

SB1048 Support.pdf

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Position: FAV



February 19, 2024

Miller Senate Office Building
c/o Education, Energy, & the Environment Committee
11 Bladen Street
Annapolis, MD 21401

RE: SB1048

Sir or Madam:

This written testimony serves as my individual support for Senate Bill 1048 (HB0752) regarding the transfer of ownership of fast land created under a tidal wetland permit issued by the Maryland Department of the Environment (MDE).

The 1970 Wetlands Act defines State wetlands as follows:

“State wetlands” means all land under the navigable waters of the State below mean high tide, which is affected by the regular rise & fall of the tide. Such wetlands, which have been transferred by the State by a valid grant, lease or patent or a grant confirmed by Article 5 of the Declaration of Rights of the Constitution of Maryland, shall be considered “private wetland” to the extent so transferred.

By granting a tidal wetlands license, MDE is acquiescing to the relocation of mean high water, and therefore the relocation of the public/private ownership boundary. Acquiescence is an established concept in boundary law, as to unwritten transfers of land ownership. SB1048 appears to codify this concept to eliminate ambiguities in property ownership. Without this transfer of ownership, either by unwritten transfer via acquiescence or fee simple interest transfer by deed, the preparation of a Boundary Survey will require additional research in MDE’s records to establish that the shoreline was created under a tidal wetlands license, and to somehow re-establish the original MHW prior to construction of the living shoreline to show a strip of land owned by the State.

As this bill appears to codify an accepted concept of boundary law, I ask that the committee make a favorable recommendation for SB 1048. If you have any questions or concerns regarding this written testimony, please contact me at 667-204-8042 or wbower@atwell-group.com. Thank you.

Respectfully,

ATWELL, LLC

Annapolis, MD



William Bower, PE, PLS
Sr. Project Manager

SB 1048 MDE OPP.pdf

Uploaded by: Les Knapp

Position: UNF



The Maryland Department of the Environment
Secretary Serena McIlwain
Senate Bill 1048
Environment - Tidal Wetland Permit - Ownership of Land

Position: Oppose
Committee: Education, Energy, and the Environment
Date: February 20, 2024
From: Jeremy D. Baker

The Maryland Department of the Environment (MDE) **OPPOSES** SB 1048. The bill changes the current law regarding ownership of tidal wetlands in connection with the construction of shoreline stabilization measures. The bill requires MDE to transfer in fee simple to the riparian landowner the interest in the land that is landward of the new mean high water line.

Bill Summary

As written, SB 1048 is limited to instances in which a shoreline stabilization measure is constructed pursuant to a tidal wetland permit. Currently, in Title 16 of the Environment Article, permits are only issued for activities occurring in private wetlands, which are already privately owned by the riparian owner. As there is no State-owned submerged land at issue, there is no interest for the Department to transfer interest in real property. Should the language and intent of the bill be updated to reflect State tidal wetlands and the State tidal wetlands licensing procedures and not private tidal wetlands and the private tidal wetlands permit, the proposed bill would have a significant fiscal and operational impact on the Department.

Position Rationale

Maryland does not merely regulate state tidal wetlands, or hold them in public trust as many other states do. Instead, the State has a direct property interest in those lands as successor to the Lords Baltimore. Under Title 16, a person who is the owner of land bounding on navigable water may make improvements into the water in front of the land to preserve that person's access to the navigable water, or protect the shore of that person against erosion. The State has no property claim, rights, or interests on or in the improvement. However, § 16-103(b) of the Environment Article provides that, "[t]he provisions of this title do not transfer the title of ownership of any land or interest in land". This system of the State holding a property interest and a riparian owner holding a right of access has been in place for hundreds of years.

Further, if SB 1048 were to become law, it could have negative impacts on state mapping and planning efforts, including 1) increasing density in the Resource Conservation Area; 2) altering the 100-foot shoreline buffer; and 3) negating the accuracy of updated Critical Area mapping and the 1,000-foot Critical Area boundary.

Finally, the Bill directs MDE to transfer in fee simple such land to the riparian owner. MDE does not have the statutory authority to hold any property on behalf of the State. The title to State wetlands is held by the State, not MDE. Thus, MDE cannot legally transfer that title in fee simple or otherwise to private entities.

For the reasons detailed above, MDE urges an **UNFAVORABLE** report for Senate Bill 1048.

Contact: Les Knapp, Government Relations Director
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SB 1048 [Opposition 2024].pdf

Uploaded by: William O'Connell

Position: UNF

To: Education, Energy, and the Environment Committee (Senate)

From: Legislative Committee of the Real Property Section Counsel

Date: February 19, 2024 [Hearing Date February 20, 2024]

Subject: **SB 1048 – Environment - Tidal Wetland Permit - Ownership of Land**

Position: **Opposed**

The Real Property Section Counsel of the Maryland State Bar Association (MSBA) **opposes Senate Bill 1048 – Environment - Tidal Wetland Permit - Ownership of Land.**

Currently, the Maryland Department of the Environment ('DOE') issues tidal wetland licenses to private landowners to authorize certain activities affecting tidal wetlands including but not limited to shoreline erosion control projects, construction of piers and associated structures, dredging, filling, and shoreline alteration. The law governing wetland use is found in the Environment Article of the Maryland Code § 16-101, et. Seq. and is regulated by the Department of Environment pursuant to COMAR 26.24.

