

Department of Legislative Services
Maryland General Assembly
2011 Session

FISCAL AND POLICY NOTE

House Bill 1107

(Delegate Lafferty, *et al.*)

Environmental Matters

Sustainable Growth and Agricultural Preservation Act of 2011

This bill prohibits the approval of a residential “major subdivision” that will be served by an on-site sewage disposal (septic) system or the approval of a residential “minor subdivision” that will be served by a septic system that does not use nitrogen removal technology. The bill also prohibits the further subdivision of any parcels of land resulting from a minor subdivision of residential land. A major subdivision is one that results in five or more new lots, plats, building sites, or other divisions of land; a minor subdivision results in fewer than five lots, plats, sites, or other divisions. The prohibitions take effect July 1, 2011, subject to certain exceptions.

The bill takes effect June 1, 2011.

Fiscal Summary

State Effect: Special fund revenues decrease beginning in FY 2012 to the extent that the development and sale of residential properties decreases under the bill’s restrictions. State expenditures (all funds) associated with achieving various Chesapeake Bay restoration goals and mandates may decrease to the extent that the bill results in a significant reduction in nutrient effluent from septic systems and stormwater runoff. Annuity Bond Fund revenues may decrease beginning in FY 2012 to the extent that the total assessable base of residential property is lower than it would otherwise be in the absence of the bill’s restrictions. General fund expenditures increase by \$67,100 in FY 2012 for the Maryland Department of the Environment (MDE) to hire an additional engineer; by FY 2016, ongoing MDE special fund expenditures total \$75,900.

Local Effect: Local government revenues decrease beginning in FY 2012 due to a decrease in the collection of local taxes and fees associated with the development, sale, or value of new residential property. Local expenditures may increase beginning in

FY 2012 for additional personnel to oversee the installation and maintenance of community sewerage systems, shared facilities, and septic systems with nitrogen removal technology. Local expenditures may decrease due to the provision of fewer services associated with residential development and infrastructure. **This bill imposes a mandate on a unit of local government.**

Small Business Effect: Meaningful.

Analysis

Bill Summary: After July 1, 2011, the State or a local authority may not record or approve a residential *major* subdivision that will be served by a septic system. Instead, a residential major subdivision must be served by a publicly owned sewerage system, or a community sewerage system, a shared facility, or a multiuse sewerage system, that meets specified conditions. The community sewerage system, shared facility, or multiuse sewerage system must be managed, operated, and maintained by a controlling authority or a third party under contract with the controlling authority. “Controlling authority” is defined as a unit of government, a public corporate body, or an intercounty agency authorized by the State, a county, or a municipality to provide for the management, operation, and maintenance of a community sewerage system, shared facility, or multiuse sewerage system.

Additionally, the community sewerage system, shared facility, or multiuse sewerage system must discharge to surface waters in accordance with an MDE discharge permit or through land application under a nutrient management plan that assures that 100% of the nitrogen and phosphorus in the applied effluent will be taken up by vegetation.

After July 1, 2011, the State or a local authority may not record or approve a residential *minor* subdivision that will be served by a septic system unless the system uses nitrogen removal technology.

After July 1, 2011, if a tract or parcel of land is subdivided into a residential minor subdivision leaving any remainder parcel or tract of land, the residential minor subdivision may not be resubdivided or further subdivided, and the remainder parcel or tract of land may not be subdivided. Also, the plat of the residential minor subdivision must state that the residential minor subdivision may not be resubdivided or further subdivided and that the remainder parcel or tract of land may not be subdivided.

Exempt from the bill’s prohibitions are applications for subdivisions made before January 1, 2011, if the plat is recorded before July 1, 2012, and applications made on or after January 1, 2011, if the plat is recorded before June 1, 2011.

