

Department of Legislative Services
Maryland General Assembly
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FISCAL AND POLICY NOTE

House Bill 1125

(Delegate Holmes, *et al.*)

Environmental Matters

Stormwater Management - Development Projects - Redevelopment and
Preliminary Plan Approval

This emergency bill defines “redevelopment” as it pertains to the State’s stormwater management regulatory program and establishes specific stormwater standards that redevelopment projects must meet. In general, redevelopment project designs must reduce impervious area by specified amounts and/or provide water quality treatment using environmental site design (ESD) or other measures. To offset those requirements, a developer may make a fee-in-lieu payment to a local government. The bill also grandfathers “development projects” that receive “preliminary plan approval” before May 4, 2010, from complying with stormwater regulations recently adopted by the Maryland Department of the Environment (MDE); for such projects, stormwater management plans are subject to the laws and regulations in effect at the time preliminary plan approval was received.

Fiscal Summary

State Effect: State capital expenditures for construction projects could be affected to the extent that costs under the recently adopted stormwater regulations vary from costs under the older regulatory regime, which may be applicable for any State project grandfathered under the bill; in addition, the bill’s provisions affecting redevelopment are likely to significantly reduce certain State capital costs. The bill may result in an additional operational burden for the Water Management Administration at MDE to revise regulations and alter long-term planning activities.

Local Effect: Local capital expenditures may decrease significantly as a greater share of construction activities qualify as a “redevelopment” activity, which is subject to less stringent stormwater management controls than for “development” activities, and which are made less stringent under the bill. Local capital expenditures are also affected for

jurisdictions that own projects grandfathered by the bill. Any savings may be offset if additional stormwater-related expenditures are necessary to meet federal water pollution requirements, though revenues may also increase from fee-in-lieu payments made under the bill. Local government operations may be significantly affected, and expenditures may increase minimally, to revise stormwater management ordinances and plans in accordance with the bill's changes.

Small Business Effect: Meaningful.

Analysis

Bill Summary: Redevelopment project designs must:

- reduce existing impervious area within the limit of disturbance by at least 20% and up to 50% as determined by a local government after consideration of specified factors;
- provide water quality treatment using ESD, alternative stormwater management measures, or other measures approved by a local government equivalent to those same percentages, as determined by a local government after consideration of specified factors; or
- use a combination of those strategies.

A fee-in-lieu payment made by a developer to offset these requirements must be in an amount determined by the local government and must be used by the local government to create or enhance stormwater management projects.

“Redevelopment” means (1) any construction, alteration, or improvement performed on a site in which existing land use is commercial, industrial, institutional, or residential, including multifamily residential; and (2) the existing site impervious area exceeds 30% or the proposed development is for an affordable housing or a transit-oriented development.

A “development project” includes a development or redevelopment project or any phase of a development or redevelopment project. “Preliminary plan approval” includes (1) an approval of a development plan, a project plan, a sketch plan, a concept plan, or a site plan; (2) an adequate public facilities approval; or (3) any other equivalent local approval.

Current Law: State law requires each county and municipality to adopt ordinances necessary to implement a stormwater management program and to restrict the development of any land unless the landowner has submitted a stormwater management

plan consistent with the local ordinance. The county or municipality has the authority to approve or disapprove stormwater management plans.

In general, a person may not develop any land for residential, commercial, industrial, or institutional use without submitting, and getting approval of, a stormwater management plan from the county or municipality that has jurisdiction. The developer must certify that all land development will be done according to the approved plan. A State or federal agency may not undertake any construction activity unless the agency has submitted and obtained approval of a stormwater management plan from MDE.

Criminal, civil, and administrative penalties apply to violations of the State's stormwater management provisions. Every three years, MDE is required to review the stormwater management programs in the counties and municipalities and monitor their implementation. MDE is also required to provide technical assistance, training, research, and coordination services to local governments in the preparation and implementation of their stormwater management programs.

Chapters 121 and 122 of 2007, among other things, required MDE to establish regulatory requirements regarding the use of ESD in stormwater management practices. In October 2008, MDE proposed regulations to implement the Stormwater Management Act of 2007. The regulations, which were adopted on May 4, 2009, require the use of ESD to the maximum extent practicable in stormwater management practices. "Environmental site design" means using small-scale stormwater management practices, nonstructural techniques, and better site planning to mimic natural hydrologic runoff characteristics and minimize the impact of impervious surfaces from land development. "Maximum extent practical" means designing stormwater management systems so that all reasonable opportunities for using ESD planning techniques and treatment practices are exhausted and, only where absolutely necessary, a structural measure is implemented. The goal of the regulations is to maintain after development as nearly as possible the predevelopment runoff characteristics.

The new stormwater regulations apply to new projects that do not have approved erosion and sediment control and stormwater management plans by May 4, 2010 (one year from the date of the final adoption of the regulations).

