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The Honorable Heather Mizeur
429 House Office Building
Annapolis, Maryland 21401-1991

Dear Delegate Mizeur:

You have asked for advice relating to MC-12, "Montgomery County - Real Property - Enforceability of Recorded Covenants and Restrictions - Agricultural Activities and Structures." Specifically, you have asked whether restrictive covenants take precedence over regulations and policies governing the Montgomery County Agricultural Reserve. You have also asked whether the answer to that question varies depending on whether the restrictive covenants predate the creation of the Agricultural Reserve. Finally, you have asked whether it would be possible to strengthen the Agricultural Reserve regulations so that they supercede restrictive covenants. The answer to the first two questions will vary depending on the facts of the cases, including the nature of the regulations and policies, the nature of the covenant, and facts related to the property and the neighborhood, as well as the timing and other factors related to the creation of the covenant. I have found no case in which an administrative agency has attempted to overcome restrictive covenants by regulation. The General Assembly could make provisions to this effect, though they face certain legal hurtles, which I discuss below.

MC-12 would add a new § 14-133 to the Real Property Article which would provide that, in Montgomery County:

> (c) (1) Any provision of recorded covenants and restrictions that prohibits or restricts agricultural activity or the construction of an agricultural structure on agricultural property is unenforceable.
>
> (2) Any provision of recorded covenants and restrictions that prohibits or restricts commercial or business activity is unenforceable to the extent that it has the effect of prohibiting or restricting the establishment and operation of agricultural activity on agricultural property.

"Agricultural property" is defined as property that:

> is encumbered by a recorded transfer of a development rights easement established

> in accordance with a program for the transfer of development rights under Article 28, § 8-101(b)(3) of the Code.

It is my understanding that the "program for the transfer of development rights under Article 28, § 8-101(b)(3) of the Code" is intended to be a reference to property within the Montgomery County Agricultural Reserve that is part of the Montgomery County Transfer of Development Rights Program. It would, however, also refer to any property encumbered by a recorded transfer of development rights anywhere in the County under any program for the transfer of development rights in place now or in the future.

The Agricultural Reserve was established in 1980 by the Preservation of Agriculture and Rural Open Space Functional Master Plan. It preserves 93,000 acres for farming. Over half of those acres are part of the Transfer of Development Rights Program.

You have not directed me to the regulations in question, and I have not found any that would directly impact on restrictive covenants. For example, Executive Regulation 3-09, which relates to "the County's supplemental payment for the Maryland Agricultural Land Preservation Foundation's purchase of agricultural land preservation easements and regulate[s] the method for purchasing agricultural easements by the County," lists specific activities that "are permitted on lands encumbered by County Agricultural Preservation Easements," including:

> a. use of the land for agriculture;
>
> b. operation of any machinery used for agriculture or the primary processing of agricultural products, regardless of the time of operation;
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> c. all normal agricultural operations, performed in accordance with good husbandry practices, that do not cause bodily injury or directly endanger human health; and
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> d. operation of a Farm Market.

3-09 II.D.1. This is a clear limitation on the power of the County to limit this type of activity, the regulations do not require any specific activity, and do not prevent private agreements not to engage in the listed activities. A zoning ordinance permitting a particular use of land does not prevent the injunction of that use as a violation of a restrictive covenant. *Criscenzo v. Chabad-Lubavitch of the Shoreline, Inc.*, 2010 Conn. Super. LEXIS 2111 (2010); *Shawangunks v. Knowlton*, 476 NE 2d 988 (N.Y. 1985); *Omega Corp. of Chesterfield v. Malloy,* 319 S.E.2d 728 (Va. 1984). It is my view that the same is true when the allowance of the activity is found in other county regulations or policies. Moreover, while regulation requires that land in the easement program be suited for agricultural activities, it does not appear to require that the land be actively used for that purpose.

It is well-established that a properly created restrictive covenant is valid in Maryland. *Colandrea v. Wilde Lake,* 361 Md. 371, 398 (2000). A covenant that runs with the land can be created where 1) the covenant touches and concerns the land; 2) the original parties intend the covenant to run; 3) there is privity of estate; and 4) the covenant is in writing. *City of Bowie v. MIE, Inc.*, 398 Md. 657, 678 (2007). Such a covenant, even when running with the land, is contractual in nature. *Colandrea*, 361 U.S. at 395.

Traditionally, restrictive covenants have been strictly construed, in that they have been read narrowly in favor of the free alienability and use of land. *City of Bowie v. MIE, Inc.*, 398 Md. 657, 680 (2007). More modern cases have interpreted ambiguous provisions by first looking to extrinsic evidence as to the intent of the parties, then applying strict construction if the intent of the parties cannot be ascertained. *Id.* at 681-681.

A suit to enforce a restrictive covenant is in the nature of specific performance, and Maryland courts have held that injunctive relief is entirely appropriate. *Colandrea v. Wilde Lake,* 361 Md. 371, 396 (2000). Enforcement by injunction requires a showing that the refusal to approve an action that would violate the covenant was "a reasonable determination made in good faith, and not high-handed, whimsical or captious in manner." *Id.* The court has also applied the doctrine of comparative hardship when considering injunctive relief in actions involving private covenants. Under that doctrine a "court may decline to issue an injunction where the hardship and inconvenience which would result from the injunction is greatly disproportionate to the harm to be remedied." *Id.* at 396-397.

