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Casenotes: Municipal Corporations/Charter Counties — County Ordinance Enacted Pursuant to Express Powers Act Prevails over Ordinances Enacted by Municipalities within That County Pursuant to Municipal Express Powers Act. Mayor of Forest Heights v. Tillie Frank, 291 Md. 331, 435 A.2d 425 (1981)

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MUNICIPAL CORPORATIONS/CHARTER COUNTIES — COUNTY ORDINANCE ENACTED PURSUANT TO EXPRESS POWERS ACT PREVAILS OVER ORDINANCES ENACTED BY MUNICIPALITIES WITHIN THAT COUNTY PURSUANT TO MUNICIPAL EXPRESS POWERS ACT. *Mayor of Forest Heights v. Tillie Frank*, 291 Md. 331, 435 A.2d 425 (1981).

In compliance with an Ordinance<sup>1</sup> (the County Ordinance) enacted by Prince George's County<sup>2</sup> (the County), two individuals applied for and were granted licenses to engage in the business of fortunetelling within the city limits of Mt. Rainier and Forest Heights. Both Mt. Rainier and Forest Heights, municipalities located within the County, had by Ordinance (the Municipal Ordinances) expressly prohibited fortunetelling within their respective city limits.<sup>3</sup> The licensees sought and obtained a declaratory judgment in the Circuit Court for Prince George's County which stated that: (1) the Municipal Ordinances were in direct conflict with the County Ordinance expressly authorizing fortunetelling, and (2) when a charter county ordinance is in direct conflict with an ordinance enacted by a municipality within that county, the county ordinance controls.<sup>4</sup> The defendants, the municipalities of Mt. Rainier and Forest Heights, appealed to the Court of Special Appeals of Maryland, but the Court of Appeals of Maryland granted certiorari prior to any action by the lower court. In *Mayor of Forest Heights v. Tillie Frank*,<sup>5</sup> a 4-3 decision, the court of appeals affirmed the circuit court's ruling.

A strong state policy exists to construe conflicting ordinances, whenever possible, as being harmonious in order to avoid the necessity of invalidating one or the other.<sup>6</sup> This policy, combined with the general rule of statutory construction giving enacted ordinances a presumption of validity, constitutionality and reasonableness,<sup>7</sup> has allowed the Maryland courts prior to *Frank* to avoid the issue of county/municipality conflicts. Consequently, *Frank* is a case of first impression in Maryland, the only opportunity the court of appeals has had to analyze

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1. PRINCE GEORGE'S COUNTY MD., CODE §§ 5-155 to -166 (1981) [hereinafter cited as P.G. CODE]. P.G. CODE § 5-156 provides that the practice of fortunetelling is unlawful unless and until a license is obtained from the Director of the Prince George's County, Maryland, Department of Licenses and Permits, or his designee. Sections 5-156 through 5-160 set forth licensing requirements.
  2. Prince George's County is a charter county created under the laws of the State of Maryland. MD. CONST. art. XI-A.
  3. FOREST HEIGHTS, MD., ORDINANCE CODE §§ 4.1, 4.2 (1979). Section 4.1 expressly prohibits fortunetelling within the Town limits, and section 4.2 imposes the penalty for violation of § 4.1. MT. RAINIER, MD., CODE OF ORDINANCES § 10-120 (1980), prohibits fortunetelling within the corporate limits of the City.
  4. *Mayor of Forest Heights v. Tillie Frank*, 291 Md. 331, 351, 435 A.2d 425, 436 (1981).
  5. 291 Md. 331, 435 A.2d 425 (1981).
  6. *Wilson v. Board of Supervisors*, 273 Md. 296, 301, 328 A.2d 305, 308 (1974).
  7. 56 AM. JUR. 2d *Municipal Corporations* § 382 (1981); see *Spann v. Gaither*, 152 Md. 1, 136 A. 41 (1927).

the powers of a county against those of a municipality within that county.