The bill redefines “subdivision” by including “resubdivision” and specifies that a change in street lines or lot lines qualifies as a subdivision unless the Secretary of the Environment determines that the change will not adversely affect the safety and adequacy of well sites or sewage disposal areas of the lot or adjacent lots. The bill also repeals an exemption from the definition of a subdivision that applies to a division into parcels of more than three acres of land for agricultural purposes, which does not involve any new street or easement of access; also repealed are similar exemptions relating to agricultural divisions of land in Carroll County.

Current Law/Background:

County Sewerage Planning

State water supply and sewerage regulations express intent that all subdivisions developed in the State are served by an adequate community water supply and community sewerage system or, when developed in the absence of such systems, provide for an adequate and safe supply of drinking water and for the safe disposal of sewerage on each building site until such community systems are available.

Each county must have a county plan or a plan with adjoining counties, approved by MDE, that deals with water supply systems, sewerage systems, solid waste disposal systems, solid waste acceptance facilities, and the systematic collection and disposal of solid waste. A county governing body must conduct a public hearing before any adoption, revision, or amendment of its county plan. Any adoption, revision, or amendment also must be submitted to each official planning agency with jurisdiction in the county for review and comment. The county planning agency must certify that the adoption, revision, or amendment is consistent with the county comprehensive plan.

Smart Growth

Article 66B of the Maryland Annotated Code governs zoning and planning in the State and gives significant authority to local governments. Two laws provide for additional State involvement: the Maryland Economic Growth, Resource Protection, and Planning Act of 1992 (the Planning Act); and the Smart Growth and Neighborhood Conservation Act of 1997 (Priority Funding Areas Act).

The Planning Act articulates the State’s growth policy through several visions – which were updated by Chapters 176 and 177 of 2009 – that seek to concentrate development in suitable areas, protect sensitive areas, and establish funding mechanisms to achieve the visions. The Act also requires local jurisdictions to address these same visions in their comprehensive plans. All local jurisdictions, with few exceptions, incorporated these

visions into their comprehensive plans on or before July 1, 1997. Under the Act, local governments are required to review, and if necessary, update their plans once every six years. In addition, the Act requires all local jurisdictions to adopt ordinances and regulations that implement the planning visions and are consistent with the local comprehensive plan.

The State sought to strengthen its efforts to control sprawl, enhance land use, and control pollution with the Priority Funding Areas Act. This Act directs State funding for growth-related infrastructure to priority funding areas (PFAs), providing a geographic focus for State investment in growth. PFAs are existing communities and places where local governments want State funding for future growth. Growth-related projects include most State programs that encourage growth and development such as highways, sewer and water construction, economic development assistance, and State leases or construction of new office facilities. The Act legislatively designated certain areas as PFAs and established criteria for locally designated PFAs.

In 2009, three smart growth planning bills were enacted into law that strengthened the State's smart growth policy foundation. Chapters 176 and 177 of 2009 established 12 State planning visions, required local and statewide reports on adequate public facilities ordinances, and authorized local jurisdictions to establish Transfer of Development Rights programs within PFAs. Chapters 178 and 179 of 2009 require local planning commissions or boards to submit annual reports to local legislative bodies that specify which ordinances or regulations were adopted to implement the State's planning visions, contain information on growth, and density of growth both inside and outside PFAs. Chapters 180 and 181 of 2009 clarify and reiterate that local jurisdictions must implement and follow the comprehensive plan each adopts by clarifying the link between local comprehensive plans and local land use ordinances.

Agricultural Land Preservation

The Maryland Agricultural Land Preservation Program, which was established by the General Assembly in 1977, purchases agricultural preservation easements that restrict development on prime farmland and woodland in perpetuity. In addition to funding from the State transfer tax, the program is funded with agricultural land transfer taxes, local matching funds, U.S. Department of Agriculture Federal Farmland Protection Program funds, and, in some years, general obligation bond funds. As of January 2010, the program had cumulatively purchased or had a pending contract to purchase conservation easements on 2,079 farms covering 283,169 acres.

