



Washington County, MD
Division of Public Works

Memorandum

Public Works Administration
Hagerstown Regional Airport
Parks, Recreation and Facilities
Capital Projects Engineering
Communications Maintenance
Land Development Engineering
Highway Maintenance
Transit Operations

TO: Interested Parties – Engineers, Planners, Surveyors, and Land Developers

FROM: Joseph Kroboth, III, P.E., L.S., M-ASCE
Director of Public Works

SUBJECT: Modified Stormwater Management Transitional Provisions (Grandfathering)

DATE: April 14, 2010

To address concerns regarding grandfathering, the difficulty of implementing environmental site design (ESD) for redevelopment projects, and the impact on Smart Growth; the Maryland Department of the Environment (MDE) has enacted emergency regulations and is providing implementation guidance to those localities responsible for SWM program administration. Although no substantial changes have been made to the new technical standards or to any provision of the Stormwater Management Act of 2007, the regulations and guidance are intended to describe what types of development projects may be eligible for grandfathering or an administrative waiver. Certain projects may use the existing standards; however, the vast majority of development and redevelopment projects will after May 4, 2010, use ESD to the maximum extent practicable (MEP). All new projects proposed after May 4, 2010, as well as those not qualifying for the grandfathering provisions within the Ordinance shall be required to implement ESD to the MEP.

The Administrative, Executive and Legislative Review Committee of the State of Maryland voted to adopt emergency regulations to formalize provisions for grandfathering and make changes to the redevelopment requirements according to the guidance noted above. Emergency regulations became effective April 7, 2010 and will last for six months, during which time the MDE must propose final regulation changes and provide for public input. In the interim, the following transitional or grandfathering provisions shall be considered effective upon adoption of the proposed Stormwater Management, Grading, Soil Erosion and Sediment Control Ordinance. Where the MDE has granted certain latitudes and flexibility for the local jurisdiction relating to transition to the new regulations, Washington County plans to take full advantage of that flexibility and thus offer Developers the opportunity to have their respective project grandfathered under the current Ordinance.

Transitional Provisions (Grandfathering):

Over the past several months, various stakeholders have expressed concern over the grandfathering and redevelopment provisions planned for this new ordinance. Recent action within the Maryland General Assembly should be a strong indicator that the legislators are being receptive to striking a balance between the development community and protection of the environment. The emergency regulation will allow a local jurisdiction to incorporate into its ordinance a waiver provision for projects that had completed part of the development review process but had not received final approval by May 4, 2010.

Upon the effective date of the emergency regulations and incorporation of consistent provisions into our proposed Ordinance, the Division of Public Works (DPW) will be able to issue an Administrative Waiver that will “grandfather” certain projects. Eligible projects will be those that have been deemed to have cleared an appropriate stage in the development process before May 4, 2010, even though they may not have received final approval by that date. Because local jurisdictions, such as Washington County, have different development review procedures and use various terms for the steps in their respective processes, the State regulations will identify the appropriate milestone accomplishments that are necessary to qualify for such a waiver. Obviously, all transitional provisions are subject approval by the Board of County Commissioners and the MDE, but the following excerpt from the proposed Ordinance is being distributed for your information and project planning.

1.6.1. Transitional provisions. The following “Grandfathering” provisions are hereby adopted to provide for the continuance of certain development activities that would otherwise be subject to the requirements of this Ordinance:

- A. Plans that have received final approval from the District for Soil Erosion and Sediment Control and final approval for SWM from the Division by May 4, 2010 shall be grandfathered in accordance with the following:
 - a. Active construction sites meeting the requirements of subsection A. above may proceed through construction completion provided they continually proceed with construction activity without interruptions in operations, excepting intermittent weather conditions and winter shutdown approved by the District and the Division.*
 - b. Projects meeting the requirements of subsection (A.) above, that have not initiated construction as of the date of the respective plan expiration/renewal date, shall meet the new SWM requirements of this Ordinance.*
 - c. Projects meeting the requirements of subsection (A.) above, that initiate construction after May 4, 2010, but do not complete the construction before the plan expiration/renewal date, may renew their plan and continue construction, provided the Developer/Property Owner continually proceeds with construction activity without interruptions in operations, excepting intermittent weather conditions and winter shutdowns approved by the District and the Division.**
- B. Unless an Administrative Waiver has been granted, projects submitted for review, but have not obtained final soil erosion and sediment control approval from the District and final SWM approval from the Division, as of May 4, 2010 shall comply with the provisions of this Ordinance. Phased projects previously having preliminary or final plat approval are only grandfathered for the actual phases meeting the requirements of subsection (A.) above.
 - a. Nothing in this Section is intended to prevent a phased project from seeking approval of an alternative compliance measure to satisfy the requirements of this Ordinance.**
- C. Pursuant to Article 3 - Stormwater Management; Upon receiving a request for an Administrative Waiver by a Developer (or an Agent for the Developer) and subject to a review for compliance with certain criteria contained in regulations established by the MDE and the Division; the Director may grant an administrative waiver for preliminary approval certifying a land development project has satisfied the conditions to obtain preliminary SWM approval prior to May 4, 2010. Such a request must be filed and post-marked no later than six months from the date that MDE’s emergency regulations became effective which was April 7, 2010. After the six month period ending on October 7, 2010, no Administrative Waivers may be issued for any reason. This provision does not affect the Developer’s options under the Alternative Compliance provisions of this ordinance. Issuance of an Administrative Waiver is limited only to preliminary approval for SWM as defined in the MDE regulations. Projects granted a preliminary SWM approval, through the Administrative Waiver process, remain subject to all other pertinent reviews and approvals. All Administrative Waivers issued under this provision shall expire on May 4, 2013.*

The difficult aspect of this proposal, as it relates to our County, is that no single milestone approval within our land development planning approval process satisfies the necessary criteria for an Administrative Waiver. As such, Washington County proposes a separate and unique preliminary SWM approval process specific to the transition to the new Ordinance. For a six-month period, beginning on April 7, 2010 and ending on October 7, 2010, Washington County will consider requests for an Administrative Waiver from the new SWM regulations. A comprehensive list of criteria for obtaining an Administrative Waiver has not yet been completed. The most basic information necessary on a development plan is summarized as follows:

- Indication of the number of dwelling units and/or lots proposed;
- the project density;
- size and location of all planned uses of the development project;
- summary of pervious and impervious surfaces;
- identification of proposed site drainage patterns;
- location of all points of discharge from the site proposed for development;
- the location of all points of in-flow of surface water drainage from off-site areas onto the site proposed for development;
- the type, location and size of all SWM measures based on site-specific SWM calculations;
- the proposed alignment (horizontal and vertical), location, and construction details for all roads, access ways and areas of vehicle traffic;
- a demonstration that the methods for delivering water and wastewater service to the development project are adequate or the size, type and general location of all proposed water and wastewater system infrastructure is acceptable to the authority having jurisdiction.

Based on the general information contained above, it is anticipated that a request for an Administrative Waiver will require a review from the Planning Department, DPW, Soil Conservation District (District) and the jurisdictions associated with the water and wastewater approval process (I.E. Health Department, Washington County Division of Environmental Management and/or the City of Hagerstown or respective town authority providing water and wastewater service).

Administrative Waivers will be submitted to the Washington County Planning Department for tracking and routing purposes. The Planning Department will circulate the request to the appropriate review authority. The final issuance of the Administrative Waiver will be from the Director of Public Works, based upon a recommendation for approval by the Deputy Director of Public Works, Land Development Engineering. An Administrative Waiver shall not be considered granted until a letter of Certification for preliminary SWM Approval is executed by the Director of Public Works is received. A request for an administrative Waiver shall be accommodated by the appropriate number of plans (quantity yet to be determined) that are stamped or labeled “*SWM Administrative Waiver Request Plans*” and shall be date stamped or labeled indicating the date of the request. In accordance with the State regulations, an Administrative Waiver shall expire on May 4, 2013.

