

T&E ITEM 1  
March 22, 2018

**Worksession**

**MEMORANDUM**

March 20, 2018

TO: Transportation, Infrastructure, Energy and Environment Committee

FROM: Amanda Mihill, Legislative Attorney *A. Mihill*

SUBJECT: Bill 1-18, Water Quality Protection Charge – Appeals

PURPOSE: Worksession – Committee should make recommendations on Bill 1-18

Those expected to attend this worksession:

- Ed Lattner, Office of the County Attorney

Bill 1-18, Water Quality Protection Charge – Appeals, sponsored by Lead Sponsor Council President at the request of the County Executive, was introduced on February 6, 2018. A public hearing was held on March 6 at which there were three speakers (see correspondence on ©11-27).

**Background**

Bill 1-18 would allow a property owner to obtain review by the Director of Finance of certain decisions by the Director of Environmental Protection involving the Water Quality Protection Charge (WQPC). The Bill would also allow a final WQPC decision by the Director of Finance to be appealed to the Maryland Tax Court.

In 2015, the Council enacted, and the Executive signed into law, Expedited Bill 45-15, Stormwater Management – Water Quality Protection Charge – Curative Legislation. Expedited Bill 45-15 designated the Water Quality Protection Charge as an excise tax. This legislation did not amend the appeals process that is in current law regarding the Water Quality Protection Charge. Current law gives the Director of the Department of Environmental Protection the authority to issue a final decision and the Board of Appeals jurisdiction to decide appeals. However, State law provides that the local tax collector (the Department of Finance in Montgomery County) issues final tax decisions and appeals are heard by the Maryland Tax Court. Bill 1-18 makes changes to County law to bring the appeals process in line with state law.

## Issues for Committee Consideration

**1. *Transition section.*** At the Public Hearing, Maria Olsen supported the transfer of jurisdiction to hear appeals from the Board of Appeals to the Maryland Tax Court. However, Ms. Olsen raised concerns with the transition section in Bill 1-18 (©5, lines 85-97). The transition section provides that if an appeal is pending before the Board of Appeals at the time Bill 1-18 takes effect, the Board of Appeals must forward a recommended decision to the Finance Director who then makes a final decision that is appealable to the Maryland Tax Court. Ms. Olsen objected to this process because, depending on the timing of the effective date of Bill 1-18, it may require appellants to incur expenses for two separate hearings (one at the Board of Appeals and one at the Maryland Tax Court) instead of one.

Council staff understands the concerns raised by Ms. Olsen and worked with the Office of the County Attorney and Ms. Olsen to craft an amendment to address this concern. The proposed staff amendment on ©28 would:

- allow a property owner to abandon a current appeal at the Board of Appeals and take the dispute directly to the Director of Finance and then to the Maryland Tax Court; and
- make Bill 1-18 an expedited bill.

**Council staff recommends approval of the staff amendment.**

**2. *Other changes to the Water Quality Protection Charge.*** Ms. Olsen and another speaker at the hearing, Devin Battley, raised additional issues with the administration of the Water Quality Protection Charge. These issues (see ©12-27) are not appropriately addressed by Bill 1-18, which is limited in scope. Councilmembers may wish to review the testimony of these individuals and follow up with the Department of Environmental Protection or subsequent legislation.

This packet contains:

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Bill No. 1-18  
Concerning: Water Quality Protection  
Charge – Appeals  
Revised: 2/1/2018 Draft No. 1  
Introduced: February 6, 2018  
Expires: August 5, 2019  
Enacted: \_\_\_\_\_  
Executive: \_\_\_\_\_  
Effective: \_\_\_\_\_  
Sunset Date: None  
Ch. \_\_\_\_\_, Laws of Mont. Co. \_\_\_\_\_

## COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

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Lead Sponsor: Council President at the Request of the County Executive

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**AN ACT** to:

- (1) allow a property owner to obtain review by the Director of Finance of certain decisions by the Director of Environmental Protection involving the Water Quality Protection Charge;
- (2) allow a final Water Quality Protection Charge decision by the Director of Finance to be appealed to the Maryland Tax Court; and
- (3) generally amend County law regarding the Water Quality Protection Charge.

By amending

Montgomery County Code  
Chapter 19, Erosion, Sediment Control, and Stormwater Management  
Article II  
Sections 19-21 and 19-35

<b>Boldface</b>	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

*The County Council for Montgomery County, Maryland approves the following Act:*

**Sec. 1. Sections 19-21 and 19-35 are amended as follows:**

**19-21. Definitions.**

In this Article, the following words and phrases have the following meanings unless the context indicates otherwise:

\* \* \*

Director of Finance: The Director of the Department of Finance or the Director's designee.

\* \* \*

**19-35. Water Quality Protection Charge.**

\* \* \*

(e) (1) A property owner may apply for, and the Director of Environmental Protection must grant, a credit equal to a percentage, set by regulation, of the Charge if:

(A) the property contains a stormwater management system for which the County does not perform structural maintenance that either treats on-site drainage only or both on-site drainage and off-site drainage from other properties located within the same drainage area;

(B) the property does not contain a stormwater management system, but is located in the same drainage area as another that contains a stormwater management system for which the County does not perform structural maintenance and both properties have the same owner;

(C) the property contains a stormwater management system built as part of a County-approved stormwater management participation project; or

27 (D) the property does not contain a stormwater management  
28 system, but is located in the same drainage area as a property  
29 containing a stormwater management system built as part of  
30 a County-approved stormwater management participation  
31 project and both properties have the same owner.

32 (2) To receive the credit, the property owner must apply to the  
33 Director of Environmental Protection in a form prescribed by the  
34 Director not later than September 30 of the year that payment of  
35 the Charge is due. Any credit granted under this subsection is valid  
36 for 3 years.

37 (3) The Director of Environmental Protection may revoke a credit  
38 granted under paragraph (2) if the property owner does not  
39 continue to take the measures needed to assure that the stormwater  
40 management system remains in proper working condition by  
41 correcting any deficiencies discovered by the Director during a  
42 maintenance inspection. The Director must not reinstate a revoked  
43 credit until the property owner has sufficiently corrected the  
44 deficiencies to fully satisfy the property owner's maintenance  
45 obligations under Section 19-28.

46 (4) The owner of an owner-occupied residential property, or any non-  
47 profit organization that can demonstrate substantial financial  
48 hardship may apply for an exemption from all or part of the Charge  
49 for that property, based on criteria set by regulation. [The] To  
50 receive the exemption, the owner or organization [may] must apply  
51 for the exemption to the Director of Finance not later than  
52 September 30 of the year that payment of the Charge is due. After

53 reviewing the request for exemption, the Director of Finance must  
 54 issue a written decision. The owner or organization may appeal  
 55 the decision of the Director of Finance to the Maryland Tax Court.  
 56 The appeal must be filed within 30 days after the date of the  
 57 decision.

58 \* \* \*

59 (h) A person that believes that the Director of Environmental Protection has  
 60 mistakenly assigned a Charge to the person's property or computed the  
 61 Charge incorrectly may apply to the Director of Environmental  
 62 Protection in writing for a review of the Charge, and request an  
 63 adjustment to correct any error, not later than September 30 of the year  
 64 that payment of the Charge is due. [An aggrieved property owner may  
 65 appeal the Director's decision to the County Board of Appeals within 30  
 66 days after the Director issues the decision.]

67 (i) A [person] property owner that believes that the Director of  
 68 Environmental Protection has incorrectly calculated a credit, revoked the  
 69 property owner's credit or denied the [person's] property owner's  
 70 application for a credit [or exemption] under subsection (e) [may appeal  
 71 the Director's] (1), (2), or (3), or denied the property owner's request for  
 72 an adjustment under subsection (h), may seek review of the Director's  
 73 decision by submitting a written request for review with supporting  
 74 reasons to the [County Board] Director of [Appeals] Finance within 30  
 75 days after the [Director issues the] date of that decision. After reviewing  
 76 the decision of the Director of Environmental Protection, the Director of  
 77 Finance must notify the property owner in writing of the decision to  
 78 affirm or reverse the decision of the Director of Environmental

79           Protection. The property owner may appeal the decision of the Director  
80           of Finance to the Maryland Tax Court. The appeal must be filed within  
81           30 days after the date of the decision of the Director of Finance.

82           [(j) The Board of Appeals may hear and decide all appeals taken from a  
83           decision of the Director of Environmental Protection under this Section  
84           as provided in Article I of Chapter 2A.]

