

**Office of the County Attorney  
Montgomery County, Maryland**

**MEMORANDUM**

May 6, 1998

TO: Lynn Frank, Chief, Public Health Services  
Department of Health and Human Services

VIA: Marc P. Hansen, Chief *MPH*  
General Counsel Division

FROM: Anne T. Windle *ATW*  
Assistant County Attorney

You have asked for a legal opinion as to whether the Montgomery County Council, sitting as the Board of Health, may enforce Chapter 23A of the Montgomery County Code, Group Homes, in the eight home-rule municipalities in the County which have not elected to adopt Chapter 23A.

State law provides, "In a code county or charter county, the governing body is ex officio the board of health for the county, unless the governing body establishes a board of health." Md. Code Ann., Health Gen. § 3-201(b) (1994). The county code provides:

There is hereby established a county board of health which shall have and exercise all the powers of a local board of health as provided in article Health-General, title 3, subtitle 2, Annotated Code of Maryland, 1957, as amended. The county council is hereby designated as the county board of health.

Mont. Co. Code, §2-65 (1997).

Md. Code Ann., Article Health-Gen., Title 3, Subtitle 2, referred to above, provides: "Except as provided in paragraph (2) of this subsection, each county board of health shall exercise the duties imposed by law on the board of health." Md. Code Ann., Health Gen. § 3-202(a)(1) (1994).

There are at least two laws, one state and one county, regarding duties the Montgomery County Board of Health shall or may exercise. State law gives county boards of

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health the following express power:

In addition to the other powers provided by law and subject to the provisions of this article, each county board of health may adopt and enforce rules and regulations on any nuisance or cause of disease in the county.

Md. Code Ann., Health Gen. § 3-202(d) (1994).

The County Code gives the Board of Health the following powers:

The council, sitting as the local board of health for the county, is hereby authorized and empowered to adopt and enforce all needful rules and regulations concerning sanitation for eating and drinking establishments, habitable buildings and private water supplies, within their jurisdiction, and to provide therein reasonable regulating fees and charges in connection therewith and penalties for the violation thereof; provided such rules and regulations are in addition to and not in conflict with any regulations of the state board of health or of any provisions of the Annotated Code of Maryland, 1957, as amended.

Mont. Co. Code, § 24-1 (1997).

Group homes are certainly habitable buildings and are arguably places which may cause disease. Therefore, I believe the Board of Health has the authority to regulate group homes.

This brings me to the heart of your question, which is whether the County may enforce its group home law in the eight municipalities that have not elected to adopt Chapter 23A. As previously stated, Md. Code Ann., Health Gen. § 3-202(a)(1) provides, "Except as provided in paragraph (2) of this subsection, each county board of health shall exercise the duties

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imposed by law on the board of health." Paragraph (2) provides:

The county board of health shall exercise those duties in each municipality or special taxing district in the county unless the municipality or district has a charter provision or ordinance that: (I) Covers the same subject matter; (ii) Is as least as restrictive as the provision that the county board is required to enforce; and (iii) Includes provisions for enforcement.

Md. Code Ann., Health Gen. § 3-202(a)(2) (1994).

My interpretation of the above state and county provisions is that the Board of Health has the authority to enforce Chapter 23A in its municipalities, once it has adopted it as a health regulation, unless the municipality has a charter provision or ordinance that also addresses group homes, is at least as restrictive as the County's ordinance, and contains enforcement provisions. However, under Mont. Co. Code §1-203 (d) and (e)(1), a municipality may elect to have county legislation apply. In this case, nine municipalities have already adopted Chapter 23A.

My understanding from you is that none of the other eight Montgomery County municipalities, upon being notified of this County Code provision, have objected to being subject to Chapter 23A. However, I do not think the fact the a municipality has not objected is a legal defense if a municipality later challenges Chapter 23A.

Therefore, I suggest that you ascertain and document in writing for each municipality whether a charter provision or ordinance exists that meets the criteria of Md. Code Ann., Health Gen. § 3-202(a)(2) or whether the municipality has elected to have Chapter 23A apply.

In summary, I believe the Montgomery County Council, sitting as the Board of Health, may adopt Chapter 23A as a health regulation. Depending upon the analysis of the state law criteria or election to adopt Chapter 23A in each of the eight municipalities, the result is that Chapter 23A may be enforceable in some municipalities but not others.

If you have any further questions, please call me at 217-2667.

c: Susan Tabach, Assistant Chief Administrative Officer