Background:

Stormwater an Increasing Problem for the Chesapeake Bay

According to MDE, while nitrogen loading to the Chesapeake Bay from agricultural and wastewater sources in Maryland has been decreasing since 1985, loading from developed areas during that same timeframe has been increasing. MDE's new stormwater regulations are expected to slow down the loading increase.

MDE's Recently Revised Stormwater Regulations

During the regulatory development process and since the adoption of MDE's new stormwater regulations, numerous concerns have been raised by local jurisdictions, developers, and others. In general, those concerns relate to the applicability of the regulations and the associated grandfathering date, the cost and feasibility of ESD in particular situations, potential conflicts of the regulations regarding redevelopment with the State's Smart Growth efforts, and enforcement and long-term maintenance of ESD practices.

MDE advised that, in implementing the regulations, there would be flexibility for case-by-case review that would take local priorities and plans into account. In addition, MDE announced that it would develop additional local guidance regarding the use of variances for exceptional circumstances.

Many of the comments MDE received during the public comment period on the proposed regulations related to grandfathering. The majority of commenters, including local approval authorities, noted that it would be unfair to impose new criteria on projects already approved and that development already under construction would need to be redesigned if no grandfathering were allowed. Based on the comments received and on MDE's past experience, MDE determined that a May 4, 2010 deadline (one year after the adoption of the regulations) was reasonable. This coincides with the time localities have to adopt revised stormwater management ordinances, although it is expected that many local governments will not meet this deadline. Some local representatives and other entities have suggested that the grandfathering provision be extended so as to allow for some projects already in the pipeline to go forward without being subject to the new requirements.

During the public comment period, MDE also received several comments on the proposed changes regarding redevelopment, which increase, from 20% to 50%, the amount of impervious surfaces that must be reduced or an equivalent amount of water quality treatment provided for a project. Several commenters expressed concern that these changes would create a disincentive to future redevelopment projects and discourage smart growth. In response to those comments, MDE advised that the regulations provide flexibility with how the requirements are met, with the ultimate goal to promote redevelopment in urban areas and to achieve water quality improvement without compromising other local initiatives. "Redevelopment" is defined in the regulations as any construction, alteration, or improvement performed on sites where existing land use is commercial, industrial, institutional, or multifamily residential and the existing site impervious area exceeds 40%.

In response to continuing concerns regarding the new stormwater regulations, in March 2010 MDE submitted emergency regulations to the Administrative, Executive, and Legislative Review (AELR) Committee that represent a compromise between MDE and stakeholders on several issues. Among other things, the emergency regulations would allow local governments to incorporate into their ordinances waiver provisions for projects that have completed part of the development review process but have not received final approval by May 4, 2010. The emergency regulations also include guidance that provides local governments greater flexibility in addressing the new stormwater management requirements for redevelopment projects. Among other things, the emergency regulations describe several alternative stormwater management measures that may be considered if addressing 50% of the site's impervious area cannot be accomplished, such as a combination of ESD and on-site or off-site structural best management practices; participation in a stream restoration project; payment of a fee-in-lieu; and a partial waiver of the treatment requirements if ESD is not practicable.

Cost Comparison of Traditional Stormwater Facilities and New ESD Practices

According to the National Research Council (NRC), there is limited data and literature available from which to compare the costs of nonstructural stormwater practices with the costs of traditional stormwater facilities. Costs of both traditional facilities and newer forms of stormwater management practices may also vary greatly based on location and specific characteristics of the project involved. In addition, the two types of stormwater management involve very different types of costs. While traditional, structural facilities may involve lower initial costs for construction and land acquisition, ESD practices generally have lower long-term operation and maintenance costs and may require less future investment in the municipal stormwater system. Overall, NRC concluded that individual controls on stormwater discharges are currently inadequate and recommended that stormwater control must be designed systematically, including the use of both traditional best management practice facilities and modern, nonstructural ESD practices.

State Expenditures: State agencies, like regulated entities, must comply with stormwater management regulations. Thus, State capital expenditures may be affected to the extent that any State construction project is grandfathered under the older stormwater management regulations as a result of this bill. However, it is unclear whether and to what extent State capital costs are affected by this grandfathering provision, as the costs of traditional stormwater practices versus the costs of ESD vary considerably depending on the project. While ESD may require more investment up front for construction and land acquisition, ESD practices generally have lower long-term operation and maintenance costs.

Capital expenditures may decrease as more construction projects qualify for the less stringent measures associated with redevelopment projects. The bill's definition of

redevelopment will allow a greater number of projects to qualify as redevelopment rather than as development activities, which are both currently defined in MDE regulations. Further, the bill lessens the stringency of measures required for redevelopment activities by, among other things, lowering the required reduction in impervious area (or equivalent reductions from qualifying alternative measures) for a redevelopment project from 50%, as required by current MDE regulations, to a minimum of 20%, as determined by a local government.