85           **Sec. 2. Transition:**

86           If an appeal of a final decision by the Director of Environmental Protection is  
87           pending before the Board of Appeals at the time this Act takes effect, the Board of  
88           Appeals must forward a recommended decision to the Director of Finance. The  
89           Director of Finance must issue a final written decision that adopts, modifies, or  
90           reverses the recommended decision. The property owner may appeal the decision of  
91           the Director of Finance to the Maryland Tax Court within 30 days after the date of the  
92           decision of the Director of Finance.

93           In COMCOR 19.35.01, any reference to the final decision of the Director of the  
94           Department of Environmental Protection must be treated as a reference to the  
95           Director's recommended decision to the Director of the Department of Finance and  
96           any reference to an appeal to the Board of Appeals must be treated as a reference to an  
97           appeal to the Maryland Tax Court.

## LEGISLATIVE REQUEST REPORT

Bill 1-18

### *Water Quality Protection Charge – Appeals*

<b>DESCRIPTION:</b>	Bill 1-18 would allow a property owner that wishes to challenge a decision by the Director of Environmental Protection involving Water Quality Protection Charge (WQPC) credits or billing adjustments to obtain review by the Director of Finance and make any final WQPC decisions by the Director of Finance appealable to the Maryland Tax Court.
<b>PROBLEM:</b>	Given that the WQPC is expressly designated as an excise tax, the current procedure under which appeals from final decisions concerning WQPC credits and billing adjustments are adjudicated by the Board of Appeals is inconsistent with State law assigning jurisdiction to hear tax appeals to the Maryland Tax Court.
<b>GOALS AND OBJECTIVES:</b>	To transfer jurisdiction to hear WQPC appeals from the County Board of Appeals to the Maryland Tax Court and require that, like any other appealable tax decision, final appealable WQPC decisions be issued by the Director of Finance rather than the Director of Environmental Protection.
<b>COORDINATION:</b>	Department of Environmental Protection; Department of Finance
<b>FISCAL IMPACT:</b>	To be requested.
<b>ECONOMIC IMPACT:</b>	To be requested.
<b>EVALUATION:</b>	To be requested.
<b>EXPERIENCE ELSEWHERE:</b>	To be researched.
<b>SOURCE OF INFORMATION:</b>	Vicky Wan, Water Quality Protection Charge & Technology Section, Department of Environmental Protection, 240-777-7722; Michael Coveyou, Treasury Division, Department of Finance, 240-777-8878
<b>APPLICATION WITHIN MUNICIPALITIES:</b>	Does not apply in Rockville, Takoma Park, or Gaithersburg
<b>PENALTIES:</b>	N/A

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Bill



OFFICE OF THE COUNTY EXECUTIVE  
ROCKVILLE, MARYLAND 20850

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Isiah Leggett  
County Executive

January 18, 2018

RECEIVED  
MONTGOMERY COUNTY  
COMMUNITY

TO: Hans Riemer, President  
County Council

FROM: Isiah Leggett, County Executive 

RE: Proposed Bill: Water Quality Protection Charge, Appeal To Tax Court

I am writing to request Council approval of the attached bill to amend County law to require that a property owner who wants to appeal the imposition of the Water Quality Protection Charge (WQPC) take that appeal to the Tax Court, rather than the Board of Appeals as currently provided. This is consistent with Expedited Bill 45-15, which designated the Water Quality Protection Charge as an excise tax imposed under the County's general taxing authority.

Md. Code Ann., Tax-Gen. (TG) § 3-103 assigns jurisdiction to hear appeals from final tax-related decisions to the Maryland Tax Court. The County's designation of the Board of Appeals as the body having jurisdiction to adjudicate appeals from final WQPC decisions is inconsistent with TG § 1-103. Therefore, the proposed legislation transfers jurisdiction to hear WQPC appeals from the Board of Appeals to the Tax Court. Also, TG § 13-101(d)(1) designates the Director of Finance as the County's "tax collector." Under State law, the tax collector is empowered to issue final tax decisions that may be appealed to the Tax Court. Therefore, the proposed bill requires the Director of Finance to issue final, appealable WQPC decisions, rather than the DEP Director.

Under this new procedure any denial by the DEP Director of a property owner's credit application or request for a revised tax bill may be challenged by requesting a review of the denial by the Director of Finance. After completing the review, the Director of Finance would then issue a final decision which could then be appealed to the Tax Court.

IL:el

c: Marc Hansen, County Attorney  
Alexandre Espinosa, Director, Department of Finance  
Patricia Bubar, Acting Director, Department of Environmental Protection  
Bonnie Kirkland, Assistant Chief Administrative Officer



**Fiscal Impact Statement**  
**Bill XX-18 Stormwater Management – Water Quality Protection Charge - Appeals**

**1. Legislative Summary.**

Bill XX-18 would allow a property owner that wishes to challenge a decision by the Director of Environmental Protection involving Water Quality Protection Charge (WQPC) credits or billing adjustments to obtain review by the Director of Finance and make any final WQPC decisions by the Director of Finance appealable to the Maryland Tax Court.

**2. An estimate of changes in County revenues and expenditures regardless of whether the revenues or expenditures are assumed in the recommended or approved budget. Includes source of information, assumptions, and methodologies used.**

This bill transfers jurisdiction to hear WQPC appeals from the County Board of Appeals to the Maryland Tax Court and require that, like any other appealable tax decision, final appealable WQPC decisions be issued by the Director of Finance rather than the Director of Environmental Protection. It does not affect the WQPC revenues or expenditures.

**3. Revenue and expenditure estimates covering at least the next 6 fiscal years.**

Not applicable.

**4. An actuarial analysis through the entire amortization period for each bill that would affect retiree pension or group insurance costs.**

Not applicable.

**5. An estimate of expenditures related to County's information technology (IT) systems including Enterprise Resource Planning (ERP) systems.**

Not applicable

**6. Later actions that may affect future revenue and expenditures if the bill authorizes future spending.**

Not applicable

**7. An estimate of the staff time needed to implement the bill.**

Minimal to no staff time is needed to implement this bill. Since 2013, DEP has received three requests for reconsideration. This bill transfers reconsideration requests from DEP to Finance. However, DEP would still administer and conduct the technical review of the request for reconsideration and work in conjunction with Finance to issue the signed decision.

**8. An explanation of how the addition of new staff responsibilities would affect other duties.**

Not applicable

**9. An estimate of costs when an additional appropriation is needed.**

Not applicable

**10. A description of any variable that could affect revenue and cost estimates.**

Not applicable

**11. Ranges of revenue or expenditures that are uncertain or difficult to project.**

Not applicable

**12. If a bill is likely to have no fiscal impact, why that is the case.**

This bill transfers jurisdiction to hear WQPC appeals from the County Board of Appeals to the Maryland Tax Court and require that, like any other appealable tax decision, final appealable WQPC decisions be issued by the Director of Finance rather than the Director of Environmental Protection. It does not affect the WQPC revenues or expenditures. DEP would still administer and conduct the technical review of the request for reconsideration and work together with Finance to issue the signed decision.

**13. Other fiscal impacts or comments.**

Not applicable

**14. The following contributed to and concurred with this analysis (enter name and dept.)**

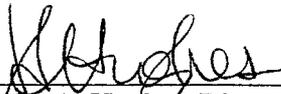
Vicky Wan, Water Quality Protection Charge & Technology Section, Department of Environmental Protection, 240-777-7722;

Patrice Bubar, Acting Director, Department of Environmental Protection, 240-777-7786

Michael Coveyou, Treasury Division, Department of Finance, 240-777-8878

Alex Espinosa, Director, Department of Finance, 240-777-8870

Trevor Lobaugh, Fiscal and Policy Analyst, Office of Management and Budget, 240-777-2763

  
\_\_\_\_\_  
Jennifer A. Hughes, Director  
Office of Management and Budget

1/22/18  
Date

**Economic Impact Statement**  
**Bill XX-18 Stormwater Management – Water Quality Protection Charge - Appeals**

**Background:**

Bill XX-18 would allow a property owner that wishes to challenge a decision by the Director of Environmental Protection involving Water Quality Protection Charge (WQPC) credits or billing adjustments to obtain review by the Director of Finance and make any final WQPC decisions by the Director of Finance appealable to the Maryland Tax Court.