A party to a covenant can also seek to avoid application of a 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.

Finally, enforcement of a restrictive covenant can 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).[1] 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).[2]

A restrictive covenant that limits agricultural uses on land in the Agricultural Reserve that is encumbered by a transfer of development rights could be found to be unenforceable under any of the theories discussed above, including being contrary to public policy. Whether a restrictive covenant would be found unenforceable in any particular case would depend on all of the facts, including the provisions of the restriction, the activity that is to be enjoined, the character of the neighbor and the facts surrounding the creation of the restriction.

The regulations and other actions of the County do indicate a general policy that land in the Agricultural Reserve be available for farming uses. The County has created the Agricultural Reserve, and has created or participates in no less than seven programs designed to further the preservation of farmland: The Montgomery County Agricultural Easement Program; Maryland Agricultural Land Preservation Foundation; Maryland Environmental Trust; Montgomery County Transfer of Development Rights Program, Montgomery County Rural Legacy Program; Legacy Open Space Program; and the Conservation Reserve Enhancement Program. The County has also put significant amounts of money into these programs. The County also requires sellers of land adjacent to land zoned as agricultural that "existing County and State law is intended to discourage owners of real property adjacent to agricultural-zoned land from filing certain lawsuits against an owner or operator of an agricultural use in those areas." Montgomery County Code, § 40-12B.

It is not my view, however, that every possible limitation on agricultural activities could be found to be void on the basis of public policy. This determination must be based on all of the facts, just as is the case in other cases involving public policy objections to the enforcement of restrictive covenants. There are many reasons why enforcement of a restrictive covenant might be reasonable

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[1] 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.

[2] 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 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).

in light of the activity in question and the current character of the surrounding neighborhood. It is also my view that, while the age of the restriction is not irrelevant, the determination of public policy is based on current public policy, not the public policy in place when the restrictive covenant was created, whether the covenant predates the creation of the Agricultural Reserve is not determinative, though that fact may be relevant to the intention of the parties and similar questions in some cases.

You have also asked how the regulations and policies regarding the Agricultural Reserve can be made stronger, presumably so that they will outweigh restrictive covenants affecting agricultural activities. It is my view that neither regulations, nor generalized policies can provide more than evidence of public policy in these cases. There are instances, however, in which state legislatures have acted to protect established public policy by expressly providing that restrictive covenants to the contrary were unenforceable. These statutes have frequently been challenged under the Contract Clause to the United States Constitution, and many have been upheld.

In *Energy Reserves Group v. Kansas Power and Light*, 459 U.S. 400 (1983), the Supreme Court noted that while the "language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Id.* at 410. It set out a three part test to determine whether an impairment of contract has violated the Contract Clause. The first inquiry is whether the state law in question acts as a substantial impairment of a contractual relationship. This inquiry determines not only whether it is necessary to proceed to the remaining steps, and also the level of scrutiny that is to be applied, which increases with the severity of the impairment. *Id.* at 411. "If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem." *Id.* at 411-412 (citations omitted). "Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." *Id.* at 412.

In cases involving restrictive covenants bearing on facilities such as group homes and day care homes, courts applying the Contract Clause of the United States Constitution have generally either found or assumed a substantial impairment. In *Overlook Farms Home Ass'n v. Alternative Living Services*, 422 N.W. 2d 131 (Wis. App. 1988), the court found that a statute voiding the application of restrictive covenants to group homes defeated the expectations of landowners and the homeowners' association and that, while the home in question did not substantially change the character of the neighborhood, it decreased the value of surrounding residences. As a result, it found a substantial impairment of the contract in question. Similarly, in *Barrett v. Dawson*, 71 Cal. Rptr. 2d 899, 903 (Cal. App. 1998), the Court found that a statute invalidating the application of restrictive covenants to bar day care homes was "to be sure, a substantial impairment of the neighbors' contract right to limit the uses of nearby property." On the other hand, in *Hall v. Butte Home Health, Inc.*, 70 Cal. Rptr. 2d 246 (Cal. App. 1997), the court found the effect of the operation of a nonprofit

group home for the elderly on the property rights of the surrounding neighbors was "de minimus," stating that the record was devoid of evidence that the neighbors had any discernable impact on their property rights, and pointing out that no manufacturing or sales occur at the facility, there are no signs or billboards, and that the facility was maintained in a manner visually consistent with the single family character of the subdivision. Moreover, the covenant in question, which related to the conduct of business, remained in force with respect to facilities not protected by the fair housing laws. The court went on, however, to "assume" that the state regulation constituted a substantial impairment.

