

DOUGLAS F. GANSLER
Attorney General

Katherine Winfree
Chief Deputy Attorney General

John B. Howard, Jr.
Deputy Attorney General



ROBERT A. ZARNOCH
Assistant Attorney General
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

May 4, 2007

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: Senate Bill 623 and House Bill 489

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency, Senate Bill 623 and House Bill 489, identical bills entitled "Ground Rents - Redemption." We write to discuss whether provisions of the bill relating to when a ground lease may be redeemed should be given only prospective effect.

Senate Bill 623 and House Bill 489 make a variety of changes in the law related to the redemption of residential ground leases.¹ Among these changes are amendments to Real Property Article 8-110 that delete provisions setting out the times at which ground leases created in various years could be redeemed, and alter current language to provide that "any reversion reserved in a lease for longer than 15 years is redeemable AT ANY TIME, at the option of the tenant, after 30 days' notice to the landlord." Since all of the time limits set under current law have run, with the exception of the five year limit for a ground lease created with after July 1, 1982, which still has effect as to leases created in the past five years, the effect of these changes for most leases is simply to remove

¹ Existing language in the provision specifies that a lease of an entire property improved or to be improved for multiple-family use on the property constitutes a business and not a residential purpose, and further provides that the term "multiple-family use" does not apply to any duplex or single-family structure converted to a multiple-dwelling unit. RP § 8-110(a)(1).

The Honorable Martin O'Malley

May 4, 2007

Page 2

confusing and obsolete language from the Code. However, if the change is given retroactive effect, it will shorten the period of time during which the ground lease holder is protected against redemption of the property without his or her consent for ground leases entered into after July 1, 2002.

Ultimately, the issue of whether a change in the law is to be given retroactive or prospective effect is a “question of legislative intention subject to the requirements of procedural due process and noninterference with vested rights.” *Becker v. Anne Arundel County*, __ Md.App. __ (April 9, 2007). Generally, a statute is presumed to operate prospectively unless a contrary intent appears, or the statute is limited to procedure or remedy. *State Ethics Commission v. Evans*, 382 Md. 370 (2004). However, if the legislative intent to make the statute retroactive is clear, it will be given retroactive effect unless retroactive application “would impair vested rights, deny due process, or violate the prohibition against *ex post facto* laws.” *Id.*

Real Property Article § 8-110 was originally adopted by Chapter 485 of 1884, which provided that “all leases or subleases of land hereafter made in this State, for a longer period than fifteen years, shall be redeemable at any time after the expiration of fifteen years at the option of the tenant.” As indicated by the language, this provision had only prospective effect. *Poultney v. Emerson*, 117 Md. 655 (1912). Subsequently, Chapter 395 of 1888 amended the section to allow redemption after the passage of ten years from the date of the lease. Although the Act was silent, this provision was also given only prospective effect. *Flook v. Hunting*, 76 Md. 178, 180 (1892). In 1900, the provision was again amended to allow redemption after five years from the date of the lease. This change was also given prospective effect. *Heritage Realty, Inc. v. City of Baltimore*, 252 Md. 1, 5 (1969); Chapter 207 of 1900. In 1971 the time period was shortened to three years, and an uncodified section specified that the change was to be given only prospective effect. Chapter 682 of 1971. Finally, in 1982, the time was again extended to five years, with the bill specifically setting out the various times depending on the year in which the lease was created, thus reflecting the prospective effect. Chapter 317 of 1982.

Senate Bill 623 and House Bill 489 contain no express provision with respect to whether they are to be given prospective or retrospective effect. Thus, ordinarily they would be presumed to have only prospective effect. This conclusion is supported by the fact that all previous changes in the time limit have been given effect only prospectively, that is, they have applied only to leases entered into after the effective date. However, since the change in language would have virtually no effect if it were interpreted to be

The Honorable Martin O'Malley
May 4, 2007
Page 3

only retroactive, there is also reason to believe that the intent was that the provision be given retroactive effect.²

It has generally been recognized that a law that simply makes irredeemable ground rents redeemable interferes with vested rights, works a taking without just compensation, and impairs contracts. *Appeal of Palairet*, 3 Leg.Gaz. 169, 1871 WL 10920 (Pa. 1871), *cf.*, *Marburg v. Mercantile Bldg. Co.*, 154 Md. 438, 441 (1928). And Maryland courts holding that statutory changes with respect to ground rents should be given prospective effect have recognized that a redeemable ground lease “of course, would be of much less value” than one that is irredeemable. *Flook v. Hunting*, 76 Md. 178, 180 (1892). While all of these cases relate to ground leases that were entirely irredeemable, it is not unlikely that a court would conclude that a shortening of the current five year term of irredeemability would also constitute a taking or impair the contract.³

For these reasons, it is entirely possible that a court might hold that Senate Bill 623 and House Bill 489 should be given only prospective effect.

Very truly yours,
/s/
Douglas F. Gansler
Attorney General

DFG/KMR/kmr
cc: Joseph Bryce
Secretary of State
Karl Aro
The Honorable Lisa A. Gladden
The Honorable Cheryl Glenn

² Chapter 1 of 2007 prohibits the creation of new residential ground leases after January 22, 2007. However, because that Chapter, as amended by Senate Bill 396 and House Bill 463 of 2007, defines the limitations of “residential” differently than Senate Bill 623 and House Bill 489, it is possible that some ground leases could be created in the future that would be subject to § 8-110 and immediately redeemable.

³ In fact, the Court of Appeals has held that an act could not be given retroactive effect to eliminate a right of redemption once the time has run to allow it. *Brager v. Bigham*, 127 Md 148, 159 (1915).

The Honorable Martin O'Malley
May 4, 2007
Page 4