**1. The sources of information, assumptions, and methodologies used.**

- Department of Environmental Protection (DEP) Water Quality Protection Charge appeal data

**2. A description of any variable that could affect the economic impact estimates.**

The bill will not have an economic impact and there are no variables that could affect that conclusion.

**3. The Bill's positive or negative effect, if any on employment, spending, savings, investment, incomes, and property values in the County.**

The bill transfers jurisdiction to hear WQPC appeals from the County Board of Appeals to the Maryland Tax Court and require that, like any other appealable tax decision, final appealable WQPC decisions be issued by the Director of Finance rather than the Director of Environmental Protection. The fiscal impact statement for the bill notes that since 2013, DEP has received three requests for reconsideration. This bill transfers reconsideration requests from DEP to Finance. However, DEP would still administer and conduct the technical review of the request for reconsideration and work in conjunction with Finance to issue the signed decision. The change will not alter the WQPC revenues or expenditures and will not have an impact on employment, spending, savings, investment, incomes, and property values in the County.

**4. If a Bill is likely to have no economic impact, why is that the case?**

See number 2.

**5. The following contributed to or concurred with this analysis:**

David Platt, Dennis Hetman, and Robert Hagedoorn, Finance.

  
\_\_\_\_\_  
Alexandre A. Espinosa, Director  
Department of Finance

1/22/2018  
Date

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**TESTIMONY ON BEHALF OF COUNTY EXECUTIVE LEGGETT ON  
BILL 01-18, WATER QUALITY PROTECTION CHARGE - APPEALS**

**March 6, 2018**

Good afternoon. My name is Ed Lattner. I'm an attorney in the County Attorney's Office. I am here today on behalf of the County Executive to testify in support of Bill 01-18, which would provide that the Director of Finance, rather than the Director of the Department of Environmental Protection, would make the final decision regarding credits or billing adjustments to the Water Quality Protection Charge, and that a property owner could challenge that decision by appealing to the Maryland Tax Court, rather than the Board of Appeals.

This change is necessary in order to ensure consistency with Expedited Bill 45-15. Enacted in November of 2015, that bill designated the County's Water Quality Protection Charge as an excise tax imposed under the County's general taxing authority. State law provides that the local tax collector, which in Montgomery County is the Finance Director, is empowered to issue final tax decisions and that the Maryland Tax Court has jurisdiction to hear appeals from those decisions. But the County Code still gives the DEP Director authority to issue a final decision and the Board of Appeals jurisdiction to decide appeals.

This bill provides that the Finance Director will review the DEP Director's decision and then make a final decision, as is the case with any other appealable tax decision. Thereafter, appeal would lie with the Maryland Tax Court rather than the Board of Appeals.

Thank you for the opportunity to testify on Bill 01-18. We look forward to working with the Council in its deliberations on this legislation.

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Regarding Bill 1-18 and the law it amends.

From the County web site.

Wet and Dry Stormwater Ponds

A pond is a type of stormwater management facility designed to collect rainwater and pollutants and prevent downstream flooding. Wet ponds always have a pool of water. Dry ponds only have water after rain.

<https://www.montgomerycountymd.gov/water/stormwater/improvements.html>

Definition of system

1 : a regularly interacting or interdependent group of items forming a unified whole a number system : such as a (1) : a group of interacting bodies under the influence of related forces a gravitational system (2) : an assemblage of substances that is in or tends to equilibrium a thermodynamic system

b (1) : a group of body organs that together perform one or more vital functions the digestive system (2) : the body considered as a functional unit

c : a group of related natural objects or forces a river system

d : a group of devices or artificial objects or an organization forming a network especially for distributing something or serving a common purpose a telephone system a heating system a highway system a computer system

e : a major division of rocks usually larger than a series and including all formed during a period or era

f : a form of social, economic, or political organization or practice the capitalist system

2 : an organized set of doctrines, ideas, or principles usually intended to explain the arrangement or working of a systematic whole the Newtonian system of mechanics

3 a : an organized or established procedure the touch system of typing

b : a manner of classifying, symbolizing, or schematizing a taxonomic system the decimal system

4 : harmonious arrangement or pattern : order

bring system out of confusion —Ellen Glasgow

5 : an organized society or social situation regarded as stultifying or oppressive : establishment 2 — usually used with the

— systemless play \ 'si-stəm-ləs\ adjective

#### Definition of facility

plural facilities

1 : the quality of being easily performed

2 : ease in performance : aptitude has a great facility for writing

3 : readiness of compliance

4 a (1) : something that makes an action, operation, or course of conduct easier —usually used in plural facilities for study. The resort has a wide range of facilities for young and old alike. (2) : lavatory 2 — often used in plural

b : something (such as a hospital) that is built, installed, or established to serve a particular purpose

I wish that Montgomery County could be correct and not so wrong.

Devin Battley



## Wet and Dry Stormwater Ponds

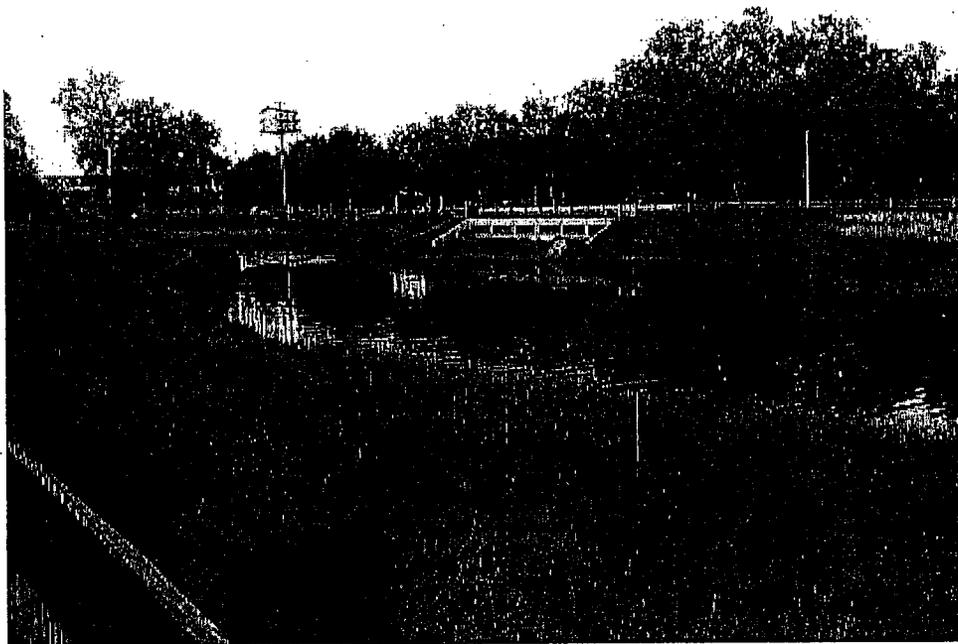
A pond is a type of stormwater management facility designed to collect rainwater and pollutants and prevent downstream flooding.

- **Wet ponds** always have a pool of water.
- **Dry ponds** only have water after rain.

Ponds have an embankment (called a dam) to hold back water that is entering the pond. Most dams are earthen (not concrete) and are grass covered. All stormwater ponds also have a control structure that releases water at a much slower rate than the stormwater entering the pond. While water remains in the pond, pollutants have time to settle at the bottom.

Most ponds located throughout Montgomery County are stormwater management ponds, even ones that are community amenities. Ponds can have many different designs, including ponds with concrete channels, dry ponds with sand filters on the pond bottom, and ponds that provided wetland habitat around the edges.

(H)



## Why are Stormwater Ponds Important?

Stormwater ponds are important stormwater management tools, because they:

- Remove pollutants
- Improve health of streams and rivers
- Help to make our waters fishable and swimmable
- Improve the quality of the Chesapeake Bay

As rainwater flows over hard surfaces and lawns it picks up pollutants such as sediment, trash, pesticides from lawns, nutrients from fertilizer or pet waste, and oil and grease from cars. Ponds can help to reduce this pollution from entering our waterways.