In 2002, the General Assembly passed a resolution that set a goal for the State to preserve three times the existing number of acres of productive agricultural land by the year 2022 under the Maryland Agricultural Land Preservation Foundation, Rural Legacy, and other

preservation programs. As of January 1, 2010, 54% of that goal had been achieved with 554,285 farmland acres protected under these various programs.

Nitrogen Removing Septic Systems

Chapter 428 of 2004 established the Bay Restoration Fund, which is administered by the Water Quality Financing Administration within MDE. The main goal of the fund is to provide grants to owners of wastewater treatment plants (WWTPs) to reduce nutrient pollution to the Chesapeake Bay by upgrading them with enhanced nutrient removal (ENR) technology. The fund is financed by a bay restoration fee (generally \$30 annually) assessed on WWTP users and users of septic systems and sewage holding tanks.

Of the BRF revenue collected from users of septic systems and sewage holding tanks, 60% must be deposited into a separate account commonly referred to as the Septics Account to provide grants and loans to septic system owners for the upgrade of their septic systems, and to implement an education and outreach program. Originally, grants and loans made from funds within the Septics Account were used to cover up to 100% of the cost of repairing, replacing, or upgrading a septic system to a system utilizing best available technology for nitrogen removal (BAT) or for covering the difference in cost between a new conventional system and one utilizing BAT; currently, MDE utilizes income-based grants to distribute funding to some grant recipients. Chapters 225 and 226 of 2008 expanded the uses of the Septics Account to include covering the cost of replacing multiple septic systems in the same community with a new community sewerage system that meets ENR standards and other specified conditions.

Chapter 280 of 2009 prohibits a person from newly installing or replacing a septic system on property in the Critical Area unless the installed system utilizes BAT. MDE is required to assist homeowners in upgrading a septic system with money authorized for this purpose from the Septics Account if sufficient funds are available; Chapter 382 of 2010 requires MDE, through calendar 2012, to pay 100% of the cost difference between a conventional septic system and a system utilizing BAT for those homeowners required to replace a failing system in the Critical Area under Chapter 280 of 2009. In addition, Chapter 280 of 2009 created a subtraction modification against the personal income tax for the cost of upgrading a septic system, less any assistance provided, for anyone required to install a BAT system under that Act. MDE also plans to connect 930 failing septic systems to WWTPs with ENR technology. Current funding is sufficient to connect 704 failing systems by the end of 2011.

Federal Chesapeake Bay Restoration Plans

The federal Clean Water Act requires states to designate intended uses for their water bodies, such as swimming and fishing, and to set water quality standards to achieve these uses. Water bodies that do not meet the water quality standards are designated as *impaired* and are assigned a Total Maximum Daily Load (TMDL) or “pollution diet,” which (1) sets the maximum amount of pollution that the water body can receive and still attain water quality standards; and (2) identifies specific pollution reduction requirements among the various contributing sources.

The U.S. Environmental Protection Agency (EPA) has been working with watershed states and the District of Columbia to develop a Chesapeake Bay TMDL since 2000 in order to prepare for a federal court-ordered deadline established by several consent decrees. The effort was also significantly reinvigorated by the signing of Executive Order 13508 by President Obama in May 2009. In May 2010, EPA committed to establishing a final bay TMDL, which it released on December 29, 2010. Working with EPA, each watershed state and the District of Columbia completed a final Phase I watershed implementation plan (WIP). The WIPs, which were released in December 2010 after a public comment period, are intended to provide a roadmap for how each jurisdiction will achieve and maintain its share of the bay TMDL.

Maryland’s WIP builds on existing State-directed restoration efforts and identifies strategy options to reduce nitrogen and phosphorus from all major sources, such as wastewater, stormwater runoff, septic systems, agriculture, and air pollution. As part of its WIP, MDE has estimated that 3,000 septic system upgrades in Maryland will be completed through calendar 2011 and is planning to upgrade 600 systems annually from 2012 to 2017, with a goal of upgrading a total of 5,700 systems between 2010 and 2017. The upgrades planned for 2012 through 2017 are estimated to provide an annual nitrogen reduction to the Chesapeake Bay of 51,186 pounds as part of Maryland’s commitment to the federal Chesapeake Bay TMDL, which is currently reflected in the final Phase I WIP. This amounts to less than 1% of the total nitrogen reduction needed to meet the WIP requirement for 2017. However, the overall contribution of septic system upgrades to achieving the final nitrogen reduction requirement in WIP is much greater, at about 15% of the final 2020 target load.

