

CITY OF BALTIMORE

STEPHANIE RAWLINGS-BLAKE, Mayor

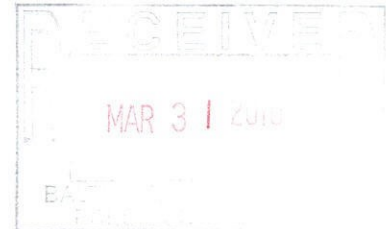


DEPARTMENT OF LAW

GEORGE A. NILSON, City Solicitor  
101 City Hall  
Baltimore, Maryland 21202

March 31, 2010

The Honorable President and  
Members of the Baltimore  
City Council  
c/o Karen Randle, Executive Secretary  
409 City Hall  
Baltimore, MD 21202



RE: City Council Bill 10-0434 – Stormwater Management

Dear President and City Council Members,

You have requested that the Law Department review for form and legal sufficiency City Council Bill 10-0434. The bill would modify the provisions governing stormwater management to comply with the new requirements of State law; require the development, review and approval of phased plans for stormwater management; establish certain minimum control requirements to manage stormwater by using environmental site design to the maximum extent practicable; require certain site design techniques and certain structural and nonstructural practices; require certain reports and inspections; provide for certain exemptions, waivers and variances; impose certain fees; define and redefine certain terms and correct and clarify related language. The bill provides for a special effective date.

Maryland law grants the authority to local jurisdictions to implement stormwater management programs and contains the parameters within which to do so. *See* Md. Code Ann., Envir. § 4-201 *et. seq.* Maryland's Stormwater Management Act of 2007 ("the Act") necessitated certain changes to these laws, specifically, the Act requires that environmental site design (ESD) be implemented to the maximum extent practicable (MEP) through the use of nonstructural best management practices and other better site design techniques. *See* <http://www.mde.state.md.us/Programs/WaterPrograms/> (Maryland Department of the Environment's website). ESD is defined in the Act and the introduction to MDE's Model Ordinance as "...using small-scale stormwater management practices, nonstructural techniques, and better site planning to mimic natural hydrologic runoff characteristics and minimize the impact of land development on water resources." MDE is currently in the process of implementing the Act through changes in its regulations, the 2000 Maryland Stormwater Design Manual and other state guidelines. The regulations promulgated by Maryland's Department of the Environment (MDE) pursuant to the statute can be found in Title 26, Subtitle 17, Chapter 2 of the Code of Maryland Regulations (COMAR). These regulations became effective May 4, 2009 and require that drafts of local ordinances implementing the Act be reviewed by MDE and adopted (with MDE's suggested revisions) by May 4, 2010. COMAR 26.17.02.03.

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MDE's new regulations also state that unless "final approval" has been received on a project by May 4, 2010, the project must comply with the new regulations. COMAR 26.17.02.01. This requirement caused political debate between developers, environmentalists and regulators who disagree as to when and how projects should be "grandfathered" and when it would be reasonable to require a project already in the "pipeline" to comply with the new, stricter, arguably more costly regulations. There were also areas of other concern including the impact of the new laws on redevelopment and Smart Growth. State legislation was introduced to address these concerns in the form of HB 1125.

### HB1125

HB1125 grants local jurisdictions the authority to incorporate waiver provisions into their ordinances to address grandfathering, redevelopment or other circumstances which prevent the reasonable application of the new MDE regulations.

#### Redevelopment:

It defines redevelopment as: "(1) any construction, alteration, or improvement performed on a site in which existing land use is commercial, industrial, institutional, or multifamily residential; and (2) the existing impervious area of the site exceeds 40%." This definition is identical to current MDE regulations. *See* COMAR 26.17.02.02. HB1125 requires redevelopment projects to reduce impervious area within the disturbance by at least 50%, implement ESD to the MEP for at least 50% of the area within the disturbance OR use a combination of stormwater strategies which reduce the impervious area or implement ESD to the MEP for at least 50% of the area. The law then grants local jurisdictions the authority to permit the use of alternative stormwater management measures if the developer demonstrates that the reduction of impervious area and ESD have both been implemented to the MEP but the requirements previously discussed still cannot be met. HB1125 then grants local governments discretion with regard to which of these alternatives is used. It states that "on-site structural best management practices; (ii) off-site structural best management practices to provide water quality treatment for an area greater than or equal to 50% of the existing site impervious area; or (iii) a combination of impervious area reduction, environmental site design, and on-site or off-site structural best management practices for an area greater than or equal to 50% of the existing site" may be used. These requirements are almost identical to the current MDE regulations implementing the Act. *See* COMAR 26.17.02.05.