## + Maintaining Your Stormwater Ponds

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**Testimony before the Montgomery County Council**

**Regarding Bill 1-18**

A Bill which would allow a property owner to obtain review by the Director of Finance of certain decisions by the Director of Environmental Protection involving the Water Quality Protection Charge (WQPC), and allow a final WQPC decision by the Director of Finance to be appealed to the Maryland Tax Court

**By Maria Leonard Olsen, Esq., on Behalf of The Pels Law Firm and Our Clients, County Corporate Citizens That Have Pending WQPC Appeal Cases**

**County Council Building, Rockville, Maryland, Third Floor Hearing Room**

**March 6, 2018 at 1:30 pm**

Good afternoon, members of the Council. My name is Maria Olsen, and my law firm, The Pels Law Firm, represents several corporate entities in the County who have cases pending that appeal the imposition of the Water Quality Protection Charge (WQPC) upon their properties and/or the Department of Environmental Protection's (DEP) denial of WQPC credits. Our firm and our clients, who are Montgomery County property owners, support transfer of jurisdiction to hear WQPC appeals to the Director of Finance and the Maryland Tax Court, but oppose the Transition section of Bill 1-18 (Sec. 2), which deals with cases pending before the Montgomery County Board of Appeals (BOA) at the time the legislation takes effect.

Opposition to Transition Section of Bill

Our clients are responsible County taxpayers who are following the procedures in place to appeal what we assert to be unjust and unlawful WQPC taxes assessed against them. We support the transfer of jurisdiction to hear WQPC appeals from the County Board of Appeals to the Maryland Tax Court. However, we oppose the Transition section of the proposed legislation which, depending on timing of passage of the Bill, could require our clients to incur the time and substantial expense of a full hearing once before the BOA and the additional time and expense of a second full hearing before the Maryland Tax Court. Such a result would be inequitable, unjust and possibly unconstitutional.

Section 2 of Bill 1-18 reads:

If an appeal of a final decision by the Director of Environmental Protection is pending before the Board of Appeals at the time this Act takes effect, the Board of Appeals must forward a recommended decision to the Director of Finance. The Director of Finance must issue a final written decision that adopts, modifies, or

reverses the recommended decision. The property owner may appeal the decision of the Director of Finance to the Maryland Tax Court within 30 days after the date of the decision of the Director of Finance.

As such, litigant taxpayers who have filed appeals with the Board of Appeals may have to go through an entire BOA briefing and appeals hearing, depending on when they are fortunate or unfortunate enough to have their cases scheduled by the BOA. For instance, 23 property owners we represent in Gaithersburg's Lindbergh Office Park<sup>1</sup> appealed their denial of WQPC credits to the BOA which, following a hearing, granted the County's motion for summary judgment against our clients in 2016. We appealed to the Montgomery County Circuit Court, which in April of 2017 reversed the BOA's decision and remanded their case to the BOA for another hearing consistent with the Court's ruling on the erroneous conclusion of law reached by the BOA. The case has not yet been scheduled for another BOA hearing. Meanwhile, dissatisfied with the Court's ruling against the County, the County attorney appealed the Circuit Court's decision to the Maryland Court of Special Appeals for another bite at the proverbial apple. If the Maryland Court of Special Appeals affirms the County Circuit Court ruling, our case will be remanded to the BOA and the client will be put to the substantial expense of another BOA trial. We hope to stay the BOA hearing pending the next Court decision on this case.

From a fairness perspective, litigants should not be forced to try their cases twice on the same issues in order to protect their legal rights. That is not how our justice system has worked. BOA hearings can be costly. One of our clients incurred legal fees in excess of \$30,000 with a different firm representing them before the BOA, in their successful attempt to preserve their rights under County law. If Bill 1-18 passes in its current form, our clients will be forced to incur substantial additional time and resources litigating before the BOA twice, and then, possibly before the Tax Court. County property owners<sup>2</sup> should not be penalized simply for having filed their appeals before introduction of this Bill. Moreover, taxpayer funds will be expended unnecessarily if the County attorneys are required to twice litigate the same matters. Such consequences are likely not the Council's legislative intent.

We ask that the Council consider the unjust consequences of Bill 1-18's Transition section to citizens seeking to preserve their legal rights. Many County taxpayers cannot afford the expense of one trial, let alone two. County litigants reasonably rely on the legal procedures in place prior to commencing litigation. Changing the rules in the middle of ongoing litigation poses due process concerns. Clarity in our legal system and non-duplication of agency and judicial resources are desired goals for all concerned and consistent with the Maryland and U.S. Constitutions.

### Constitutional Implications of Bill 1-18's Transition Section

As the Maryland Court of Appeals stated, "From the earliest cases to the present, this Court has consistently taken the position that retroactive legislation, depriving persons or private entities

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<sup>1</sup> Lindbergh Park consists of 23 commercial real properties along Lindbergh Drive in Gaithersburg at the intersection of Airpark Road and Maryland Route 124.

<sup>2</sup> While the Fiscal Impact Statement that accompanies Bill 1-18 states that "[s]ince 2013, DEP has received three requests for reconsideration," our cases pending before the County BOA involve the properties of multiple County taxpayers. One of our clients is the Lindbergh Park Owners Association, which includes 23 commercial property owners who have appealed the denial of WQPC credits owed pursuant to the County Code. The BOA has not issued a schedule in that case, which was remanded to the BOA by the Montgomery County Circuit Court in April of 2017. The others are Ben Porto & Son Ltd. and Tri-State Stone & Building Supply, which own and operate the last surviving local dimension stone quarry in the County that has been designated by the County to be an Area of Critical Concern worthy of special protections. The BOA prehearing in the Porto case is scheduled for March 21, and the hearing is scheduled for May 16, 2018.

of vested rights, violates the Maryland Constitution, regardless of the reasonableness or 'rational basis' underlying the legislation." *Dua v. Comcast Cable of Maryland, Inc.*, 805 A.2d 1061 (Md. 2002). The Court held therein that under principles of Maryland constitutional law "a remedial or procedural statute may not be applied retroactively if it will interfere with vested or substantive rights" and that "there is a vested right in an accrued cause of action and that the Maryland Constitution precludes the impairment of such right. Furthermore, this principle applies to both common law and statutory causes of action." Requiring County property owners to litigate their appeals claims twice, in two different forums (i.e., in the BOA and in the Tax Court, for those with pending BOA appeals), impairs the parties' vested rights in their accrued causes of action.

Violation of equal protection rights may also be implicated by the wording of Bill 1-18's Transition section. The Maryland Court of Appeals has said, "The Equal Protection Clause of the Fourteenth Amendment guarantees that equal protection shall be given to all persons under like circumstances in the enjoyment of their civil and personal rights. Hence, a statute placing burdens upon an individual or limiting his rights may be invalidated because of an arbitrary or unreasonable classification or discrimination. *Tatlebaum v. Pantex Mfg. Corp.*, 204 Md. 360, 369-370, 104 A.2d 813, 819 (1954). Placing additional burdens on litigants who filed appeals prior to legislative action by requiring additional steps not required of other appellants seeking the same relief—due only to timing of the filing of a party's appeal—amounts to arbitrary and unreasonable discrimination.

### Proposed Remedy to the Transition Section

Our firm and those we represent support transferring review to the Director of Finance and the Maryland Tax Court. However, those County taxpayers who already have filed appeals in the BOA seeking to preserve their rights should not have to pursue identical appeals claims in two separate forums. That would be an unnecessary waste of County and taxpayer resources. If the Council seeks to transfer WQPC appeals jurisdiction to the Maryland Tax Court, those with pending cases should not have to litigate before the BOA prior thereto. All cases should be heard by the Tax Court and the BOA should be divested of jurisdiction immediately. County Executive Isiah Leggett states in his request to the Council to approve proposed Bill 1-18, "The County's designation of the Board of Appeals as the body having jurisdiction to adjudicate appeals from final WQPC decisions is inconsistent with [Maryland Code, Tax-Gen. (TG)] § 1-103," the BOA should not hear any WQPC appeals, including those that currently are pending.

### Conclusion

Thank you for this opportunity to comment on Bill 1-18. We urge you to consider the unjust application to pending cases of the Bill's Transition section in its current form and would gladly work with the County on studying reasonable changes to the WQPC law. We have submitted, in written form, other attached suggestions for improving and clarifying section 19-35, which is being generally amended via this Bill. Thank you for your consideration.

## Additional Testimony Regarding the WQPC Statute

The two cases that our law firm has pending before the County Board of Appeals expose additional problems with the WQPC statute being considered by the Council in Bill 1-18, i.e., Montgomery County Code section 19-35, the "Water Quality Protection Charge."