The County Ordinance which authorized fortunetelling was a licensing statute.<sup>8</sup> The purpose of a license is to confer a right or power which otherwise does not exist.<sup>9</sup> However, if a license is imposed as a regulatory measure rather than a revenue-producing measure, it will be viewed as restrictive in nature.<sup>10</sup> The court in *Frank* looked at the wording of the County Ordinance, specifically the words "enabling" and "authorized," and viewed that ordinance as permissive rather than restrictive.<sup>11</sup> Although the court of appeals had previously recognized that a local government may expand a policy in effect throughout the broader governmental unit of which it is a part,<sup>12</sup> the court had never held that a local unit could prohibit what a larger governmental unit had expressly permitted. Since the Municipal Ordinances sought to prohibit what the County had expressly authorized, the court of appeals construed the Municipal Ordinances as being in direct conflict with the County Ordinance. The court of appeals then examined the express powers granted to charter counties<sup>13</sup> by the State of Maryland, and held that such powers were superior to, and controlled, the express powers granted to municipal corporations.<sup>14</sup>

In *Frank* the court determined that a direct conflict existed between the County Ordinance and the Municipal Ordinances. The court analogized the instant case to the resolution of conflicts between state and county laws — that a municipal or county ordinance can neither permit what the State has expressly prohibited, nor prohibit what the State has expressly permitted,<sup>15</sup> although a municipal or county ordinance can be more regulatory or restrictive than an already restrictive State law.<sup>16</sup> The court in *Frank* viewed the language of the

8. See *supra* note 1.

9. 14 M.L.E. *Licenses* § 1 (1981).

10. *Id.*

11. *Mayor of Forest Heights v. Tillie Frank*, 291 Md. 331, 338, 435 A.2d 425, 429 (1981); see P.G. CODE § 5-155(e) (1981). A permissive ordinance is one which authorizes a certain act; a restrictive ordinance is one which restricts, by regulation, a certain act. 14 M.L.E. *Licenses* §§ 11-14 (1981).

12. *Mayor of Baltimore v. Sitnick & Firey*, 254 Md. 303, 255 A.2d 376 (1969); *Rossberg v. State*, 111 Md. 394, 74 A. 581 (1909).

13. See MD. ANN. CODE art. 25A (1981). The Maryland legislature is given authority to grant powers to charter counties via MD. CONST. art. XI-A, § 2.

14. *Mayor of Forest Heights v. Tillie Frank*, 291 Md. 331, 351, 435 A.2d 425, 436 (1981). The express powers granted to municipalities are found in MD. ANN. CODE art. 23A (1981). The legislature is empowered via MD. CONST. art. XI-E to grant such powers.

15. See *Mayor of Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 391, 396 A.2d 1080, 1085 (1979); *Mayor of Baltimore v. Sitnick & Firey*, 254 Md. 303, 313, 255 A.2d 376, 382 (1969); *Levering v. Williams*, 134 Md. 48, 53, 106 A. 176, 180 (1919); *Rossberg v. State*, 111 Md. 394, 416-17, 74 A. 581, 584 (1909).

16. *Mayor of Baltimore v. Sitnick & Firey*, 254 Md. 303, 255 A.2d 376 (1969); *Rossberg v. State*, 111 Md. 394, 74 A. 581 (1909).

County Ordinance as indicative of an authorizing rather than a restricting ordinance and thus held that a direct conflict existed.<sup>17</sup>

Upon this finding, the court next had to decide the central issue of which ordinance should prevail. In resolving this issue, the court analyzed the home rule amendments and express powers acts relating to municipalities and charter counties.

Article XI-A, the Home Rule Amendment, enacted by the General Assembly in 1914,<sup>18</sup> authorizes counties within the State to adopt charters.<sup>19</sup> Section 2 of the Home Rule Amendment requires the General Assembly to grant express powers to any county forming such a charter. The grant of the express powers to such counties is commonly referred to as the Express Powers Act,<sup>20</sup> which, among other things, grants charter counties the power "[t]o enact local laws for such county, including the power to repeal or amend local laws thereof enacted by the General Assembly upon the matters covered by the express powers . . . ."<sup>21</sup> The Express Powers Act authorizes charter counties to enact ordinances not inconsistent with the laws of the State, which are necessary or expedient in providing for the health and welfare of the citizens of the county.<sup>22</sup> Similar to the Express Powers Act, section 3 of the Home Rule Amendment gives charter counties power to enact local laws upon all matters covered by the express powers granted. However, section 3 of the Home Rule Amendment expressly provides that charter counties do not have the power to enact laws or regulations for incorporated towns, villages or municipalities on any matter covered by the express powers granted to such towns, villages or municipalities.<sup>23</sup>

