DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

DAN FRIEDMAN
Counsel to the General Assembly

SANDRA BENSON BRANTLEY
BONNIE A. KIRKLAND
KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

March 16, 2012

The Honorable Kathleen M. Dumais
101 House Office Building
Annapolis, Maryland 21401-1991

Dear Delegate Dumais:

You have asked for advice concerning House Bill 722 (MC 16-12), "Montgomery County - Real Property - Enforceability of Recorded Covenants and Restrictions - Agricultural Activities and Structures," as amended. Your questions, and my answers thereto, appear below.

As amended, House Bill 722 allows any person with standing[1] to challenge a recorded covenant or restriction that prohibits or restricts, on agricultural property: 1) agricultural activity; 2) the construction of an agricultural structure; or 3) commercial or business activity necessary to the conduct of agricultural activity, as unenforceable to the extent that the provision is inconsistent with the classification of agricultural property and contrary to public policy. The bill also creates a rebuttable presumption that recorded covenants and restrictions that limit an existing use are inconsistent with the classification of agricultural property and contrary to public property.[2]

1. Under what circumstances can a Court set aside restrictive covenants? Have restrictive covenants been set aside by Maryland appellate courts, and, if so, when and under what circumstances?

---

[1] The bill expressly states that "Montgomery County shall have standing to intervene in a case where a provision of recorded covenants and restrictions under this section," but does not give the County the authority to bring an action on its own. As a general rule, such covenants can be enforced only by a party to the covenant or one for whose benefit it was made. *Long Green Valley Association v. Bellevale Farms*, __ Md. App. ___ (February 14, 2012).

[2] The bill defines the term "existing use" to mean "any lawful agricultural activity or agricultural structure on agricultural property." This definition would appear to drop a major portion of the ordinary definition of the term "existing use," namely, the time of existence. For example, in the zoning context, the term "existing use" refers to a use that was in existence at the time that a zoning ordinance that would forbid that use is adopted.

Ordinarily, a party to a covenant can seek to avoid application of the covenant by showing that notwithstanding the clear purpose, the covenant should no longer be recognized as valid and enforceable. *City of Bowie v. MIE, Inc.*, 398 Md. 657, 685 (2007). "The proper legal standard for this inquiry is to examine whether, after the passage of a reasonable period of time, the continuing validity of the covenant cannot further the purpose for which it was formed in light of changed relevant circumstances." *Id.* Chief among the factors to be considered is whether there has been "radical change in the neighborhood causing the restrictions to outlive their usefulness." *Id.* at 687. Courts may also apply equitable principles to limit the covenant's duration to a reasonable period of time. *Id.* at 689.

In *Whitmarsh v. Richmond*, 179 Md. 523, 529 (1941), the Court of Appeals applied these principles to hold that a restriction of a property to residential uses would not be enforced where the property had come to be surrounded with commercial properties. Similarly, in *Esso Standard Oil v. Mullen*, 200 Md. 487, 490 (1952), the Court refused to enforce a covenant against nonresidential uses where the neighborhood was shown to have become "dominantly and progressively commercial." *See also Talles v. Rifman*, 189 Md. 10 (1947). More recently, in *Dumbarton Improvement Association v. Druid Ridge Cemetery Company*, 195 Md. App. 53 (2010), the Court of Special Appeals held, as an alternative ground for its decision, that a 1913 deed restriction on using certain property other than as a cemetery would not bar a proposed sale of 36 acres of the property for residential use where there had been "such a radical change in the vicinity since 1913 that the restriction is no longer enforceable." This case has been appealed to the Court of Appeals and was heard in May of 2011.

