applicants for all extended tenancies exceeds the 20% unit maximum dictated by the Maryland Condominium Act.[3] In §11A-5(d) it is proposed that priority be given to the following categories of persons in the following order:

(1) A senior citizen, handicapped citizen or developmentally disabled person who meets the financial limit of 80% of area median income, regardless of whether the person

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[2] As currently provided under the Maryland Condominium Act and the County's condominium law, designated family include two groups: 1) "senior citizen" defined as a person who is at least 62 years old on the date that the notice to convert to condominium is provided and 2) "handicapped citizen" defined as a person with a measurable limitation of mobility due to congenital defect, disease, or trauma. To be included in the definition of a designated family, members of both of these groups must have resided in the apartment building for at least 12 months prior to receiving a notice to convert the apartment building to condominium and their income can not exceed 80% of area median income. *See* §11-137 (a)(2),(3) and (6) and §11A-5(a).

[3] We note that this prioritization is limited to persons applying for extended tenancies of three years, but there is no similar provision for those seeking life tenancies.

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has resided in the apartment building for at least 12 months prior to receiving a notice of conversion;

(2) A senior citizen, handicapped citizen or developmentally disabled person regardless of whether the person meets the financial limit of 80% of area median income, or whether the person has resided in the apartment building for at least 12 months prior to receiving a notice of conversion;

(3) All other households that meet that financial limit of 80% of area median income.

It is unclear from an equal protection perspective, why seniors, handicapped and developmentally disabled persons, whose income could put them in a position to purchase their rental unit, are entitled to the economic benefit conferred upon them by an extended tenancy.

When considering an equal protection challenge, a court generally presumes that the statute at issue is valid and the court will uphold the statute if the classification it draws is rationally related to a legitimate purpose. *See, e.g. City of Cleburne, Texas v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). However, if the legislation concerns a suspect class or concerns the exercise of a constitutional right, the court will review the statute under the strict scrutiny standard and will uphold the statute only if the statute is narrowly tailored to serve a compelling state interest. *Id.* Suspect classes include race, alienage and national origin. *See, e.g., Korematsu v. United States*, 323 U.S. 214, 216. There are also some quasi-suspect classifications such as gender and illegitimacy that are subject to an intermediate form of scrutiny. A statute using these classifications will be upheld if the classification delineation is "substantially related to a sufficiently important governmental interest." *Cleburne* at 441.

Although statutes affecting handicapped or disabled persons do not receive heightened judicial scrutiny under an equal protection analysis (*Mitchell v. Apfel*, 19 F. Supp. 2d 523, 526 (W.D. N.C. (1988)), *aff'd*, 182 F. 3d. 272 (4th Cir. 1999)), they are still subject to a rational basis analysis which requires that there be some rational basis explaining why the economic benefits of an extended lease are provided to some regardless of income, but not others.

ADDITIONAL ITEMS

Although this is an expedited bill, it may be wise to clean up some inconsistencies and errors in Chapter 11A. For example, the definition of "rental facility" in §11A-2(k) is incorrect. This definition includes rental facilities of 2 or more units and the County is expressly preempted by State law from defining a rental facility as a building containing less than 10 units. There are also incorrect references to the Maryland Condominium Act throughout Chapter 11A. Some of these incorrect references can be found in §11A-4(b) (2), §11A-4(c) and §11A-5(d).

SUMMARY

If there is a rental housing shortage caused by the conversion of apartment buildings to condominiums, the County has the legal authority under §11-140 of the Maryland Condominium Act to offer extended leases to persons other than those covered by the definitions of "senior citizen" and "handicapped" in §11-137. However, the County is preempted by the State from extending leases to those additional persons for more than 3 years. Further, under federal law,

the County must have a rational basis for selecting specific groups or persons to receive the economic benefits of an extended lease afforded to those persons covered by Chapter 11A.

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