The source of the powers and authority granted to municipalities is similar to that of charter counties. In 1954, the General Assembly enacted the Municipal Home Rule Amendment.<sup>24</sup> This Amendment, among other things, provides a means of self-government by granting to municipal corporations the power and authority to amend or repeal existing local laws enacted by the General Assembly relating to the incorporation, organization, government or affairs of the municipality.<sup>25</sup> The express powers granted to municipal corporations are found in the Municipal Express Powers Act,<sup>26</sup> which provides that every municipal

17. *Mayor of Forest Heights v. Tillie Frank*, 291 Md. 331, 338, 435 A.2d 425, 429 (1981). Section 5-156(e) of the P.G. CODE defines license as a certificate which enables a person to engage in fortunetelling. P.G. CODE § 5-156(e) (1981).

18. Law of April 16, 1914, ch. 416, 1914 Md. Laws 657 (ratified as MD. CONST. art. XI-A).

19. MD. CONST. art. XI-A, § 1.

20. MD. ANN. CODE art. 25A, § 5(A) (1981).

21. *Id.*

22. *Id.* § 5(S).

23. MD. CONST. art. XI-A, § 3.

24. Law of March 2, 1954, ch. 53, 1954 Md. Laws 198 (ratified as MD. CONST. art. XI-E).

25. MD. CONST. art. XI-E, § 3.

26. MD. ANN. CODE art. 23A, § 2 (1981).

corporation "shall have general power to pass such ordinances not contrary to the public general or *public local laws* and to the Constitution of Maryland as they may deem necessary in order to assure the good government of the municipality, to protect and preserve the municipality's rights, property and privileges . . . ."<sup>27</sup>

In *Frank*, the conclusion reached by the majority that a conflicting charter county ordinance prevails over a municipal ordinance,<sup>28</sup> rested partly on the majority's interpretation of the Municipal Express Powers Act. The court construed the term "public local laws" to include ordinances enacted by charter counties, and therefore concluded that county ordinances prevail when in conflict with any municipal ordinance.<sup>29</sup> The court buttressed its decision by reference to the language of section 3 of the Home Rule Amendment which gives a charter county the power to enact local laws,

provided, that [no powers authorized herein] shall be construed to authorize or empower the County Council of any County of this State to enact laws or regulations *for any incorporated town, village or municipality in said County, on any matter covered by the powers granted to said town, village or municipality* by the Act incorporating it, or any subsequent Act or Acts amendatory thereto.<sup>30</sup>

The court interpreted the phrase "any incorporating town, village or municipality" to mean that while a charter county could not enact laws applicable to only one particular municipality, it did have express authority to enact laws which covered all of the municipalities within its geographical limits.<sup>31</sup>

Chief Judge Murphy, in a strong and lengthy dissent, argued that the state-county analogy could not be used with respect to counties and municipalities.<sup>32</sup> While the dissent agreed with the majority's conclusion as to the purpose of the Home Rule Amendment, *i.e.*, to transfer local lawmaking powers from state to county governments, it disagreed with the court's conclusion that a county should have the same relationship with respect to a municipality as the State has to a county in the absence of a home rule government.<sup>33</sup> According to the Chief Judge, applying the state-county analogy to county-municipality relationships finds no support in the Home Rule Amendment and completely contravenes the Municipal Home Rule Amendment.<sup>34</sup> In

27. *Id.* (emphasis added).

28. *Mayor of Forest Heights v. Tillie Frank*, 291 Md. 331, 350, 435 A.2d 425, 436 (1981).

29. *Id.* at 348-50, 435 A.2d at 435-36.