State Revenues: Legislative Services advises that a reliable estimate of the bill’s fiscal impact cannot be made at this time; however, the cumulative effect of the bill’s various prohibitions is likely a significant decrease in residential development in the short term and a potential return to current and expected future growth rates in residential development over the long term, albeit under a different geographic distribution. Maryland Department of Planning (MDP) data show that over 4,000 residential parcels were developed outside of PFAs in 2007, representing about 29% of all single-family

residential development. A 2011 report from the Abell Foundation shows that the long-term average share of single-family residential development that occurs outside of PFAs is roughly 25%. In addition, MDP has estimated that, at the current pace and under the current pattern of residential development, about 560,000 acres of new land will be developed by 2030.

The bill prohibits the approval of major subdivisions served by septic systems, which may effectively prohibit a significant number of residential developments of certain sizes and in certain locations due to the prohibitive cost of either extending sewer lines or constructing new community sewerage systems and shared facilities, and due to various restrictions from State and local zoning and environmental regulations and policies. Assuming major subdivisions primarily occur outside of PFAs and areas where existing infrastructure exists, the bill will likely lead to a significant decrease in the number of major subdivisions in Maryland. It is unlikely that the loss in residential development associated with major subdivisions will be offset by a shift to development within urban areas in the short term.

Any shift in residential development patterns from major subdivisions to minor subdivisions is complicated by the bill's requirement to utilize septic systems with nutrient removal technology. The typical additional cost of a septic system utilizing nutrient removal technology is about \$13,000. While this may significantly increase the cost of a single-family home, it is likely less than the increase in cost per unit attributed to constructing a new community sewerage system or shared facility, except in large subdivisions; the construction cost of such systems may exceed \$1 million, plus \$10,000 annually for operation and maintenance. The impact on residential development in minor subdivisions is further complicated by the bill's prohibition on the resubdivision or further subdivision of lots in minor subdivisions, which will eventually and gradually restrict the availability of land for residential development outside of urban areas.

These various restrictions may significantly reduce residential development overall in the short term. Thus, State transfer tax revenues likely decrease minimally in fiscal 2012 and more significantly in the next several years due to the development and sale of fewer residential properties. The State and most counties impose a transfer tax. The State transfer tax rate is 0.5% of the consideration payable for an instrument of writing conveying title to, or a leasehold interest in, real property (0.25% for first-time Maryland homebuyers). The transfer tax primarily funds Program Open Space, which is administered by the Department of Natural Resources and provides funds for State and local conservation acquisitions and development of public outdoor recreational sites, facilities, and open space. It also funds the Maryland Agricultural Land Preservation Program. The decline in fiscal 2012 may be minimal due to the bill's various exemptions for subdivision applications that are filed and recorded before certain dates.

To the extent that the bill's restrictions reduce the assessable base of residential property in the State, property tax revenues decrease for the Annuity Bond Fund. It is unknown whether or when this may occur. While the bill's restrictions are likely to cause a reduction in the level of development of new residential property, it is uncertain whether the total *value* of residential property will decrease. To the extent that the demand for housing in Maryland remains constant, any decrease in the number of future homes built may be fully reflected in an increase in the value of the current housing stock, resulting in no change in the assessable base. Thus, it is unknown whether Annuity Bond Fund revenues are affected. Legislative Services advises, however, that any increase in the value of current residential properties may have a detrimental impact on the availability of affordable housing in Maryland.

Any decrease in residential development may also result in a minimal decrease in special fund revenues for the Circuit Court Real Property Records Improvement Fund, which consists of surcharges assessed on instruments recorded in the land records and the financing statement records, document copying revenues, and accumulated interest revenue.