HB1125 then provides a third option if developers demonstrate that these requirements still cannot be met. The current MDE regulations also provide this option, but the list of alternatives is shorter and slightly different. HB1125 outlines the alternatives in a prioritized list. They include "(i) a combination of impervious area reduction, environmental site design, and on-site or off-site structural best management practices; (ii) retrofitting, including existing best management practice upgrades, filtering practices, and implementation of off-site environmental site design; (iii) participation in a stream restoration project; (iv) pollution trading with another entity; (v) design criteria based on watershed management plans developed in accordance with regulations adopted by the department; (vi) payment of a fee-in-lieu; or (vii) a partial waiver of the treatment requirements if environmental site design is not practicable." The local body is

then directed to, after it has determined that ESD has been implemented to the MEP, consider the priority the law gives to the alternatives listed above. Finally, the law states that at this point in the process the local body MAY consider whether the redevelopment project is located in an area designated as a priority funding area under State law; a transit oriented development area under State law; or a base realignment and closure revitalization and incentive zone under State law. It MAY also consider whether the redevelopment project is necessary to accommodate growth consistent with the comprehensive plan for the area where the development project will be located; or whether financing has been secured based on an approval of a redevelopment plan by the local body. These alternative considerations vary from current law, but a careful reading shows that these considerations are discretionary and not mandatory.

#### Grandfathering:

As stated previously, current COMAR regulations require that projects not receiving final approval by May 4, 2010 comply with the new regulations implementing the Stormwater Act of 2007. HB1125 permits the local body to grant a waiver for projects receiving “preliminary approval” on or before May 4, 2010 and provides various expiration dates for the waivers depending upon the stage of the project in the local approval process. It defines “preliminary project approval” as “preliminary approval by an approving body made as part of a local preliminary development or planning review process that includes: (1) the proposed: (i) number of dwelling units or lots; (ii) project density; and (iii) size and location of all planned uses of the development project; (2) plans that identify: (i) proposed site drainage patterns; (ii) the location of all points of discharge from the site; and (iii) the type, location, and size of all stormwater management measures based on site-specific stormwater management calculations; and (3) any other information required by the approving body, including: (i) the proposed alignment, location, and construction type and standard for all roads, access ways, and areas of vehicular traffic; (ii) a demonstration that the methods for delivering water and wastewater service to the development project are adequate; or (iii) the size, type, and general location of all proposed wastewater and water system infrastructure.”

This is not a comprehensive summary of HB1125, but only focuses on the two main issues of redevelopment and grandfathering waivers. HB1125 also addresses quantitative and qualitative control waivers.

#### MDE’s Approval Process

In accordance with the changes required by the Act, as mentioned above, the MDE has issued a Model Ordinance to be used as a guide for municipal governments to use in implementing these changes on the local level. Although local ordinances may be customized to account for local conditions, implementing ESD to the MEP must be “the overriding goal that pervades all typical decisions made.” Baltimore City complied with the November deadline and submitted a draft ordinance for MDE review. MDE reviewed the draft and returned comments to the City in a letter dated January 8. The City submitted a new draft ordinance (which varies from City Council Bill 10-434) incorporating MDE’s comments on March 28. Since the law must be approved by MDE to be effective, the current First Reader version of the bill must be amended to replicate the final version receiving approval by MDE. The Law Department defers

to Legislative Reference (which was involved in the drafting of both versions) for these amendments, but can assist in the drafting if needed.

City Council Bill 434 must also be amended to reflect the changes incorporated into State law in HB1125, which is currently pending passage by the Senate. Once the bill passes the Senate (assuming it does) the effective date of the legislation will depend on the date the Governor signs the bill since it is an emergency measure (effective immediately upon enactment). This presents a challenge since the bill must go through these pending changes mandated by state law to be effective, but the ordinance must be adopted locally by MDE's May 4 deadline. MDE states on its website that the emergency regulations once contemplated by MDE to address the same concerns that HB1125 addresses "will not affect the requirement for local jurisdictions to adopt modified ordinances by May 4, 2010...The Department will develop Model Ordinance language and work with local jurisdictions to accommodate these new grandfathering and waiver provisions. The Department will exercise discretion during its review of local stormwater programs who are making a good faith effort to reach the May 4, 2010 deadline." The website has not been updated, but it seems as though the same "discretion" will be exercised with regard to the changes HB1125 would require should it pass.

Any variations from the requirements of state law with regard to Baltimore's stormwater program must be approved by MDE. MDE is authorized to take legal action ordering compliance and or any sanctions authorized by law. COMAR 26.17.02.03. Therefore, the bill must be amended to reflect MDE's approved version, the emergency legislation of HB1125 as of its effective date (which is currently unknown) and any further variations from state law require MDE approval.

Subject to the above, the Law Department approves City Council Bill 10-0434 for form and legal sufficiency.

Sincerely yours,



Ashlea H. Brown  
Assistant Solicitor

cc:

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