30. MD. ANN. CODE art. 25A, § 3 (1981) (emphasis added).

31. *Mayor of Forest Heights v. Tillie Frank*, 291 Md. 331, 341, 435 A.2d 425, 431 (1981).

32. *Id.* at 352, 435 A.2d at 437 (Murphy, C.J., dissenting).

33. *Id.* at 342, 435 A.2d at 431-32.

34. *Id.* at 353, 435 A.2d at 437.

addition, in the dissent's opinion, it undermines the object and purpose of municipal home rule government.<sup>35</sup>

Chief Judge Murphy's dissent reasonably criticized the court's interpretation of the phrase "public local laws" because the cases cited by the majority did not fully support such a conclusion.<sup>36</sup> Furthermore, looking at the Express Powers Act, the term consistently applied to enactments by charter counties is "local laws," never "public local laws."<sup>37</sup> According to Chief Judge Murphy, however, regardless of the wording of the Express Powers Act, construing this Act to grant power to counties to enact laws over all municipalities within their limits contravenes the intent of the home rule amendments, which is to give counties and municipalities the power to govern as to local matters without state interference.<sup>38</sup> This power allows citizens to be governed by those closest to them in accordance with democratic ideals.<sup>39</sup>

As Chief Judge Murphy emphasized, historically municipalities and counties have been viewed as co-equal.<sup>40</sup> *Campbell v. Mayor of Annapolis*<sup>41</sup> addressed the constitutional authority of a municipal corporation to impose a license fee for the operation of residential rental units absent express powers to do so by the General Assembly.<sup>42</sup> In determining that the municipality had such authority, the court of special appeals looked to the powers granted to municipalities pursuant to the Municipal Home Rule Amendment, but cited for support two cases which discussed the powers of charter counties.<sup>43</sup> In a footnote to the

35. *Id.*

36. The majority cites, as examples, the following cases: *Ritchmount Partnership v. Board*, 283 Md. 48, 54-58, 388 A.2d 523, 528-30 (1978) (charter county power to enact "local laws," no mention of public local laws); *Steimel v. Board*, 278 Md. 1, 6-11, 357 A.2d 386, 389-91 (1976) ("public local law" and "public general law" are used to refer to acts by the General Assembly); *State's Attorney v. Mayor of Baltimore*, 274 Md. 597, 603, 337 A.2d 92, 97 (1975) ("public local law" used in reference to enactments by the General Assembly); *County Council v. Investors Funding Corp.*, 270 Md. 403, 418, 312 A.2d 225, 233-34 (1973) ("local laws" used in reference to powers given by General Assembly to county to enact local laws); *State v. Stewart*, 152 Md. 419, 137 A. 39 (1927) (no reference to "public local laws" as county enactments). *Contra Scull v. Montgomery Citizens League*, 249 Md. 271, 239 A.2d 92 (1968) (refers to county ordinances as public local laws). According to the dissent, the wording in *Scull* "represents an inadvertent lack of precision on the part of this Court, rather than any determination that county enactments are public local laws in the traditional legislative sense." *Mayor of Forest Heights v. Tillie Frank*, 291 Md. 331, 362, 435 A.2d 425, 442 (1981) (Murphy, C.J., dissenting).

37. See MD. ANN. CODE art. 25A, § 5(A), (Q), (U), (V) (1981).

38. *Mayor of Forest Heights v. Tillie Frank*, 291 Md. 331, 359-61, 435 A.2d 425, 438 (1981) (Murphy, C.J., dissenting).

39. *Richmount Partnership v. Board of Supervisors*, 283 Md. 48, 55-56, 388 A.2d 523, 528-29 (1978).

40. *Mayor of Forest Heights v. Tillie Frank*, 291 Md. 331, 353, 435 A.2d 425, 437 (1981) (Murphy, C.J., dissenting).

41. 44 Md. App. 525, 409 A.2d 1111 (1980).

42. *Id.* at 526, 409 A.2d at 1112.