In the pending appeal by Battley and the Lindberg Park Owners Association (LPOA), the Circuit Court for Montgomery County ruled on April 25, 2017, that the BOA made an erroneous conclusion of law in applying Montgomery County Code section 19-35(e)(1), which mandates credits against the WQPC for property owners who have "stormwater management systems" that are not maintained by the County. Although the property owners in the Lindbergh Park development: (1) designed, paid for and privately maintain a stormwater management system that manages all of the stormwater on their properties; and (2) the Circuit Court for Montgomery County held that "the Board of Appeals made an erroneous conclusion of law by conflating the statutory meaning of 'stormwater management system' found in Montgomery County Code section 19-35(e)(1) to equate with only the stormwater management ponds [physically situated] on the properties at issue in this case," the County seeks a second appeal because they were unsatisfied with the first appeal's judicial result. Appellees repeatedly have sought relief from the County DEP's failure to grant the WQPC credits statutorily mandated and logically due to property owners who manage their own stormwater, first by appealing within the DEP, then to the BOA, which ruled in the County's favor, and finally before the Montgomery County Circuit Court, which reversed the BOA and remanded the case to the Board for a full hearing consistent with its Order. The Board has not yet scheduled the new hearing.

Not only do the LPOA stormwater ponds and infrastructure treat all of their own stormwater, they also treat stormwater runoff from the County roads adjacent to LPOA property. LPOA members receive no compensation for this stormwater management provided to the County. Against the expressed intent of the enabling legislation, the County seeks to tax LPOA members for stormwater that already has been treated by the LPOA's three stormwater treatment ponds into which all of the property stormwater was designed to drain. The County is charging the LPOA members the same WQPC as landowners who do not pay for nor have any stormwater management for their properties. This is patently unfair, a misapplication of the WQPC legislation, and an arbitrary and capricious action on the part of the County.

Section 19-35 as currently drafted is having unintended consequences, such as in this case, where property owners who are being proactive in their stormwater management are not being rewarded with credits for good environmental practices. A stated goal of the WQPC credit program is to provide incentives to property owners to treat their own stormwater. The County's interpretation of the statute in the Battley case is incongruous with this goal. The County asserts that, because the stormwater management ponds for which all members pay maintenance thereof, and into which stormwater from the entire LPOA development are channeled, are only physically located on the properties of five of the 23 properties in the development, those whose property lines do not include one of the three ponds receive no credit.

As the Circuit Court properly held, "The relevant Code section mandates credits for property owners who have "stormwater management systems" and not the narrower "stormwater management facilities," which the Council could have so codified had that been their intent." The problem could be easily remedied by clarifying the wording of section 19-35(e)(1)(A) to include property owners who have a stormwater management system in place that treats their stormwater. With a clarification in the statutory language, the County attorneys would cease from attempting to double tax the Lindbergh Park property owners for the stormwater they already manage, and stop wasting taxpayer dollars by pursuing this case further.

\* \* \*

In another case pending before the BOA, Ben Porto & Son Ltd. (Porto) has been battling the County's implementation of the WQPC against it for years. The County's last remaining dimension stone quarry, a County-designated Critical Area deemed worthy of special protections, has incurred a 10,329.17% increase in its WQPC from 2012 to 2016. The DEP granted a credit to this highly state-regulated mine, and then denied the credit starting with tax year 2016, demanding multiple conditions for receipt of credit that do not and should not apply to quarries.

Porto has served Montgomery County, The National Park Service, The District of Columbia, and residents and property owners in the Washington metropolitan area for nearly a century. This Montgomery County business<sup>3</sup> mines a rare stone, which is the area's only indigenous quartzite stone.<sup>4</sup> The County designated Porto's quarry and property a Critical Area in recognition of its uniqueness and importance to the County.<sup>5</sup> Porto's unique Carderock stone is matched in only three or four other places in the world.<sup>6</sup> Porto's quarry recently has provided historic matches at The White House, Arlington National Cemetery and Clara Barton Parkway. Arlington National Cemetery, Walter Reed, the National Institute of Health, Nationals Stadium, The National Zoo and Georgetown University have used Porto's material for new construction or historic matches, as has Wheaton's Brookside Gardens, Potomac's Glenstone Museum, and numerous County private schools, businesses and residences.<sup>7</sup>

Porto has had County and State-approved stormwater management facilities on its property long before the WQPC was instituted, in the form of sediment control facilities,<sup>8</sup> and a berm it constructed in the early 1970s. A Maryland Department of the Environment inspector inspects the

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<sup>3</sup> Porto owns the real property. Tri-State Stone & Building Supply, Inc., operates the quarry and building supply. For ease of reference, both entities are referred to herein as "Porto."

<sup>4</sup> As the Montgomery County Circuit Court stated in Porto & Sons, LTD., v. Montgomery County, Maryland: Porto "has mined and sold the stone 'Mica-schist' from this site since 1924. The stone mined at plaintiff's property is quite rare, there being only three or four regional locations in the world which are known to contain similar deposits. The property is designated as an "Area of Critical State Concern" under Montgomery County Council's Resolution No. 8-1261, which states in part that "areas of critical state concern are those areas of the state which are considered to be of significant importance and the future use or development of these areas would be of concern to the citizens of the state."

<sup>5</sup> 1977 MNCPPC Critical Area Recommendation ("the Recommendation"), attached as Exhibit 2. The County adopted the Recommendation through Resolution 8-1261 (1977). See Ruth Hepner, *Bridge Halted Halfway Because of Rare Mica-Schist—Quarry Has County in a Quandary*, Montgomery County Journal (March 7, 1980) at A1, C10, attached as Exhibit 3.

<sup>6</sup> Hepner, *supra*, at A1.

<sup>7</sup> Other notable projects that have used natural stone mined from Porto's property include: Howard Hughes Medical Center, Rock Creek Park, Bolling Air Force Base, The Pentagon, the grounds of The National Cathedral, The Norwood School, Washington Episcopal School, The National Cathedral School, Stone Ridge School of the Sacred Heart, the reconstruction of the Canal Road wall by Chain Bridge, The Baltimore Washington Parkway, The South West Waterfront Redevelopment, the DC Clean Rivers Project, and the Anacostia River Projects overflow and diversion structures.

<sup>8</sup> Sediment control facilities are a form of stormwater management, as defined by the Code of Maryland Regulations §26.21.01.10 (grading and sediment control for mining operations); COMAR §26.17.02.02B(36) (Definitions): "Stormwater management" means, for: (a) Quantitative control, a system of vegetative and structural measures that control the increased volume and rate of surface runoff caused by man-made changes to the land; and (b) Quantitative control, a system of vegetative, structural, and other measures that reduce or eliminate pollutants that might otherwise be carried by surface runoff" and (38): "Stormwater management system" means natural areas, ESD practices, stormwater management measures, and any other structure through which stormwater flows, infiltrates, or discharges from a site."

sediment control facilities on a regular basis, as a condition of Porto maintaining its quarry permits. Porto assisted the County by increasing the height of Porto's large stormwater management berm, at its own expense, when the County realigned Seven Locks Road in the early 1980s. Porto's original (and later raised) berm has protected County land since 1972. The berm helped prevent flooding and erosion from Cabin John Creek, and significant erosion of the County land adjacent to Seven Locks Road.

The WQPC as applied to Porto does not take into consideration its unique operation and location (the specific natural resource cannot be mined elsewhere; they cannot move their quarry), history with the County, settlement agreements the County entered into with Porto following past litigation, and pre-WQPC erosion control practices that were required of them by State mining statutes and that meet the clear intention of stormwater control legislation. Even before the WQPC's implementation, Porto assumed more than a reasonable share of providing stormwater management services. In addition, the County failed to create State-mandated guidelines for determining which on-site facilities may be the basis for a fee reduction, including for exempt properties. The WQPC unfairly favors business concerns in densely populated areas and disadvantages the Critical Areas the County aims to protect. Moreover, as Porto has been designated a Critical Area and its quarry mines a natural resource, it too should be afforded the same treatment by the County that agricultural property receives. The credits granted to quarries should mirror those granted to agricultural properties.

