

CITY OF BALTIMORE

STEPHANIE RAWLINGS-BLAKE, Mayor

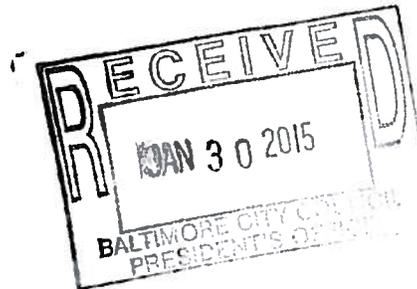


DEPARTMENT OF LAW

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

January 29, 2015

The Honorable President and Members  
of the Baltimore City Council  
Attn: Executive Secretary  
Room 409, City Hall  
100 N. Holliday Street  
Baltimore, Maryland 21202



Re: City Council Bill 14-0448 – Natural Resources – Soil Erosion and Sediment Control – Delegation of Hearing Authority

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 14-0448 for form and legal sufficiency. The bill attempts to standardize the administrative hearing requirements across several different provisions of the Natural Resources Article of the City Code: floodplain management, stormwater management and soil erosion and sediment control. Currently, for floodplain and stormwater, the Director of the Department of Public Works (“DPW”) may delegate to a hearing officer the authority to issue proposed or final findings of fact and conclusions of law. However, in the case of sediment control, the current code does not give the Director of Public Works the authority to delegate to a hearing officer the ability to make *final* findings of fact or conclusions of law, only proposed findings. Thus, for sediment control, only the DPW Director can issue the final administrative decision of the Department and the Director must review and consider the hearing officer’s proposed findings and conclusions before issuing that final decision.

Although there may be merit to harmonizing these provisions if possible, what the Director of DPW may delegate to a hearing officer must be permitted under the state laws that give the City the power over these particular subjects. Soil Erosion and Sediment Control are governed by Title 4, Subtitle 1 of the Environment Article of the Maryland Code. Section 4-101 sets forth the General Assembly’s purpose in uniform state-wide soil erosion and sediment control implementation:

To protect the natural resources of the State, the Secretary of the Environment, in consultation with the Secretary of Natural Resources shall adopt criteria and procedures for the counties and the local soil conservation districts to implement soil erosion control programs. These procedures may provide for departmental review and approval of major grading, sediment, and erosion control plans.

Fav upon  
approval of MDE

These procedures shall provide that the Department of the Environment conduct periodic inspections and review of the implementation by the counties and the local soil conservation districts of these control plans.

Md. Code, Env., §4-101.

A similar goal of state-wide uniformity in implementation is not contained in Title 4 (stormwater) or Title 5 (floodplain management) of the Environmental Article of the Maryland Code. See Md. Code, Env., §§4-201; 5-802; see also 44 C.F.R. 59.24 (floodplain management governed extensively by federal law).

State law concerning soil erosion and sediment control mandates that the Maryland Department of the Environment (“MDE”) assist local governments “in preparing and implementing a unified sediment control program under this subtitle.” Md. Code, Env., §4-107. The State has gone so far as to require that MDE be a part of the local ordinance drafting process: “Each county or municipality shall adopt grading and building ordinances necessary to carry out the provisions of this subtitle, with the assistance of the Department of the Environment and the appropriate soil conservation district.” Md. Code, Env. §4-103(b). “The Secretary of the Environment shall delegate enforcement authority under this subtitle to any county or municipality which is found capable of enforcing compliance with the provisions of this subtitle, or is found to have enforcement capability within that jurisdiction *which is comparable to that of the Department in terms of laws and procedures*, manpower, equipment, and overall effectiveness.” Md. Code, Env. §4-103(e)(2)(emphasis added).

Because of the state law’s emphasis on MDE involvement, MDE’s regulations require that it “shall be responsible for the implementation and supervision of the erosion and sediment control program established by the Sediment Control Subtitle. This responsibility includes but is not limited to”, “review and approval of . . .County erosion and sediment control ordinances” as well as “Municipal erosion and sediment control ordinances,” and “Determinations on the delegation of enforcement authority.” COMAR 26.17.01.02.A. MDE’s review of the City’s practice for sediment and erosion control will include assuring that the City’s process is effective and addresses citizen complaints timely. COMAR 26.17.01.02.C(d). Thus, a “county, a municipality or the Commission may seek delegation of enforcement authority from the Secretary to enforce compliance with the provisions of the following: (1) This chapter; (2) *An approved erosion control ordinance*; (3) Approved erosion and sediment control regulations; and (4) Approved erosion and sediment control plans.” COMAR 26.17.01.03 (emphasis added). Because MDE can only delegate the authority to the City to enforce “approved erosion control ordinances,” DPW made sure that the text of the ordinance as heretofore enacted meets with MDE’s approval.

MDE’s review of the City’s ordinance will determine if the City’s “practices adopted and used” are “consistent with the guidelines and regulations adopted by the Administration.” COMAR 26.17.01.02.B. It is unclear from the Maryland Model Erosion and Sediment Control Ordinance if MDE would approve a local ordinance that has a hearing officer making final findings of fact and conclusions of law.

*See*

<http://www.mde.state.md.us/programs/Water/StormwaterManagementProgram/SoilErosionandSedimentControl/Documents/Model%20Ordinance%20-%20Sediment%20Control%20Feb%2021%202012%20final%20draft.pdf>.

In some sections the model ordinance refers to the “local jurisdiction” and in others the “local agency” but does not state whether the functions carried out by those entities can be delegated to a hearing officer. Moreover, since MDE will be evaluating the City’s ordinance not merely on its face but also to see if the City’s adopted practices are used in a way that is consistent with MDE’s guidelines and regulations, the change proposed in this bill must have MDE approval, even if MDE previously approved the delegation of authority in concept several years ago. *See* First Reader of City Council Bill 12-0153.

The last time the City’s Soil Erosion and Sediment Control law was changed via City Council Bill 12-0153, DPW had received an October 15, 2012 letter from MDE that formally approved that ordinance. DPW stated that “any changes made to this ordinance prior to its adoption will require approval by MDE prior to implementation.” *See* DPW Bill Report for 12-0153. Additionally, the City has a Municipal Separate Storm Sewer System (MS4) permit, conditions of which are governed by MDE. This MS4 permit was reissued by MDE on December 27, 2013. In the reissuance, it noted that “MDE will continue to work with local governments” concerning subjects including those involving soil. *See* <http://www.mde.state.md.us/programs/Water/StormwaterManagementProgram/Documents/Baltimore%20City%20-%20Basis%20for%20Final%20Determination%2012%2019%202013.pdf>, p. 12, 14. This reflects an additional reason to make sure that MDE approves of how the City conducts its hearings on matters related to soil.

The Law Department can approve this bill for form and legal sufficiency so long as it meets with the approval of MDE. It is the Law Department’s understanding that DPW has contacted MDE, made it aware of the change, and obtained consent.

Very truly yours,



Hilary Ruley  
Chief Solicitor

cc: George Nilson, City Solicitor  
Angela C. Gibson, Mayor’s Legislative Liaison  
Elena DiPietro, Chief Solicitor  
Victor Tervalo, Chief Solicitor  
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Avery Aisenstark, Legislative Reference