43. *Id.* at 533, 409 A.2d at 1115. The following cases were cited for support: *County*

*Campbell* opinion, the court stated that while such cited cases concerned charter counties, "the principles there stated apply equally to Article XI-E [the Municipal Home Rule Amendment], which is here involved."<sup>44</sup>

Chief Judge Murphy's conclusion seems to best support the legislative intent of the Home Rule Amendments. Furthermore, section 3 of the Home Rule Amendment states that a charter county's power to enact laws is always "subject to the laws of the state."<sup>45</sup> Since the Municipal Home Rule Amendment and Municipal Express Powers Act are State laws, a charter county's power to enact laws is subject to these statutes. If these statutes can be construed to give a municipality express powers over a certain area, the powers granted to charter counties in the Express Powers Act should be subject to the provisions of the Municipal Home Rule Amendment and the Municipal Express Powers Act.

Assuming that the *Frank* court was correct in using the state-county analogy with respect to counties and municipalities, then any direct conflicts are resolved in favor of the county. If the County Ordinance is a permissive or authorizing ordinance, the prohibitive Municipal Ordinances would be in direct conflict. In another dissent by Judge Smith, however, it was proposed that the County Ordinance should be viewed as regulatory or restrictive in nature. Consequently, the Municipal Ordinances should be construed as being merely more restrictive than the already restrictive County Ordinance and therefore not in direct conflict.<sup>46</sup> The County Ordinance authorized fortunetelling by means of a license which is, by nature, authorizing or permissive.<sup>47</sup> However, if imposed as a regulatory rather than a revenue measure, such a license would be restrictive in nature.<sup>48</sup> A reading of the strict provisions of the County Ordinance supports a conclusion that the li-

Council v. Investors Funding Corp., 270 Md. 403, 312 A.2d 225 (1973); McBriety v. Mayor of Baltimore, 219 Md. 223, 148 A.2d 408 (1959).

44. *Campbell v. Mayor of Annapolis*, 44 Md. App. 525, 533 n.1, 409 A.2d 1111, 1115 n.1 (1980); see also *Howard County v. Matthews*, 146 Md. 553, 127 A. 118 (1924). This case discussed the authority of the county to enter into and to amend a county contract for the construction of roads. In its discussion and analysis of the implied and express powers granted to counties, the Court of Special Appeals of Maryland equated counties with municipalities when it stated: "Counties, like municipal corporations, can only exercise such powers as are expressly granted by the State, together with such implied powers as are necessary for the execution of the powers expressly granted." *Id.* at 561, 127 A. at 121.

45. MD. CONST. art. XI-A, § 3 (1981).

46. *Mayor of Forest Heights v. Tillie Frank*, 291 Md. 331, 367, 435 A.2d 425, 444 (1981) (Smith, J., dissenting).

47. See 14 M.L.E. *Licenses* § 1 (1981). The object of a license is to confer a right or power which does not otherwise exist. *Id.*

48. *Id.* The object of a statute or ordinance requiring a license to be accompanied by a fee or tax, may be to regulate and control that particular occupation or business for the general welfare of the citizens. *Id.*

cense authorizing fortunetelling is more regulatory than permissive.<sup>49</sup> Therefore, the Municipal Ordinances could be construed as merely being more restrictive and not in conflict.

As a direct result of the court's holding in *Frank*, several members of the General Assembly in the 1982 Legislative Session introduced bills to amend and/or repeal provisions of the home rule amendments and express power acts.<sup>50</sup> These bills, as introduced, showed a clear disapproval of the court's decision in *Frank*, and if passed in their original forms, would have given municipalities the power to enact ordinances on a par with county ordinances.<sup>51</sup> However, during the legislative process, H.B. 1400 and S. 661 were amended. As amended, these bills took the form of a clarification of the existing law, rather than as new law.<sup>52</sup> H.B. 1400 would have provided a temporary solution to the much-needed clarification of the meaning of the Municipal Express Powers Act. The effect of H.B. 1400 would have been that in certain enumerated circumstances, a municipality would have the power to enact ordinances for purposes of self-government, even though contrary to a county ordinance.<sup>53</sup>