Courts in these cases have had no problem finding a significant and legitimate public purpose in the cases involving group homes and day care homes. In *Overlook Farms Home Ass'n v. Alternative Living Services*, 422 N.W. 2d 131 (Wis. App. 1988), the court found that without the legislation "the elderly, handicapped and mentally retarded would be forced either to live alone where they cannot sufficiently care for themselves, or be unnecessarily institutionalized." In *Barrett v. Dawson*, 71 Cal. Rptr. 2d 899, 903 (App. 1998), the court found that "ensuring adequate and local day care for working parents is probably about as broad a public purpose as any that might be imagined in the regulatory universe." And in *Hall v. Butte Home Health, Inc.*, 70 Cal. Rptr. 2d 246 (App. 1997), the court found a compelling public interest in "ensuring that those classes of persons who fall within the protection of the civil rights laws have access to suitable and affordable housing."

Nor have these courts had any difficulty in finding that the laws in question were appropriate to the public purpose justifying their adoption. In *Overlook Farms Home Ass'n v. Alternative Living Services*, 422 N.W. 2d 131 (Wis. App. 1988), the court found that the statute was "narrowly drafted and safeguarded from abuses by restrictions put on the operation of community-based residential facilities." In *Barrett v. Dawson*, 71 Cal. Rptr. 2d 899, 903 (App. 1998), the court found that the statute was tailored, in that it protected only family day care homes appropriate to lots zoned for single-family dwellings and not commercial kindergartens. And in *Hall v. Butte Home Health, Inc.*, 70 Cal. Rptr. 2d 246 (App. 1997), the court found the limitations impaired contracts only to the extent necessary to provide suitable housing for the disabled.

Other cases have disagreed, finding contract clause and due process violations from the impairment of restrictive covenants. *Adult Group Properties v. Imler*, 505 N.E.2d 459 (Ind. App. 1987); *Clem v. Christole*, Inc., 582 N.E.2d 780, 784 (Ind. 1991). In the *Clem* case, the court specifically held that the statute was not reasonably necessary for the protection of the health, safety, and welfare of the general public, did not address a broad problem general to society, and that it imposed a statutory regulation in a field not traditionally subject to legislation. *Id.* at 784. The court also noted that the effect was not temporary but permanent, irrevocable, and retroactive. *Id.*

As might be gathered from the above discussion, I have found no cases involving an attempt by a state to invalidate restrictive covenants involving agricultural activities. The language proposed in MC-12 would completely eliminate any restrictive covenant regarding agricultural activities, and

partially eliminate restrictive covenants involving business activities to the extent that they reached certain activities related to agriculture. While a restrictive covenant is a contract right, it is not one in which a person can have a reasonable expectation of perpetual continuation in light of the governing law, which favors strict construction against limitations, and allows a court to refuse enforcement on a number of grounds. Thus, while the impairment may be substantial, it is not so severe as to indicate the need for severe scrutiny. Moreover, it seems clear that the preservation of agricultural land is vital for both environmental and economic reasons. Finally, the effect of the bill is limited to properties encumbered with a transfer of development rights within the Agricultural Reserve. Restrictive covenants in other parts of the County, and on land not encumbered with a transfer of development rights, are unaffected. Thus, it is appropriately aimed at the precise area that the County has decided to protect. As a result, it is my view that a statute like MC-12 could withstand Contract Clause scrutiny.

Maryland courts, however, have taken a very strict approach to the validity of laws that retroactively affect vested rights. *Muskin v. Department of Assessments and Taxation*, 422 Md. 544 (2011); *Dua v. Comcast Cable*, 370 Md. 604, 629 (2002). In these cases, the Court of Appeals has made clear that under some circumstances, Maryland law may impose greater limitations than those prescribed by the United States Constitution's analog provisions. *Muskin* at 556. In those cases, federal cases interpreting the federal constitutional provisions are treated "merely as potentially persuasive authority" in interpreting the Maryland provisions. *Id.* Moreover, the Court has stated that "[i]f a retrospectively-applied statute is found to abrogate vested rights or takes property without just compensation, it is irrelevant whether the reason for enacting the statute, its goals, or its regulatory scheme is 'rational.'" *Id.* at 557. While the Court has rejected the rational basis test in this context, it has not suggested some higher standard that might be applicable to State exercise of the police power. It has, however, recognized that taxation and zoning and other land regulation is permissible. *Id.* at 565. It has also not yet rejected federal Contract Clause analysis as improper in cases involving impairment of contract.

A reading of the *Muskin* case, however, suggests that the Court would require a strong showing with respect to both public purpose and the fit between the public purpose and the means chosen. In *Muskin*, the Court described the remedy in question as "extreme regulatory overreaching" not justified by "anecdotal problems (not demonstrated to be systemic or endemic)." *Id.* at 559. In doing so, the Court dismissed evidence that went well beyond what would be necessary to demonstrate rationality, specifically a series of well-researched articles in the Baltimore Sun concerning the abuses of ground rents, backed up by testimony from witnesses before the committees.

For this reason, if the General Assembly chooses to invalidate restrictive covenants involving agricultural activities in the Agricultural Reserve, I would recommend making as strong a factual showing as possible as to why such restrictive covenants stand as a barrier to achieving the public policies in question. It may also be advisable to stop short of invalidating all such covenants, either

by giving an appropriate agency the authority to make determinations as to which were contrary to public policy or by granting that agency standing to challenge the enforcement of restrictive covenants it finds to be contrary to public policy.

Sincerely,

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