Local Fiscal Effect: Similar to the impact on State agencies, local capital expenditures are affected to the extent any local projects are grandfathered under the bill, as more local government projects qualify under the bill's definition of redevelopment, and as the cost of redevelopment likely declines under the bill's changes. Local government administrative activities are also affected by the bill, as local governments are responsible for administering stormwater management programs and may be required to revise ordinances and plans to incorporate the bill's changes.

Larger jurisdictions subject to the certain federal Clean Water Act provisions may also be significantly affected by the bill's changes. Stormwater control measures are one of several primary components of the federal regulatory regime designed to address nonpoint source water pollution. Thus, local expenditures may increase significantly for some jurisdictions to the extent that their stormwater planning efforts under the new regulations requiring ESD are disrupted by the bill's grandfathering provisions, as these jurisdictions may no longer be able to incorporate the expected reductions in pollutant loading associated with the new ESD regulations. In this case, a jurisdiction may need to revise its plans to require greater reductions from other sources of water pollution, whether from publicly owned facilities, new or existing industries, or through the implementation of other, potentially more expensive, efforts.

For example, Baltimore City advises that, as a large municipality, it is expecting the cost of compliance with "Phase I" federal stormwater management permit requirements to be about \$300 million over the next five years. Of this amount, about \$30 million is currently expected to be borne by private-sector developers. To the extent that stormwater measures required of private developers are weakened by the bill, Baltimore City will be required to make up the difference by increasing expenditures on stormwater control measures, watershed improvement projects, or more stringent regulation of other private-sector activities. In addition to Baltimore City, four other "large" jurisdictions (Anne Arundel, Baltimore, Montgomery, and Prince George's counties) and five "medium"-sized jurisdictions (Carroll, Charles, Frederick, Harford, and Howard counties) are subject to Phase I permit requirements, and over 60 jurisdictions are subject to lesser Phase II requirements.

It is unclear whether and to what extent any or all of these federally permitted jurisdictions will incur a net increase in expenditures to satisfy federal clean water laws as a result of the bill's relaxation of stormwater management regulations. This uncertainty is due in part to the flexibility granted by the bill. For instance, the bill grants to jurisdictions such as Baltimore City the authority to seek a fee-in-lieu payment from a developer in an amount determined by the local government. Thus, if Baltimore City is in jeopardy of failing to satisfy certain federal permit requirements under the bill, it may seek to recoup any loss of private-sector contributions to its permit goals by requiring a fee-in-lieu payment in an amount necessary from developers. In this way, the bill confers a degree of flexibility for local governments and developers to determine how to meet clean water goals in the most cost-effective manner. However, Legislative Services advises that the new ESD regulations that take effect May 4, 2010, as well as the older regulations, also provide varying degrees of flexibility for local governments to ensure that development and redevelopment activities cost-effectively satisfy stormwater requirements as well as other priorities and legal requirements. In addition, the emergency regulations recently submitted to the AELR Committee also provide flexibility for local governments through the use of fee-in-lieu payments and the consideration of other local and State goals.

Small Business Effect: The bill has a meaningful benefit on small business developers, construction firms, and other associated contractors to the extent that (1) the bill's grandfathering provision enables some projects to go forward without being redesigned; or (2) additional construction activities qualify as redevelopment rather than development and benefit from the less stringent stormwater regulations pertaining to redevelopment activities. As noted above, although the initial costs to implement ESD may be higher than traditional stormwater methods, over time, MDE's new regulations are anticipated to be cost-neutral or possibly even less costly, particularly from lower maintenance costs. By grandfathering certain projects, developers may benefit in the short term, while the owners or operators of the developed property may incur additional maintenance-related costs in later years.

The bill may have a meaningful adverse impact on small businesses engaged in the design and construction of ESD practices as a result of the grandfathering provision and from relaxing the regulations governing redevelopment activities; less stringent regulations may result in the incorporation of fewer ESD practices in redevelopment projects.

Additional Comments: Legislative Services advises that the U.S. Environmental Protection Agency (EPA) is in the process of developing new stormwater regulations. Although the new stormwater regulations are to apply nationwide, EPA has specified the Chesapeake Bay as one of five primary federal concerns. In addition, EPA guidance documents focus extensively on the use of nontraditional, nonstructural stormwater

practices, components of which are currently set forth in the new ESD regulations. Currently, EPA anticipates final action on the stormwater management regulations in late 2012. Further, pursuant to a federal court order, EPA has begun the process of establishing a comprehensive nutrient budget for the Chesapeake Bay watershed, known as Total Maximum Daily Load. In order to complete this, MDE is required to submit a watershed implementation plan to EPA by June 1, 2010. Thus, federal regulatory efforts may require MDE to readopt ESD regulations, or another more stringent framework of stormwater regulation, despite the bill's changes.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Kent, Montgomery, and Worcester counties; Baltimore City; Maryland Department of Planning; Maryland Department of the Environment; U.S. Environmental Protection Agency; National Research Council; Department of Legislative Services

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