

on their [sic] land prohibiting homes built to the federal manufactured home construction and safety standards when the landowner allows other forms of single-family residential construction.”

I. Background: Applicable Statutory Provisions.

Consensus Committee. The Consensus Committee was established by the National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. 5401 *et seq.* (“the Act”) for the purpose of providing periodic recommendations to the Secretary to adopt, revise, and interpret the federal manufactured housing construction and safety standards and the procedural and enforcement regulations. 42 U.S.C. 5403(a)(3)(A). It may submit to the Secretary proposed procedural and enforcement regulations and recommendations for the revision of the regulations. 42 U.S.C. 5403(b)(1).

Within 120 days from the date on which the Secretary receives a proposed procedural or enforcement regulation from the Consensus Committee, the Secretary must approve or reject the proposal. If he rejects the proposal, he must provide to the Consensus Committee a written explanation of the reasons for rejection and publish in the **Federal Register** the rejected proposal and the reasons for the rejection. 42 U.S.C. 5403(b)(4).

Preemption. It appears that the legal underpinning of the Consensus Committee’s recommendation is the preemption provision of the Act, 42 U.S.C. 5403(d). The preemption provision allows federal construction and safety standards promulgated under the Act to preempt state and local laws. See “Notice of Staff Guidance, 62 FR 3456 (1997);” “Statement of Policy,” 62 FR 24337 (1997). The provision states that Federal construction and safety standards promulgated under the Act preempt state and local laws to the extent that such are applicable to the same aspect of performance of a manufactured home and are not identical to Federal construction and safety standards. 42 U.S.C. 5403(d).

Congress amended the preemption provision in 2000 to provide that preemption “shall be broadly and liberally construed to ensure that disparate state or local requirements or standards do not affect the uniformity and comprehensiveness of the [Federal construction and safety] standards promulgated under this section nor the Federal superintendence of the manufactured housing industry as established by this title [the Act].” 42 U.S.C. 5403(d).

This amendment to the Act provided explicit statutory support for paragraph (d) of HUD’s regulation at 24 CFR 3282.11 that implements the preemption authority. Paragraph (d) states: “No State or locality may establish or enforce any rule or regulation or take any action that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The test of whether a State rule or action is valid or must give way is whether the State rule can be enforced or the action taken without impairing the Federal superintendence of the manufactured home industry as established by the Act.”

The U.S. Court of Appeals for the 11th Circuit had raised a concern as to whether this paragraph was valid, stating that section 3282.11(d) “seems to expand the scope of the unambiguous preemption provision enacted by Congress.” *Georgia Manufactured Housing v. Spalding County*, 148 F.3d 1304, n8 (11th Cir. 1998).

The amendment expressed Congress’ intent that the preemption over local construction standards should be construed so as to recognize the nationwide scope of the Federal manufactured housing program and the manufactured housing industry.

The amendment did not modify the basic substance of the statutory preemption provision. By its specific terms, the provision apply to construction and safety standards, generally codified in 24 CFR part 3280. It does not apply to other regulations, including the Manufactured Home Procedural and Enforcement Regulations in 24 CFR part 3282.

The 2000 Congressional amendments also revised the Purpose of the Act to include, “to facilitate the availability of affordable manufactured homes and to increase homeownership for all Americans”, 42 U.S.C. 5401(b)(2). The amendment cannot be found to expand the applicability of the preemption provision beyond the federal construction and safety standards. There is no indication of congressional intent to preempt local land use or zoning laws. *Accord, Burton v. City of Alexander City*, 2001 U.S. Dist. LEXIS 6651, M.D. Ala. 2001. (“* * * Congress plainly did not intend to preempt zoning laws that operate only where HUD does not. The most that can be said about the 2000 Act is that it removed any possible ambiguity created by a cryptic footnote in *Spalding County* * * * See 148 F.3d 1309 n.8.”).

Authority of the Secretary and the Administrative Procedure Act. All regulations promulgated by the

Department must be consistent with a statutory grant of authority. Generally, with respect to the manufactured housing program that authority would be found in a specific authority such as in the Act or in some general authority such as that found in Section 7(d) of the Department of Housing and Urban Development Act, 42 U.S.C. 3535(d). All regulations must also comply with the procedural and substantive requirements of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.* Under the APA, federal regulations will be held unlawful and set aside if found to be “in excess of statutory jurisdiction, authority, or limitations, or shore of statutory right * * *” 5 U.S.C. 706(2).

Decision of the Secretary

The Secretary rejects the proposed recommendation of the Consensus Committee. The Secretary need not publish the proposal or his reasons for rejection for the following reasons. Nevertheless, since the proposal is the first recommendation issued by the Consensus Committee, the Secretary is publishing the proposal and his reasons for rejection in order to explain the statutory limitations on the Consensus Committee’s authority and the Secretary’s obligations under the Act.

Bases for Rejection. 1. The Act gives no specific jurisdiction or authority to the Consensus Committee to proposed procedural or enforcement regulations that have no relationship to the revision or enforcement of the federal construction and safety standards. As such, the proposed regulation is beyond the authority granted by the Act to the Consensus Committee to propose and is beyond the scope of what the Secretary is required to respond to under the procedures established in the Act.

The jurisdiction of the Consensus Committee is limited by the provisions of the Act. The Consensus Committee may make recommendations to adopt, revise, or interpret the procedural and enforcement regulations. The Consensus Committee does not have authority under the Act to make recommendations concerning the Procedural and Enforcement Regulations that are beyond the scope of the regulations.

The scope of 24 CFR 3282.1(b), the Procedural and Enforcement Regulations, is to prescribe procedures for the implementation of the Secretary’s responsibilities under the Act to conduct inspections and investigations necessary to enforce the federal construction and safety standards, to determine that a manufactured home fails to comply