

**Office of the County Attorney
Montgomery County, Maryland**

MEMORANDUM

January 29, 1997

TO: Robert K. Kendall, Director
Office of Management and Budget
and
Robert C. Hubbard, Acting Director
Department of Permitting Services

VIA: Charles W. Thompson, Jr.
County Attorney

FROM: John J. Fisher
Assistant County Attorney

RE: Applicability of Permit Fees to MCPS, the WSSC, Montgomery College,
the M-NCPPC, the Montgomery County Revenue Authority and County Agencies

You have asked whether a fee may be charged for County permits for sediment control (Ch. 19), grading and road access (Ch. 49), fire codes (Ch. 22), building permits (Ch. 8), electrical codes (Ch. 17) and well and septic permits (Ch. 27A) issued to Montgomery County Public Schools (MCPS), the Washington Suburban Sanitary Commission (WSSC), Montgomery College, the Maryland-National Capital Park and Planning Commission (M-NCPPC), the Montgomery County Revenue Authority (Revenue Authority) or County agencies. The attached chart sets forth this office's conclusions based on our research.

This office previously determined based on research done in May 1991 and May 1993 (copies of those memoranda are attached for your reference) that Chapter 19 (sediment control), Chapter 22 (fire code), Chapter 8 (building permits) and Chapter 17 (electrical code) cannot be enforced against MCPS, the WSSC, Montgomery College, or the M-NCPPC. What follows is an analysis of whether Chapter 49 (grading and road access) and Chapter 27A (wells and septic permits) may be enforced against these state agencies.

Chapter 49 of the Montgomery County Code (relating to grading and road access permits) is derived from the Express Powers Act. Md. Ann. Code, Art. 25A §§5(K) and (T) (1957, 1994 Repl. Vol.). This enabling legislation (like in the case of Ch. 8, building permits) does not provide specific authority for the application of Chapter 49 to State agencies. The County is not empowered by Article 25A to impose the requirements of Chapter 49 on MCPS, the WSSC, Montgomery College or the M-NCPPC as State agencies. Although Article 29 §10-102 Md. Code Ann. does require the WSSC to obtain a permit in Montgomery or Prince

George's counties for work in a public roadway, the WSSC is expressly exempted from being charged any cost for the permit. Article 29 §10-102(c)(1)(ii) and (d)(2) Md. Code Ann.

Chapter 27A (relating to water and septic permits) also derives from the Express Powers Act. Md. Ann. Code Art. 25A, §§5(T) and (Y) (1957, 1994 Repl. Vol.). This enabling legislation, similarly, does not provide specific authority for the application of Chapter 27A to State agencies. County authority for issuance of well permits derives, (in addition to the Express Powers Act) from the Environmental Article Md. Code Ann. which defines person to include the State, Envir. Art. Md. Code Ann. § 9-201(d); and by express delegation to the County of enforcement of COMAR 26.04.04 (well construction) which likewise defines person to include the State, COMAR 26.04.04.01G. In addition the Environmental Article expressly authorizes the County to charge fees for the issuance of certain well permits §§ 9-1305(d) and 9-1307(c) Envir. Art. Md. Code Ann. Accordingly, the County can charge MCPS, the WSSC, Montgomery College, and M-NCPPC for the well permits specified in §§ 9-1305(d) and 9-1307(c).

Authority for County issuance of septic permits also derives from the Environment Article Md. Code Ann., and by express delegation to the County of enforcement of COMAR 26.04.02 (septic permits) both of which define person to include State agencies. Neither of these express requirements that State agencies comply with the County septic permitting process, however, includes an express right to charge State agencies for those permits. Resolution of the septic permit issue depends on whether the County may charge a State agency a fee for a permitting service in the absence of an express statutory requirement that the State agency pay a fee. The general rule is that in the absence of express statutory authority no fee may be charged. However, an argument can be made that because the State agency is required to comply with the permitting process, impliedly it is also required to pay the permit fee. It is our opinion that the general rule controls, and that therefore, no fee may be charged to MCPS, the WSSC, Montgomery College or the M-NCPPC for issuance of septic permits.