Enforcement of a restrictive covenant can also be avoided by showing that the covenant is void as contrary to public policy. Some of the earliest cases in which this was done involved covenants that excluded persons of a particular race. *See Gandolfo v. Hartman*, 49 F. 181 (C.C.S.D. Cal. 1892) (declaring a covenant not to convey or lease land to a "Chinaman" void and contrary to public policy); *Clifton v. Puente*, 218 S.W.2d 272 (Tex. Civ. App. 1949) (refusing to enforce a restrictive covenant that prohibited the sale or lease of property to persons of Mexican decent).[3] Other cases have found that enforcement of covenants to exclude housing for the handicapped, intellectually disabled or mentally ill violates public policy. *Rhodes v. Palmer Pathway Homes*, 400 S.E.2d 484, 486 (S.C. 1991); *Westwood Homeowners Ass'n v. Tenhoff*, 745 P.2d 976, 155 Ariz. 229 (1987); *Craig v. Bossenbery*, 351 N.W.2d 596 (Mich. Ct. App. 1984); *Crane Neck Ass'n v. New York City/Long Island County Servs. Group*, 460 N.E.2d 1336 (N.Y. 1984).[4]

---

[3] In *Shelley v. Kraemer*, 334 U.S. 1, 20-21 (1948), the Supreme Court held that enforcement of such a covenant would not only be against public policy but also unconstitutional.

[4] Since the enactment of the Fair Housing Amendments Act of 1988 courts faced with this issue have concluded that failure to waive the restrictive covenants for a home for the disabled constitutes a failure to provide reasonable accommodation in violation of that Act unless the facts

The Court of Appeals has recognized the possibility that a restrictive covenant could be invalid as result of conflict with public policy, but I have found no case where they have made this finding. *See Colandrea v. Wilde Lake,* 361 Md. 371 (2000); *Clem v. Valentine*, 155 Md. 19 (1928).

2. Has the General Assembly previously passed legislation similar to that proposed by MC12-16?

There are other statutes in Maryland establishing rebuttable presumptions. A search for the term "rebuttable presumption" in the Code turns up 24 of them. Among those, Criminal Procedure Article, § 11-623(c)(1), which establishes a presumption that a contract with a convict is a notoriety of crimes contract, Criminal Law Article, § 4-203(a)(2), which creates a rebuttable presumption that a person who transports a handgun does so knowingly, and Tax - General Article, § 10-101(k)(3), which creates a rebuttable presumption that a person who left the State and returns within six months "did not have a bona fide intention to remain permanently outside this State." I have found no provision, however, which creates the presumption that a contractual provision is invalid.

3. Is there any constitutional question raised by MC12-16 in that application may result in the taking of vested rights of property owners?

Two of the major provisions of the bill simply state what is most likely already the case – that a person with standing may challenge a covenant or restriction. Although it specifies grounds, specifically that the covenant or restriction are inconsistent with the classification of agricultural property or against public policy, it is my view that these grounds are already available, and that inconsistency with the classification of agricultural property is simply a form of inconsistency with public policy.

The third provision is the one creating a rebuttable presumption. In Maryland:

> Unless otherwise provided by statute or by these rules, in all civil actions, a presumption imposes on the party against whom it is directed the burden of producing evidence to rebut the presumption. If that party introduces evidence tending to disprove the presumed fact, the presumption will retain the effect of creating a question to be decided by the trier of fact unless the court decides that such evidence is legally insufficient or is so inconclusive that it rebuts the presumption as a matter of law.

---

do not support a finding of a violation. *Advocacy Center for Persons v. Woodland Estates*, 192 F.Supp.2d 1344 (M.D. Fla. 2002); *Dornbach v. Holley*, 854 So.2d 211 (Fla.App. 2002); *Skipper v. Hambleton Meadows Architectural Review Committee*, 996 F.Supp. 478 (D. Md. 1998); *Martin v. Constance*, 843 F.Supp. 1321 (E.D.Mo. 1994).

Maryland Rule 5-301(a).

Thus, the rebuttable presumption would shift the burden of production of evidence, but would not alter the burden of persuasion.[5]

I have found no Maryland case that addresses whether a new rebuttable presumption, or other alteration in the burden of production or burden of persuasion can be given retroactive effect where vested rights are implicated. It is generally established, however, that procedural statutes are presumed to have retroactive effect, *Langston v. Riffe*, 359 Md. 396, 419 (2000), while substantive changes are presumed to be prospective absent clear language to the contrary. *Doe v. Roe*, 419 Md. 687 (2011). This difference reflects the general view that substantive changes are more likely to have substantive effects, and thus, to raise constitutional issues.