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49. Judge Smith based his reasoning on *Theatrical Corp. v. Brennan*, 180 Md. 377, 24 A.2d 911 (1942), which held that a license is regulatory if the main reason for imposing a fee is for regulatory purposes rather than increased revenue. *Id.* at 381-82, 24 A.2d at 913-14. Since there were only eight fortunetelling licenses existing in the County at that time, according to Judge Smith the fees derived from those licenses were insignificant for revenue purposes. Finding that the County Ordinance was regulatory in nature, he concluded that the Municipal Ordinances were merely more regulatory and, therefore, not conflicting. *Mayor of Forest Heights v. Tillie Frank*, 291 Md. 331, 367, 435 A.2d 425, 444 (1981) (Smith, J., dissenting).

50. On February 9, 1982, S. 661 was introduced by fourteen senators. S. 661, 1982 MD. GEN. ASS. On February 12, 1982, the counterpart to S. 661, H.B. 1400, was introduced by eighteen delegates. H.B. 1400, 1982 MD. GEN. ASS. In addition, on February 12, 1982, H.B. 1757 was introduced by ten delegates. H.B. 1757, 1982 MD. GEN. ASS.

51. The preamble to H.B. 1757 emphasized that the concept of municipal government is a long recognized and highly cherished right. The preamble specifically mentioned the *Frank* decision and disagreed with the conclusion reached by the court. This bill died after the first reading. H.B. 1400 would have amended MD. ANN. CODE art. 23A, § 2 (1981), by deleting the words "or public local laws" in the first paragraph, which then would have made it clear that a municipality may enact any ordinance not contrary to the public general laws of the State. In addition, MD. ANN. CODE art. 25A, § 5 (1981) would have been amended to expressly provide that a county could not prevent a municipality from exercising any power granted to it in its charter or by the General Assembly. H.B. 1400, 1982 MD. GEN. ASS.

52. H.B. 1400 specifically stated that while a reallocation of authority, as evidenced in *Frank*, was necessary before making a permanent reallocation, the General Assembly would closely analyze county/municipality relationships and the balancing factors involved. H.B. 1400, 1982 MD. GEN. ASS.

53. In part this amendment would have provided that the municipalities may enact ordinances contrary to county ordinances, if such ordinances are within the municipalities' express powers, except that counties would still have control over revenue measures. In addition, H.B. 1400 would have provided that a final

Although H.B. 1400 was passed by both the House and the Senate in its original form, the Senate did not concur on the amended form. As a result, this bill was never enacted.<sup>54</sup> Such action by the House and the Senate, however, gave a clear indication that the legislature was not content with the conclusion reached in *Frank*. However, further legislation was necessary to clarify the existing law.

During the 1983 legislative session the General Assembly enacted further legislation.<sup>55</sup> H.B. 1277 clarifies and changes the existing law by providing that, subject to certain exceptions and conditions,<sup>56</sup> county legislation does not apply to a municipality within that county. As a result, municipalities have been given the power of self-government in matters of local concern, while counties have retained such powers as are necessary to operate an effective county government and protect the health, welfare, and safeth of its residents.

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determination as to the reallocation of authority be made by July 1, 1984. *See* H.B. 1400, 1982 MD. GEN. ASS.

54. H.B. 1400 was amended and sent back to the Senate on April 10, 1982. The Senate did not concur with the amendments and the 1982 legislative session ended before action could be taken (information obtained through Maryland Legislative Reference).
55. Act of Apr. 6, 1983, 1983 Md. Laws. This law takes effect on Jan. 1, 1984. It should be noted that this bill was scheduled to be signed by the Governor on May 10, 1983 - after publication of this note.
56. The new law adds sections 2A and 2B to Article 23A which provide certain conditions under which county legislation will apply to a municipality within that county. This law provides that, regardless of the existence of these conditions, a county may enact legislation applicable to municipalities within its boundaries upon a specific finding that absent such legislation a significant adverse impact on the health, safety, and welfare of certain residents will result. In this instance the county is required to give notice and hold a public hearing on the matter. In addition any such finding is subject to judicial review.