Although the bill takes effect June 1, 2011, it is assumed that it has no impact on State revenues in fiscal 2011.

State Expenditures: State expenditures (all funds) associated with various programs designed to restore the Chesapeake Bay or achieve other environmental goals, or to comply with various local, State, or federal environmental laws, such as the Chesapeake Bay TMDL, may decrease. The bill is likely to result in a significant reduction in nutrient loads to the Chesapeake Bay watershed as fewer septic systems are installed, a greater share of new septic systems utilize nutrient removal technology, and a decrease in residential development that would otherwise result in the creation of new impervious surfaces.

General fund administrative expenditures increase by \$67,119 in fiscal 2012, which assumes a 30-day start-up delay. This estimate reflects the cost for MDE to hire an additional engineer to oversee the permitting of new community sewerage systems and shared facilities serving major subdivisions. This estimate includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Position	1
Salary and Fringe Benefits	\$61,389
Other Operating Expenses	<u>5,730</u>
Total 2012 MDE Administrative Expenditures	\$67,119

Future year expenditures reflect 4.4% annual salary increases and 3% employee turnover as well as 1% annual increases in ongoing operating expenses. If the number of proposed community sewage systems and shared facilities is less than currently anticipated, the position may not be needed. If it is higher, additional staff may be needed.

Although the bill takes effect June 1, 2011, State expenditures are not affected in fiscal 2011.

Local Revenues: As discussed above, to the extent that the bill's restrictions reduce the level of residential development in the State, local property taxes, transfer taxes, building excise taxes, development impact fees, recordation and subdivision plat fees, and other taxes and fees decrease beginning in fiscal 2012. The rate and timing of any such decrease is unknown.

Any decrease in new residential development will disproportionately affect jurisdictions where nonurban residential development is most prevalent. Areas in which residential development is predominately concentrated in PFAs may experience the smallest decline in development in the short term, and may experience the most growth in the long term under the bill. It is unknown when builders, developers, and State and local governments will fully adjust to the bill's restrictions such that overall residential development returns to levels reflecting current or expected trends. As an example of the bill's potential impact on local revenues, Garrett County advises that various local revenues may decrease by roughly \$200,000 in fiscal 2012 and by roughly \$400,000 by fiscal 2016.

Local Expenditures: As some of the fees and taxes associated with residential development are used to cover the cost of regulating new residential development and providing public infrastructure to support such development, local expenditures associated with residential development may also decrease.

Local expenditures may also increase beginning in fiscal 2012 for additional personnel to oversee the installation and maintenance of community sewerage systems, shared facilities, and septic systems with nitrogen removal technology. For example, Baltimore County advises that the periodic inspection of public and community sewerage systems will most likely increase over time and will most likely result in additional costs. Howard County advises that, while it may be tasked with operating and maintaining community sewerage systems and shared facilities as a controlling authority under the bill, the additional expenditures will be passed through to homeowners in the affected subdivisions at costs of between \$7,000 and \$10,000 per home annually.

Small Business Effect: The bill is expected to have a meaningful adverse impact on small business residential developers, homebuilders, and associated contractors. In addition, small business septic system installers may generally incur a meaningful loss in

sales; however, septic system contractors that specialize in systems with nutrient removal technology may benefit.

Additional Information

Prior Introductions: None.

Cross File: SB 846 (Senator Pinsky, *et al.*) - Education, Health, and Environmental Affairs.

Information Source(s): Baltimore, Garrett, and Howard counties; City of Rockville; State Department of Assessments and Taxation; Maryland Department of Agriculture; Department of Natural Resources; Maryland Department of Planning; Maryland Department of the Environment; Judiciary (Administrative Office of the Courts); Secretary of State; Abell Foundation; Homebuilders Association of Maryland; Department of Legislative Services

Fiscal Note History: First Reader - March 10, 2011
mc/lgc

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