The process of obtaining a license includes a detailed application filed with DOE which includes a drawn plan showing the extent of the proposed activity. The licenses have a three-year duration and do not transfer title in any manner or respect to any filled or submerged land affected by the activities undertaken by the private landowner.

The proposed legislation seeks to require that DOE transfer title in fee to any landowner who obtains a wetland permit for the purpose of shore stabilization. The extent of the proposed conveyance is the 'land that is landward of the mean high tide up to the portion of the land that is stabilized under the permit'.

We oppose this bill for several reasons. First, Maryland law already provides for recovery of land lost by private landowners due to the processes of erosion and avulsion. The Environment Article of the Maryland Code § 16-201(a) provides that a "person who is the owner of land bounding on navigable water is entitled to reclaim fast land lost by erosion or avulsion during the person's ownership of the land to the extent of provable existing boundaries." Therefore, to whatever extent a shoreline stabilization project works to reclaim a certain riparian owner's land lost to erosion or avulsion, the law currently provides that title remains vested in the landowner. To the extent that the proposed legislation seeks to ensure private landowners are not affected by the effects of erosion, avulsion, or other natural processes, the proposed

legislation is unnecessarily duplicative.

Second, a significant part of the impetus for passing the Wetlands Act, Section 16 of the Environment Article, was the legislative history with respect to granting of patent title to submerged lands to riparian owners and the unregulated filling of submerged land. In 1862, the General Assembly passed Chapter 129 of the Acts of 1862 “in order to resolve any doubts about the rights of owners bounding on navigable waters.” Chapter 129 ended the State’s prior practice of patenting lands covered by navigable waters and instead entitled riparian owners to all accretions and relictions both natural and otherwise, and therefore implicitly allowed for artificial filling of navigable waters and wetlands. It also allowed the riparian owner the exclusive right of making improvements into the waters in front of his land, which improvements passed automatically with the title to the fast land.

In short, the law granted riparian owners the right to “wharf-out” from their lands provided such action did not interfere with navigation. The provisions in Chapter 129 were later codified in the now defunct Sections 45 and 46 of Article 54 the Maryland Annotated Code. As filling submerged land became increasingly lucrative and more feasible for riparian owners, the affect on the state’s wetlands became significant and was a large impetus for the passage of the Wetlands Act. To pass the proposed legislation would again open the door for riparian owners to personally benefit from the filling of wetlands and unwind 50 years of positive effects of the Wetlands Act.

Third, the proposed legislation as it currently reads seems to be a veiled process to transfer a significant amount of state land to private, riparian owners with little oversight and/or discretion on the part of the state. In Maryland, the law provides that title to private property binding on tidal or navigable waters extends only to the mean high-water mark. *Owen v. Hubbard*, 260 Md. 146, 153 (1970). Conversely, the State of Maryland holds title to all submerged land under the navigable waters of the state. *See Bd. of Pub. Works v. Larmar Corp.*, 262 Md. 24, 35 (1971). To whatever extent a shore stabilization project by a private landowner purposefully or inadvertently fills previously submerged land, the proposed legislation will necessarily require that the state transfer said land to the private owner. This would have a deleterious effect on the rights of the public to fishing and navigation under the public trust doctrine. Public policy demands that the transfer of public land to private parties be met with higher scrutiny and a greater public benefit.

Finally, the proposed legislation is opaque with respect to the process for transferring title to the land. The tidal wetland permits are not currently recorded in the circuit court. Though there is a searchable repository of wetlands permits on the DOE website, the information is limited. More than a few questions will require clear answers:

1. Does DOE even have authority to transfer state land to private landowners?
2. Will DOE require that tidal wetland permits be recorded with the circuit court?
3. When will title transfer – will DOE execute a deed to a private owner upon approval of the permit or completion of a project? Who will be responsible for recording such a deed?
4. In order to obtain an insurable interest, the private owners will need to obtain ALTA boundary surveys of the newly acquired land – will an ALTA survey be part of the permit process?

5. Will the State Department of Assessments and Taxes records be updated?

For private landowners to benefit from the proposed legislation, the land transferred in fee will need to be insurable by title insurers. For title insurers to properly vet these transfers will at minimum require satisfactory evidence of authority of the transferor(s), recordable instruments conveying title which includes information regarding the approval of the wetland permit, and a boundary survey clearly delineating the boundaries of the property to be transferred. The legislation as proposed does not sufficiently address these title issues regarding how title will transfer and, therefore, the insurability of these transfers.

For these reasons, the Real Property Section Counsel of the MSBA **opposes SB 1048** and asks for an **unfavorable report**. Thank you for your consideration.