Redevelopment:

The regulations for redevelopment are applicable only to projects that meet the definition of “redevelopment.” Sites that do not meet the definition are considered “development.” State regulations as well as our proposed Ordinance define redevelopment as “*any construction, alteration, or improvement performed on sites where existing land use is commercial, industrial, institutional, or multifamily residential and the existing site impervious area exceeds 40 percent.*” The MDE adopted this definition only after considering comments and suggestions from the regulators, engineers, homebuilders, and environmental organizations that comprised MDE’s redevelopment committee. While the recommendations from this group varied widely, there were areas of consensus. For example, the committee agreed that the regulations

should require more management on less densely developed sites, encourage redevelopment by imposing reduced requirements, and allow greater flexibility compared to new development requirements.

For all redevelopment projects, the primary goal is to achieve water quality improvements on existing developed lands. To accomplish this, the stormwater regulations require reducing imperviousness, implementing ESD to the MEP to provide water quality treatment for one-inch of rainfall, or using some combination of these for at least 50% of the existing impervious area. This standard is significantly less stringent than the requirements for new development, which require the use of ESD to the MEP to treat up to 2.7 inches of rainfall.

The MDE recognizes that designers, developers, engineers and reviewers need significant flexibility as they consider stormwater management in a redevelopment context. For this reason, both the proposed local Ordinance and the state regulations describe several alternative stormwater management measures that may be considered if addressing 50% of the site's impervious area cannot be accomplished. These include a combination of ESD and on-site or off-site structural Best Management Practices (BMPs), or any method of alternative compliance that may include, but is not limited to:

- Other types of retrofitting (BMP upgrades, filtering practices, implementing ESD off-site);
- Participation in a stream restoration project;
- Pollution trading with another entity;
- Watershed Management Plans;
- Payment of a fee-in-lieu; and
- Partial Waiver of the treatment requirement to the extent that ESD is not practicable.

The determination of what alternative compliance stormwater management measures will be available shall be made by the DPW and/or the Soil Conservation District, as applicable at the appropriate point in the development review process. The DPW and the District shall consider the prioritization of alternative compliance measures outlined above, after ESD to the MEP has been determined to be impracticable. In deciding what alternatives measures may be required, the DPW and/or the District may use considerations including, but not limited to the following:

- Whether a project is in an area targeted for development incentives, such as priority funding area, a designated transit oriented development area or a revitalization and incentive zone,
- Whether the project is necessary to accommodate growth consistent with comprehensive plans, and
- Whether surety and/or project financing has already been secured based on an approved development plan.

These options provide Developers significant flexibility with which to address the State's new SWM requirements.

Smart Growth and Stormwater Management

The MDE regulations and programs intend to support the principles of Smart Growth, which are critical to achieving federal and State air pollution and water quality standards. Since 1997, the MDE has reportedly considered whether every new regulation or program supports Smart Growth. In the case of the stormwater regulations, the standard for redevelopment projects is significantly less stringent than the standard for new development. In addition, the MDE has indicated the definition of redevelopment was carefully analyzed to establish a definition that reasonably enables ESD to be implemented. To the extent ESD cannot be implemented, due to site constraints, the regulations provide the necessary flexibility to allow a project to reasonably proceed. The guidance recognizes that we as the local review and approval authority can take

into account whether the project is in an area targeted for development incentives, such as a priority funding area, a transit oriented development, or a designated revitalization and incentive zone.

Smart Growth projects that are already in the development pipeline can proceed to completion under the new regulations by taking advantage of the available flexibility and Administrative Waivers. Future Smart Growth projects may comply with the new regulations either by incorporating ESD from the initial concept stage or by using the flexibility described above.

In order to assure that the stormwater regulations do not disproportionately affect Smart Growth, the MDE has advised they will develop a system for tracking future developments and, if necessary, consider adjustments to the regulations. We have been encouraged to notify the MDE if they encounter instances where the new requirements prevent or significantly discourage Smart Growth projects.

Thank you for your continued assistance as we develop our new Stormwater Management, Grading, Soil Erosion and Sediment Control Ordinance proposal. Please encourage interested parties to forward their questions and comments to either your attention or me.

CC: Board of County Commissioners
Greg Murray, County Administrator
John Martriano, County Attorney
Mike Thompson, Director, Planning and Community Development
Jennifer Smith, PE, Deputy Director, DPW-LDE
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