BRIAN E. FROSH
ATTORNEY GENERAL

ELIZABETH F. HARRIS
CHIEF DEPUTY ATTORNEY GENERAL

CAROLYN A. QUATTROCKI
DEPUTY ATTORNEY GENERAL

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

SANDRA BENSON BRANTLEY
COUNSEL TO THE GENERAL ASSEMBLY

KATHRYN M. ROWE
DEPUTY COUNSEL

JEREMY M. MCCOY
ASSISTANT ATTORNEY GENERAL

DAVID W. STAMPER
ASSISTANT ATTORNEY GENERAL

November 18, 2020

The Honorable Shelly Hettleman
203 James Senate Office Building
Annapolis, Maryland 21401

Dear Senator Hettleman:

You have asked for advice concerning whether the Maryland Department of the Environment ("MDE") can legally deny or suspend its enforcement of COMAR 26.11.06.08 and 26.11.06.09 as applied to the hemp farm located at 1810 Broadway Road in Lutherville until such time as the neighbors file a nuisance complaint with the local agency authorized to hear complaints against agricultural operations or enter into mediation under the auspices of the State Agricultural Mediation Program's Maryland Conflict Resolution Service. It is my view that MDE has the discretion to determine which complaints represent the best use of its enforcement powers.

As I understand from your request and the response of MDE on October 6, 2020, neighbors of the hemp farm complained to MDE about the smell of hemp in the neighborhood and MDE responded by conducting an odor survey in the winter of 2020. The neighbors then requested that an odor survey be conducted this coming summer while the hemp was growing. In the meantime, MDE researched the facility and determined that it was operating under the Department of Agriculture's Hemp Research Pilot Program. The Hemp Research Pilot Program was created by Agriculture Article ("AG"), Title 14, Subtitle 2 under the authority of 7 U.S.C. § 5940. The State law permits the Department of Agriculture or an institution of higher education to apply to "grow, cultivate, harvest, process, manufacture, transport, market, or sell hemp under the Program if the hemp is grown or cultivated to further agricultural research or academic research purposes." AG § 14-202(c).[1] In making this inquiry MDE was informed that the farm had met all the requirements to participate in the program and was issued a registration for 2020.

[1] The federal law authorizing the Hemp Research Pilot Program had been set to expire October 31, 2020. However, the recently enacted Continuing Appropriations Act, 2021 and Other Extensions Act, Pub.L. 116-159, amended this provision to extend the sunset until September 30, 2021. Meanwhile, the General Assembly passed Chapter 228 of 2019 which will allow commercial hemp farming under a license from the Department of Agriculture once the licensing program is put in place. That change will allow

In its response, MDE included information about the Maryland Right to Farm law. Courts and Judicial Proceedings Article ("CJ"), § 5-403. That law provides agricultural operations protection from civil actions for maintaining a nuisance or interference with the enjoyment of property on any grounds including odors and dust. CJ § 5-403(c). The law does not, however, relieve an agricultural operation of the responsibility of complying with any permit required for the agricultural operation, or any health, environmental, or zoning requirements. CJ § 5-403(b)(1)(ii) and (iii). Nor does it protect an agricultural operation from liability from negligent operation. CJ § 5-403(b)(1)(iv). As pointed out in the MDE letter, however, the law does permit a nuisance complaint to be filed with a local agency that is authorized to hear a nuisance complaint against agricultural operations or, in the absence of such a local agency, then the State Agricultural Mediation Program. CJ § 5-403(e)(2) and (4). A decision of a local agency on a nuisance complaint against an agricultural operation is subject to judicial review under Title 7, Chapter 200 of the Maryland Rules. CJ § 5-403(e)(3). A person who enters into mediation with the Department of Agriculture may bring a nuisance action once the Department certifies that the mediation has concluded. CJ § 5-403(e)(4). I do not read the MDE letter to suggest that it would take further action after the neighbors took these actions, but rather that the MDE was not going to take further action, but the neighbors could choose to file a nuisance action with the County or enter into mediation as appropriate. Thus, your question is essentially whether MDE has the discretion to determine how, when, and whether to take action on specific complaints.

The regulations in question read as follows:

> .08 An installation or premises may not be operated or maintained in such a manner that a nuisance or air pollution is created. Nothing in this regulation relating to the control of emissions may in any manner be construed as authorizing or permitting the creation of, or maintenance of, nuisance or air pollution.
>
> .09 A person may not cause or permit the discharge into the atmosphere of gases, vapors, or odors beyond the property line in such a manner that a nuisance or air pollution is created.

This provision was adopted under the power of MDE to adopt rules and regulations for the control of air pollution in this State, including testing, monitoring, record keeping, and reporting requirements. Environment Article ("EN"), § 2-301(a)(1). It states prohibitions against installations, premises, and persons, but does not place any particular requirements on MDE. Clearly, MDE has the authority to enforce the regulations it adopts under its law. Having this authority does not, however, require that it pursue enforcement on every arguable violation. *Falls Road Community Association, Inc., et al. v. Baltimore County*, 437 Md. 115, 142 (2014).

---

hemp farming without the necessity of partnering with the Department of Agriculture or an institution of higher education.

In the *Falls Road* case, the Court elaborated on the reasons for this rule saying:

> There are a myriad of discretionary decisions made in determining how to employ limited resources. It is well within the discretion of County officials to pick and choose among the categories of violations, or to prioritize certain types or areas of enforcement. The County may also legitimately decide not to pursue enforcement in matters where they believe, perhaps even wrongly, that they may not prevail. The enforcement arena is simply littered with decisions that are discretionary.

Id. at 142-143.

There is a provision of law that states that the Secretary of MDE "shall investigate all nuisances that affect the public health and devise means for the control of these nuisances." EN §10-102. The *Falls Road* Court addressed the meaning of a similar provision, concluding that the use of the word "shall" in describing the powers of the County did not mandate enforcement in each and every possible case. *Id*. at 144.

> There are any number of possible reasons, all perfectly within the discretion of the County, for not pursuing the particular enforcement mechanisms that would most please the Community Association. Whether to prosecute an enforcement action necessarily involves consideration of potential outcomes, the odds of success, the cost to the taxpayers, and the likely benefit to the community and to County residents generally. The choice is therefore inherently discretionary. Even assuming, for purposes of argument, that the County agrees that a violation has occurred, the County may decide not to expend its limited resources litigating a particular matter. Or it may ascribe greater priority to competing demands for deployment of its resources. Such administrative and financial factors are generally appropriate in a determination of how to exercise discretion.

Id.

This office has reached similar conclusions with respect to the authority of MDE. In 104 *Opinions of the Attorney General* 3 (2019), Attorney General Brian E. Frosh found no law that compelled the State to enforce provisions of the Sustainable Growth and Agricultural Preservation Act of 2012. *Id*. at 4, 25. As in the *Falls Road* case we concluded that provisions of the Environment Article that used the term "shall" in conjunction with MDE's enforcement powers did not mean that MDE was required to pursue enforcement of every arguable violation. *Id*. at 37 n. 21. The Opinion further explains that although the law provided that MDE "shall" issue a complaint if it has "reasonable grounds to believe" that a violation occurred, the law did not require it to find reasonable grounds. *Id*. at 37 n. 21. Similarly, while EN § 10-102 provides that MDE "shall investigate all nuisances that affect the public health and devise means for the control of these nuisances," it does not require MDE to conclude that a nuisance exists or that it affects public health.

For these reasons, it is my view that MDE is not required to take additional action on the complaints concerning the Lutherville hemp farm.

Sincerely,

Kathryn M. Rowe
Assistant Attorney General

KMR/kmr
hettleman08