State regulation of mines preempts County law with respect to mines like Porto's, and mines are exempt from stormwater management per State and County law. The DEP's denial of credits fails to acknowledge Porto's legal exemption from the WQPC. DEP's position is that "the County will continue to view and treat the Porto properties no differently than other similarly situated commercial and industrial properties in the County that contain impervious areas." The DEP fails to acknowledge the fact that Porto is unlike County commercial and industrial properties: It is an extractive use (mine) that is exempt from the WQPC under both State and County law. Importantly, mines (and farms) are not required to meet post construction stormwater management criteria. Mines are exempt, just as farms are, under section 26.17.02.05, from the specific requirements in the Chapter because mines are regulated elsewhere for stormwater runoff (Title 15 of the Environmental Code Sub Chapter 8 Surface Mining and COMAR 26.21.01.10 Grading and Sediment). Section 26.17.02.05.B ("When Stormwater Management is Required.... The following activities are exempt from the provisions of this chapter: ... (3) Land development activities which the Administration determines will be regulated under specific State laws which provide for managing stormwater runoff."). Both mines and farms also are deemed areas of Critical Concern/Economic Concern.

In addition, a primary stated goal of the WQPC was to reduce phosphorus and nitrogen pollutants from the Chesapeake Bay. According to the Chesapeake Bay Foundation, "**The largest source of pollution to the Bay comes from agricultural runoff**, which contributes roughly 40 percent of the nitrogen and 50 percent of the phosphorus entering the Chesapeake Bay." <http://www.cbf.org/issues/agriculture/nitrogen-phosphorus.html> (emphasis added). Farms, however, are exempt from the WQPC with the exception of the residential portion, if any. There is considerable merit for an exemption for mines, which do not produce manure from livestock and don't fertilize their land for the growing of crops. Agriculture and mineral extraction are important to the citizens of Montgomery County. Farms use heavy equipment and can build massive facilities such as feed lots, access roads, barns, silos, parking lots, etc., and generally participate in activities that would be considered "industrial" and/or "commercial" if the land were not classified as "agricultural." The State Department of Planning classifies mines as "Extraction Use," not "Industrial Use." When stormwater management was started, quarries were deemed exempt. So, too, are quarries rightly exempt from the WQPC.

Porto is a licensed, permitted, specifically and highly-regulated mining quarry whose status and unique operations were not properly taken into account in implementing the WQPC program as currently drafted. Porto's property situation does not fit into the categories contemplated by the current WQPC credit requirements. Porto's property is a mining operation and building supply, both of which have been in operation since before zoning came to the County in 1928. Quarries are one of the most regulated entities in the County and have had stormwater management in the form of sediment control practices in place for decades.

Porto has a valid Surface Mining License from the State of Maryland and a valid Quarry License from Montgomery County. Porto's entire 21.49 acre site is permitted by both the County and the State. In order to obtain and keep its licenses, Porto must show that "an approved sediment control and *stormwater management plan* is in effect, and a current sediment control permit is issued for the quarry." Montgomery County Code Sec. 38-12(a)(2) (Quarries) (emphasis added). Porto's regulated sediment control and stormwater management practices meet or exceed the goals of the WQPC, especially in light of the legislature's intention that the County should take into consideration the attributes of agricultural property and other land development activity, such as mines (quarries).

Porto undertakes many measures to attenuate stormwater impact on its own property and that of nearby properties, including County-owned property. Porto increased the height of its stormwater management berm, at its own expense, to help the County meet the goals of the Critical Area Impact Study during the Seven Locks Road Approachments and Bridge Replacement project years ago. The berm has managed stormwater both on-site and off-site far beyond the drainage for which it should be responsible. Stormwater control and maintenance on Porto's property is routine and long-standing. The nature of how a quarry operates, however, makes the accurate calculation of the WQPC credit under its current unfair Credit Application methodology unfeasible. The County, via its implementation of the WQPC—which is ostensibly an excise tax for the privilege of having impervious surfaces on one's property—has become another type of stormwater regulation via the DEP's demand for specific calculations in order for quarries to obtain credits. Porto's quarry is in a constant state of flux as they mine for the rare stone on various parts of its property. DEP continues to attempt to put a square peg into a round hole by considering quarries the same as industrial property. It is not the same. The State recognizes the quarry to be a mineral extraction site. It is patently unfair for a highly-regulated entity, with effective stormwater management, not to be granted credit because the County has not sufficiently considered its unique character and its status as an Area of Critical Concern the County deem worthy of protection.

In addition, the County was required in 2012 to create guidelines for determining which on-site systems, facilities, services or activities may be the basis for a stormwater remediation fee reduction, including guidelines relating to agricultural activities or facilities that are otherwise exempted from stormwater management requirements by the County or municipality.<sup>9</sup> The County

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Md. ENVIRONMENT Code Ann. § 4-202.1(f) (Stormwater Remediation Fees -- Policies and procedures; inspections):

"(1) If a county or municipality establishes a stormwater remediation fee under this section, the county or municipality shall establish policies and procedures, approved by the Department, to reduce any portion of a stormwater remediation fee established under subsection (e) of this section to account for on-site and off-site systems, facilities, services, or activities that reduce the quantity or improve the quality of stormwater discharged from the property.

(2) The policies and procedures established by a county or municipality under paragraph (1) of this subsection shall include:

(i) Guidelines for determining which on-site systems, facilities, services, or activities may be the basis for a fee reduction, including guidelines:

1. Relating to properties with existing advanced stormwater best management practices;  
2. Relating to agricultural activities or facilities that are otherwise exempted from stormwater management requirements by the county or municipality; and

3. That account for the costs of, and the level of treatment provided by, stormwater management facilities that are funded and maintained by a property owner;

(ii) The method for calculating the amount of a fee reduction; and

(iii) Procedures for monitoring and verifying the effectiveness of the on-site systems, facilities, services, or activities in reducing the

has not done that. Two of Porto's parcels were not charged a WQPC until after the approval of Chapter 151 in 2012. Porto's Fee on the one parcel charged was \$92.50. The County failed to establish guidelines in 2013, 2014, 2015, 2016 and 2017. These were the years the WQPC increased exponentially. Failure to adopt guidelines to rectify programmatic shortcomings is contrary to the intent and goals of the State and County's stormwater program, and has led to an unfair result in the WQPC's application to Porto.<sup>10</sup>

Porto is a unique and rare operation in Montgomery County. Roads and other impervious surfaces on the property are continually changed as they mine the natural resources on the permitted property. Porto has met its sediment control permit requirements for decades, and plans to continue to do so. Because of its unique property and operation, however, it cannot fit into the WQPC Credit Calculator because that Calculator did not account for perpetually changing properties such as Porto's. It appears that the County did not take this into consideration in promulgating the WQPC law. And the County's failure to promulgate mandated credit guidelines for stormwater remediation by quarries has added to the inequity. Application of the WQPC to Porto's unique property contradicts the intentions behind the law, creating an arbitrary and onerous burden on Porto.

In addition, Porto is exempt from State and County stormwater management requirements, which should include the WQPC. The Maryland Department of the Environment's Stormwater Management section of the Code of Maryland Regulations provides:

.05 When Stormwater Management is Required.

A. Unless the particular activity is exempted by this regulation, a person may not develop any land without an approved final stormwater management plan from the approving agency. A grading or building permit may not be issued for a property unless a final stormwater management plan has been approved that is consistent with:

- (1) The Stormwater Management Subtitle;
- (2) This chapter;
- (3) The county or municipal ordinance.
- (4) The Design Manual for new development; and
- (5) Policies established by the local approving agency for redevelopment.

B. The following activities are exempt from the provisions of this chapter...

**(3) Land development activities which the Administration determines will be regulated under specific State laws which provide for managing stormwater runoff.**

COMAR § 26.17.02.05 (emphasis added).

Porto's operations fall under a land development activity--Mining--which the Administration

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quantity or improving the quality of stormwater discharged from the property.”

This language is similar to that in Chapter 151 (House Bill 987), approved by the Governor May 2, 2012 (the first year Porto incurred a WQPC):

“(F) (1) A COUNTY OR MUNICIPALITY SHALL ESTABLISH POLICIES AND PROCEDURES, APPROVED BY THE DEPARTMENT, TO REDUCE ANY PORTION OF A STORMWATER REMEDIATION FEE ESTABLISHED UNDER SUBSECTION (E) OF THIS SECTION TO ACCOUNT FOR ON-SITE AND OFF-SITE SYSTEMS, FACILITIES, SERVICES, OR ACTIVITIES THAT REDUCE THE QUANTITY OR IMPROVE THE QUALITY OF STORMWATER DISCHARGED FROM THE PROPERTY.

