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April 27, 2020

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: House Bill 1479

Dear Governor Hogan:

We have reviewed and hereby approve House Bill 1479, "Calvert County - Subdivision Plats - Stormwater Management Easements," for constitutionality and legal sufficiency." While we approve the bill, we recommend that one provision be amended in the future to clarify the nature of the required easement.

House Bill 1479 sets out the requirements for subdivision plats that are to be recorded in Calvert County. Among the requirements are that the plat include a signed statement that is substantially in the same form as is set out in the bill at page 3, lines 11-20 as follows:

> The platting or dedication of the following described land . . . (insert a correct description of the land subdivided) is with the free consent and in accordance with the desire of the undersigned owners, proprietors, mortgagees, or trustees. Furthermore, the undersigned (the "Grantors") grant the commissioners of Calvert County and their officers, agents, employees, contractors, and subcontractors, a perpetual easement across the subdivided land to access and inspect, and, if necessary, maintain, repair, construct, or reconstruct stormwater management facilities, structures, and devices within this subdivision.

As indicated by this language, and supported by the description in the Fiscal and Policy Note, the intention is to create a perpetual easement on the property. Testimony on the bill from employees of the Calvert County Department of Public Works further reflects that the intent was to create a blanket easement, that is "[a]n easement that, when created, is not limited to any specific part of the servient estate." Black's Law Dictionary (11th ed. 2019) ("floating easement"). A blanket easement is said to be necessary for the county inspections required every three years because modern practices with respect to stormwater facilities involves multiple small facilities rather than the large ponds used previously and thus an inspector must

visit a variety of locations in each subdivision to perform the inspections required by law. The signed statement set out in the legislation, which does not require metes and bounds for the area of the easement itself, supports the conclusion that a blanket easement is intended. *See Atmos Energy Corporation v. Paul*, 2020 WL 1057331, *8 (Tex. App. March 5, 2020) ("a 'blanket easement' is '[a]n easement without a metes and bounds description of its location on the property.'").

House Bill 1479 further provides, at page 3, line 32 to page 4, line 6, that the recordation of a subdivision plat operates to "transfer, in fee simple," to the Board of County Commissioners an easement from every public way, road, and dedication to all storm water facilities, structures, and devices within the subdivision "for any public purpose, including inspection, and, if necessary, maintenance, repair, construction, or reconstruction of stormwater management facilities, structures, and devices within the subdivision." This language is susceptible to a reading that is significantly broader than is indicated either by the required signed statement or the testimony in support of the bill. As a preliminary matter, the language does not only permit access for inspection, and, if necessary, maintenance, repair, construction, or reconstruction of stormwater management facilities, [1] but for "any public purpose." The term "public purpose" is an extremely broad one, and would include uses for which a government would ordinarily have to pay fair market value. *Kelo v. New London*, 545 U.S. 469, 480 (2005).

In addition, the use of the term "fee simple" to describe the easement created could lead to confusion about the nature of the easement. In general, "fee simple" is the broadest property interest in land allowed by law and it endures until the current holder dies without heirs. Black's Law Dictionary (11th Ed. 2019). An "easement" is a "non-possessory interest in the real property of another that can arise either by express grant or implication." *Emerald Hills Homeowners' Association v. Peters*, 446 Md. 155, 162 (2016) and has been described as "one of the most 'complex and archaic bod[ies] of American property law.'" *Id*. at 157. Typically, an interest in the nature of an easement does not indicate an interest in the nature of a fee simple. *In re Condemnation Proceeding by South Whitehall Tp. Authority*, 940 A.2d 624, 628 (Pa. Cmwlth. 2008). Instead, "[a]n easement is a non-possessory interest in land in the possession of another entitling its holder to a limited use or enjoyment of the land in which the interest exists," while "a fee simple absolute interest . . . is a possessory interest which entitles the owner of that interest to exclusive possession of the land itself. *Id*. Maryland courts have adhered to this distinction. *See, e.g., Maryland-National Capital Park and Planning Commission v. McCaw*, 246 Md. 662, 675 (1967) ("When a parcel of land is dedicated as a street or for other public use, the owner of the land retains his fee simple interest, subject to an

[1] While the testimony reflected that the easement is solely for the purpose of inspections, the unfortunate truth is that the failures of Homeowners Associations and other property owners sometimes put the County in the position of performing maintenance, repair, construction, or reconstruction of the stormwater management facilities that they inspect, thus necessitating the inclusion of the language permitting access for maintenance, repair, construction, or reconstruction.

easement for the public"); *Toney Schloss Props. Corp. v. Berenholtz*, 243 Md. 195, 205-206 (1966) ("[T]he dedicator retains the fee and the full right of enjoyment so far as this does not interfere with the dedicated use.").

Courts in some states, however, have found that:

> language mixing an easement and the phrase fee simple simply means that an easement is held in perpetuity and may be disposed of at will, but the deed does not pass the underlying title to land to the grantee. *See, e.g., Englishmans Bay Co. v. Jackson*, 340 A.2d 198, 200 (Maine 1975) (recognizing that the precise interest granted by a right of way deed was "an easement in fee simple"); *McClung v. Sewell Val. R. Co*., 97 W.Va. 685, 127 S.E. 53, 54 (1924) (recognizing that a railroad deed conveyed "an easement in fee simple" but did "not pass the land itself"); *Atlanta, B. & A. Ry. Co. v. Coffee Cty*., 152 Ga. 432, 110 S.E. 214, 215 (1921) (when interpreting an easement granted in fee simple, "[t]he words 'fee simple' are descriptive of the extent of duration of the enjoyment of the easement"); *Buffalo City Mills v. George H. Toadvine Lumber Co*., 150 N.C. 114, 63 S.E. 678, 678-79 (1909) (holding that a "contract to convey an easement in fee simple" could not be construed "as a contract to convey the land itself").

BNSF Ry. Co. v. Chevron Midcontinent, L.P., 528 S.W.3d 124, 134-35 (Tex. App. 2017).

Because Maryland has not, as yet, recognized this language as referring to a perpetual easement rather than a possessory interest in land, it may be advisable to amend the language at a future session to refer to a perpetual easement rather than an easement to be transferred in fee simple to avoid confusion in the future.

Sincerely,

Brian E. Frosh
Attorney General

BEF/KMR/kd

cc: The Honorable John C. Wobensmith
Keiffer J. Mitchell, Jr.
Victoria L. Gruber