I have also found no Maryland case that directly addresses whether a change in the burden of production or burden of persuasion is procedural or substantive. Maryland courts have, however, referred to the burden of proof as procedural in passing. *In re Blessen H.*, 392 Md. 684, 692 (2006); *One 1984 Ford Truck v. Baltimore County*, 111 Md. App. 194, 203 (1996); *Hohman v. A. S. Abell Co.*, 44 Md. App. 193, 200 (1979). Courts in other states have differed on this issue, with some referring to a change in the burden of proof as procedural and applying it retroactively, and others finding such changes substantive and applying them prospectively only. *Compare Shaps v. Provident Life*, 826 So. 2d 250, 254 (Fla. 2002); *United Securities Corp. v. Bruton*, 213 A. 2d 892 (D.C. 1965) *with Princess Cruises v. United States*, 397 F.3d 1358, 1364, 1366 (Fed. Cir.2005); *Woodward v. DOJ*, 598 F.3d 1311, 1315 (Fed. Cir. 2010).

In this case, it is my view that there are good reasons to consider the change to be procedural. First, under the Maryland Rules, the presumption shifts only the burden of presenting evidence, not the entire burden of proof. Second, as a practical matter, the burden of defending the validity of a covenant already falls on the person who seeks to enforce it, or to defend it against a claim of invalidity. In addition, as discussed in the Mizeur letter, covenants are already subject to a certain level of judicial alteration based on public policy and other concerns. Thus, it cannot be said that the contemplated change would radically affect settled expectations.

4. What is the standard of review for determining whether or not a restrictive covenant is contrary to public policy?

---

[5] The burden of proof is divisible into two parts - the burden of production and the burden of persuasion. *Montgomery County Fire Board v. Fisher*, 298 Md. 245, 256 (1983).

As noted above, I have found no Maryland case in which a contract or provision thereof is found invalid as against public policy.[6] The Court of Appeals has, however, discussed the concept of voidness of contractual provisions that conflict with public policy in other contexts. In *Maryland National Capital Park and Planning Commission v. Washington National Arena*, 282 Md. 588 (1978), the Court of Appeals stated:

> Fearing the disruptive effect that invocation of the highly elusive public policy principle would likely exert on the stability of commercial and contractual relations, Maryland courts have been hesitant to strike down voluntary bargains on public policy grounds, doing so only in those cases where the challenged agreement is patently offensive to the public good, that is, where "the common sense of the entire community would . . . pronounce it" invalid. . . . This reluctance on the part of the judiciary to nullify contractual arrangements on public policy grounds also serves to protect the public interest in having individuals exercise broad powers to structure their own affairs by making legally enforceable promises, a concept which lies at the heart of the freedom of contract principle.

*Id.* at 606 (Citations omitted). The Court continued:

> In the final analysis, it is the function of a court to balance the public and private interests in securing enforcement of the disputed promise against those policies which would be advanced were the contractual term held invalid. Enforcement will be denied only where the factors that argue against implementing the particular provision clearly and unequivocally outweigh 'the law's traditional interest in protecting the expectations of the parties, its abhorrence of any unjust enrichment, and any public interest in the enforcement' of the contested term.

*Id.* at 607.

5. Isn't it correct that a restrictive covenant on property in the Agricultural Reserve can be challenged now without the passage of this bill?

Yes. As discussed above, it is my view that the actions purportedly permitted by House Bill 722 could be brought under current law.

---

[6] But see *Stitzel v. State*, 195 Md. App. 443 (2010), in which public policy was used as a basis to declare a conveyance of land in violation of State law to be void.

Sincerely,

Kathryn M. Rowe
Assistant Attorney General

KMR/kmr
dumais12.wpd