(2) THE POLICIES AND PROCEDURES ESTABLISHED BY A COUNTY OR MUNICIPALITY UNDER PARAGRAPH (1) OF THIS SUBSECTION SHALL INCLUDE:

(I) GUIDELINES FOR DETERMINING WHICH ON-SITE SYSTEMS, FACILITIES, SERVICES, OR ACTIVITIES MAY BE THE BASIS FOR A FEE REDUCTION, INCLUDING GUIDELINES:

1. RELATING TO PROPERTIES WITH EXISTING ADVANCED STORMWATER BEST MANAGEMENT PRACTICES;
2. RELATING TO AGRICULTURAL ACTIVITIES OR FACILITIES THAT ARE OTHERWISE EXEMPTED FROM STORMWATER MANAGEMENT REQUIREMENTS BY THE COUNTY OR MUNICIPALITY; AND
3. THAT ACCOUNT FOR THE COSTS OF, AND THE LEVEL OF TREATMENT PROVIDED BY, STORMWATER MANAGEMENT FACILITIES THAT ARE FUNDED AND MAINTAINED BY A PROPERTY OWNER;

(II) THE METHOD FOR CALCULATING THE AMOUNT OF A FEE REDUCTION; AND

(III) PROCEDURES FOR MONITORING AND VERIFYING THE EFFECTIVENESS OF THE ON-SITE SYSTEMS, FACILITIES, SERVICES, OR ACTIVITIES IN REDUCING THE QUANTITY OR IMPROVING THE QUALITY OF STORMWATER DISCHARGED FROM THE PROPERTY” (emphasis added).

<sup>10</sup> See *Department of the Environment v. Anacostia Riverkeeper*, 134 A.3d 892, 906 (Md. Ct. Appeals 2016), reconsideration denied (2016).

determined is to be regulated under specific State laws that provide for managing stormwater runoff. The permitting process to which Porto is subject ensures that its sediment and stormwater control measures are inspected by the State as a condition of being granted its quarry and sediment control permits.<sup>11</sup> Maryland Regulations exempt Porto's property from State and County Stormwater Management requirements.

For the same reasons, Porto should be exempt from the WQPC. The Exemptions section of Article II, "Storm Water Management," §19-31 (Exemptions) provides:

The following development activities are **exempt from stormwater management requirements** under **this Article**:

- (a) agricultural land management practices;
  - (b) any addition or modification to an existing single family detached residential structure if the addition or modification does not disturb more than 5,000 square feet of land area;
  - (c) any development not associated with the construction of a new residential or commercial building if the development does not disturb more than 5,000 square feet of land area; and
- any land development activity that the Administration finds is subject to any State law that regulates stormwater management runoff.** (emphasis added).

This Article includes the WQPC, section 19-35. The exemption language parallels that of the Stormwater Management, above. In implementing the Stormwater Management Programs, the State recognized the quarry permitting laws that regulate stormwater management runoff and granted them an exemption. The lack of a WQPC exemption under a parallel regulatory structure is inequitable and almost nonsensical. Prior to 2012, Porto was not charged this WQPC tax. The reason Porto was exempt is because mines are highly regulated entities with strict sediment control requirements. The State changed the law in 2012. Porto was charged a cumulative WQPC fee for its three parcels of \$92.50 in 2012. In 2016, that figure jumped 10,329.17% to \$9,554.48. Given the State's recent actions in making the law optional, Porto's extensive sediment control measures under quarry licensing law and Porto's assistance to the County via its berm that prevents a great deal of stormwater runoff onto County land and areas of Critical Concern, Porto should be returned to an exempt status.

As the Maryland Court of Special Appeals pointed out in *East Star v. County Comm'rs of Queen Anne's County*, 38 A.3d 524, 203 Md. App. 477 (2012), "The General Assembly, in Title 15, Subtitle 8 of the Env. Article, has enacted a very elaborate scheme regulating virtually all aspects of surface mining in Maryland." 38 A.3d at 531.<sup>12</sup> The contradiction between the treatment of Porto with regard to stormwater management under State law versus County law demonstrates that the WQPC is impliedly preempted. A local law is impliedly preempted when it "deal[s] with an area in which the Legislature has acted with such force that an intent by the State to occupy the entire field must be implied." *Talbot County v. Skipper*, 329 Md. 481, 488 (1993) (quoting *Cty. Council for Montgomery Cty. v. Montgomery Ass'n.*, 274 Md. 52, 59 (1975)). Such is the case here with regard to the State's regulation of mining.

The WQPC tax also benefits non-residential property owners in higher density zones like Downtown Bethesda and Silver Spring over property owners in less dense zones. For example, 7770 Norfolk Avenue, Bethesda, MD, 20814, is 17 stories. According to the WQPC on the

<sup>11</sup> COMAR § 26.21.01.10.

<sup>12</sup> *East Star* is the seminal holding in the State of Maryland on the issue of preemption of local law with regard to restrictions placed upon surface mining operations such as Porto's. *Prince George's Cnty. Council Sitting Council v. Bardon, Inc.* (Md. App., 2015)(unreported decision). Judge McGann of the Montgomery County Circuit Court cited it with favor last month in his Opinion striking down a County pesticides law that was impliedly preempted by State law. *Complete Lawn Care, Inc. v. Montgomery County*, Civil Action No. 427200-V and *Goodman, et al. v. Montgomery County*, Civil Action No. 427253-V, Opinion, issued August 3, 2017.

County's website, it has a 20,584 SF lot and the building area is 15,005.47 SF. On .4725 acres, the County has allowed the owner of this property to develop approximately  $15000 \times 17 = 255,000$  SF. Other non-residential or non-agricultural land in less dense zones generally have large setbacks and significantly less density. In order to develop 255,000 SF where only three stories are allowed, the owner would need 1.95 acres and there would probably need to be driveways and impervious parking lots as well. Even if those extras were not needed, the owner would need 4.12 times the land to develop the same SF area and the WQPC would be based on 84,942 SF or more.

The WQPC penalizes property in less dense zones because they need more impervious surfaces to develop the land to their full or even partial potential, due to County zoning laws. The County has imposed a consumption tax on improvements to real property, not accounting for properties like Porto's that were developed prior to the tax, based on the County-implemented zoning regulations. The tax is unfairly designed and imposed, and the inequities must be addressed.

The WQPC is disproportionately applied to non-residential, non-agricultural property owners like Porto. The County provided significant benefits to agriculture property owners at an early stage. The County has increasingly provided benefits to residential property owners. The County's actions have placated the majority of the strong agricultural and residential property owner voting blocks that protested against the WQPC. This excise tax disproportionately taxes non-residential and non-agricultural property owners for thousands of dollars, while agricultural and residential property owners are back to a reasonable fee that does not exceed \$285.00 in 2016. These constituents' voting status is likely to keep the tax escalation in check, but not so for non-residential or non-agricultural property owners, whose concerns have not been addressed by the County in any meaningful way.

Excise taxes on fuel amount to a consumption tax. Fuel is a commodity used in vehicles, which are durable consumer goods. To avoid paying the fuel tax, one has the choice of driving, walking, biking, taking public transportation or buying a more fuel efficient vehicle. While vehicles have a very limited lifespan, developed property such as Porto's typically does not. By taxing Porto for the privilege of maintaining impervious surfaces on its own property, the County is taxing something that most would consider inherent in property rights, and already is appraised and taxed.<sup>13</sup> The options now are to: (i) pay the charge, which could force an eventual sale of the property; (ii) remove the improvements and other areas deemed impervious surfaces; (iii) modify the existing property to receive a credit; or (iv) redevelop the entire property and seek a credit for impervious surfaces. For some property owners who placed the improvements on the property, or who started conducting a specific use on the property, after bargaining with the County through the zoning and building permit process and obtaining the right to install and maintain impervious surfaces on their property, none of these options are tenable. At least property tax is based on the assessed value, and all aspects of the property, including improvements, are taken into consideration during the appraisal process, or can be, on appeal. This is not the case with the WQPC.

Porto negotiated with the County when they participated in the most recent comprehensive zoning rewrite, the 2000 Potomac Subregion Masterplan, the 1998 non-conforming use certificate process for both a quarry and a building supply, the 1979 court case that led to the Impact Study and a Stipulation of Settlement, and the 1998 court case that led to a 2000 Settlement Agreement.<sup>14</sup>

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<sup>13</sup> In fact, a cursory review of Montgomery County's Real Property Tax Rate Schedules shows that a "Storm Drainage Tax" was charged to County property owners in 2015 and 2016, and discontinued in 2017, perhaps evidencing double taxation for those years.

<sup>14</sup> In 1979, the County sought to relocate a portion of Seven Locks Road adjacent to Porto's Property. Porto sued, and the County was enjoined from proceeding with the road relocation. Consequently, Porto and the County entered into a Settlement Agreement, whereby the County resolved "to cooperate with Porto and provide any information in the possession of the County, so that Porto may have its existing permits (necessary for continuation of the quarry

Porto has been operating in the same location since prior to zoning coming to its part of the County in 1928. It would place a significant burden on Porto's operations, which allows it to continue mining the Critical Resource, if they were forced to eliminate all or a portion of the impervious surfaces on the property. Taken to its logical conclusion, the exponential increase in the WQPC could amount to an unconstitutional taking.

The County made a simple, reasonably priced formula for single family residential and agricultural property owners, with the opportunity to receive credits. That is not the case for non-residential property. The consequences of what amounts to preferential treatment here was probably unintended and, at worst, misguided.

The WQPC's effect is to tax a pre-existing, legal use of land and to contravene zoning and land use policy. Montgomery County, via the current County Executive, has implemented its own method for the determination of its WQPC alone and without specific direction from the State or consideration of other relevant State policies. The WQPC rates and guidelines were decided by Montgomery County alone as well. The current County government has created the largest anti-mining tax (in an already highly-regulated industry) and non-agricultural business tax, and the most anti-property rights legislation that Porto has witnessed in all of the years that Porto has operated a business in Montgomery County.<sup>15</sup>

The effect of the WQPC legislation on Porto is one that provides an ultimatum to pay a tax for a preexisting and legal use of land, or give up all or a portion of a pre-existing, legal use of land. Giving up all impervious surfaces is not feasible to continue operating the Critical Area. Giving up a significant amount of pre-existing legal use of land in order to modify it to an "Approved Storm Water Management System" large enough to receive the highest credit would create a significant hardship and would greatly impair Porto's ability to continue to stave off the urbanization pressures highlighted in the MNCPPC Recommendation. This creates a significant hardship on Porto's Mineral Extraction Site and Minor Quarry.

The WQPC as it stands also creates a hardship as the land is now encumbered in a way it was not during multiple negotiations with the County regarding the land, such as the 1979 litigation with the County regarding the taking of a portion of Porto's land for the Seven Locks Road Bridge and Approaches Project, the Impact Study for Critical Area that arose from a takings case, the non-conforming use certificate request for both a quarry and a building supply in 1998, Porto's participation in the 2000 Potomac Master Plan Project, and Porto's participation in the most recent comprehensive zoning re-write, during all of which Porto had the privilege of maintaining the impervious surfaces upon the land, a privilege that was taken away in an instant with the emergency curative legislation designating the fee as an excise tax for the privilege of maintaining impervious surfaces on Porto's quarry property.

In zoning, the County is allowed to change the setbacks in a particular zone, or update the building code, but pre-existing conditions are grandfathered. There are also variances when there are provable hardships, not just economic hardships based on income. Without affording a variance and grandfathering process, the County is disregarding years of zoning and land use rights law. The

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operation) renewed or replaced, or so that Porto may secure additional permits as necessary to carry on its business." In 2000, following a lawsuit by Porto and Tri-State, alleging that the County violated the 1980 Settlement Agreement, the parties entered into a second Settlement Agreement, whereby the County agreed that it "re-affirms its commitment and will continue to cooperate with Porto and provide any information in the possession of Montgomery County, so that Porto may have its existing permits (necessary for continuation of the quarry operation) renewed or replaced, or so that Porto may secure any additional permits necessary to carry on its business." Both the 1980 Settlement Agreement and the 2000 Settlement Agreement were signed by the County Executive and are enforceable contracts.

<sup>15</sup> Many County citizens are unaware of this tax. Because the excise tax unfairly impacts Porto's unique situation, Porto wishes to bring to light its unintended effects.

County has not weighed the impact of their revenue generation choice for Mineral Extraction Sites it deemed critical to the citizens of the County and State. Specifically, it has not done so for Porto's Minor Quarry which is the last of the three that were placed on the list in 1977.

Porto requests that the County formally recognize Porto's exemption from the WQPC as an entity regulated by State Mining Laws that already include stringent provisions for stormwater management. In the alternative to an exemption, Porto requests a 100% credit for its three contiguous parcels. The Code provides for credits if: "(A) the property contains a stormwater management system for which the County does not perform structural maintenance that either treats on-site drainage only or both on-site drainage and off-site drainage from other properties located within the same drainage area; (B) the property does not contain a stormwater management system, but is located in the same drainage area as another that contains a stormwater management system for which the County does not perform structural maintenance and both properties have the same owner; (C) the property contains a stormwater management system built as part of a County-approved stormwater management participation project; or (D) the property does not contain a stormwater management system, but is located in the same drainage area as a property containing a stormwater management system built as part of a County-approved stormwater management participation project and both properties have the same owner."

Porto's stormwater management system, as defined by the Code §19-21, is not structurally maintained by the County, meriting a credit pursuant to §19-35(e)(1)(A). Porto's contiguous properties are eligible for credit pursuant to §19-35(e)(1)(B). Porto's property contains a stormwater management system built as part of a County-approved stormwater management participation project<sup>16</sup> that dates back to at least the early 1980s--the Seven Locks Road Bridge and Approaches Project, as described above and in the County's Impact Study, which qualifies it for a credit under §19-35(e)(1)(C). Section 19-35(e)(1)(D) allows for a credit for Porto's contiguous parcels.

The problems that necessitated the filing of Porto's appeals could be rectified by amending the WQPC's statutory language. We respectfully suggest that credits be granted to quarries that mirror those granted to agricultural properties. First, because like farms, land permitted under State law and County Law requirements for quarries are exempt from the stormwater management sections of State and County law. Second, the County found both farms and the two remaining quarries in the County to be Areas of Critical Concern under the Areas of Economic Concern category. Porto is the last of the three minor quarries that were in existence when the Montgomery County Council, by Resolution No. 8-1261 (March 22, 1977), recommended Porto's property be designated as an Area of Critical State Concern." Quarries that mine natural resources should be treated as agricultural land has been treated with the WQPC. Quarries should receive the same credits farms do for all impervious surfaces except for residential area, if any.

Our firm would welcome the opportunity to provide additional briefing to the Council to facilitate consideration of these issues. Thank you.

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<sup>16</sup> "*Stormwater management participation project*: A capital improvement project in which both the County and the property owner jointly fund the construction of a regional stormwater management facility intended to benefit properties in addition to those belonging to the property owner." *Id.* A "Stormwater management facility" is defined in the Code as "An infiltration device, filtering device, stormwater pond, stormwater wetland, hydrodynamic structure, or other practice designed and constructed to control stormwater to reduce accelerated stream channel erosion and pollution of surface waters." Montgomery County Code §19-21.

**AMENDMENT**

To Bill 1-18

**BY COUNCIL STAFF**

PURPOSE: allow a property owner to abandon a current appeal at the Board of Appeals and take the dispute to the Director of Finance, and make Bill 1-18 an expedited bill.

*Beginning on page 5, lines 85-97, amend Sec. 2 to read:*

1           **Sec. 2. Transition:**

2           If an appeal of a final decision by the Director of Environmental Protection is  
3 pending before the Board of Appeals at the time this Act takes effect, the property  
4 owner may immediately withdraw the Board of Appeals proceeding and seek review  
5 of the Director's decision within 30 days of the withdrawal. If the property owner does  
6 not withdraw the Board of Appeals proceeding, the Board of Appeals must forward a  
7 recommended decision to the Director of Finance. The Director of Finance must issue  
8 a final written decision that adopts, modifies, or reverses the recommended decision.  
9 The property owner may appeal the decision of the Director of Finance to the Maryland  
10 Tax Court within 30 days after the date of the decision of the Director of Finance.

11           In COMCOR 19.35.01, any reference to the final decision of the Director of the  
12 Department of Environmental Protection must be treated as a reference to the  
13 Director's recommended decision to the Director of the Department of Finance and  
14 any reference to an appeal to the Board of Appeals must be treated as a reference to an  
15 appeal to the Maryland Tax Court.

16           **Sec. 3. Expedited Effective Date.**

17           The Council declares that this legislation is necessary for the immediate  
18 protection of the public interest. This Act takes effect on the date on which it becomes  
19 law.