MCPS is also unique in that by State statute it is specifically required to comply with all County building, electrical, fire and plumbing regulations and codes, but is specifically exempt from being charged any fees for any permits required pursuant to those regulations or codes for the construction or remodeling of a building. Md. Educ. Code Ann. §4-116(c). Since we determined in our May 1993 memorandum that sediment control is part of the building permitting requirements, it remains our opinion that because MCPS is exempt from paying building permit fees it is also exempt from paying sediment control permit fees.

As to the Revenue Authority, section 42-29 of the Montgomery County Code specifically requires that any facility or project constructed by the Revenue Authority be built under the laws, rules and regulations of the County. The Revenue Authority is specifically

required by this code section to obtain building and other permits, where required, and to pay the applicable permit fees.

Turning next to the County agencies, County agencies can either be subject to, or exempt from, County laws as the County chooses. Currently three of the six County Chapters reviewed, specifically Chapters 19, 8 and 27A dealing with sediment control, building permits and well and septic permits, respectively, each by definition are applicable to County agencies. See Montgomery County Code §§19-1 (20), 8-1 (c), 8-2 and 27A-2. Similarly Chapter 22 (the Fire code) applies to all buildings owned or occupied by any agency of the County §22-3(b); and Chapter 17 (the Electrical code) is specifically made applicable to public as well as private buildings and structures §17-1(a). Chapter 49 (grading and road access) applies to work on any County road or street by any "person" but does not define the term person. §§49-2 and 49-7. Pursuant to the rules of statutory construction, Chapter 49, therefore, does not apply to County agencies. Although Chapter 49 is not currently applicable to County agencies, County agencies can consent to comply with Chapter 49 and pay the permit fees required by that Chapter if the County so chooses.

Based on the foregoing, it is our conclusion that the County may charge fees and issue permits to the WSSC, Montgomery College or the M-NCPPC only if

- (i) these State entities voluntarily submit to the permitting process, or
- (ii) the County is enforcing State laws applicable to these entities which have been delegated to the County for enforcement and these State laws expressly authorize the imposition of a fee on the State governmental unit (as in the case of well permits).

In cases where the County contributes to the funding of a State agency, whether the County can condition that funding upon compliance with the County's permitting process and payment of applicable fees must be determined on a case-by-case basis. Whether such conditional funding is permissible requires an examination of the nature and type of the funding and a review of the law applicable to the particular State agency in question. Accordingly, we do not recommend that County funding of State agencies be so conditioned without a review of the particular funding and State agency in question, by this Office.

	MCPS	WSSC	Mont. College	M-NCPPC	Rev. Auth.	County Agencies
Sediment Control (Ch. 19)	applicable, but no fees may be charged	exempt	exempt	exempt	applicable and fees may be charged §42-29	applicable and fees may be charged §19-1(20)
Grading and Road Access (Ch. 49)	exempt	applicable but no costs may be charged	exempt	exempt	currently not applicable	currently not applicable
Fire Code (Ch. 22)	applicable, but no fees may be charged	exempt	exempt	exempt	applicable and fees may be charged §42-29	applicable and fees may be charged §22-3(b)
Building Permits (Ch. 8)	applicable, but no fees may be charged	exempt	exempt	exempt	applicable and fees may be charged §42-29	applicable and fees may be charged §§8-1(c) and 8-2
Electrical (Ch. 17)	applicable, but no fees may be charged	exempt	exempt	exempt	applicable and fees may be charged §42-29	applicable and fees may be charged §17-1(a)
Wells or Septic (Ch. 27A)	applicable fees may be charged for well permits but not septic permit	applicable fees may be charged for well permits but not septic permit	applicable fees may be charged for well permits but not septic permit	applicable fees may be charged for well permits but not septic permit	applicable and fees may be charged §42-29	applicable and fees may be charged §27A-2

M E M O R A N D U M

May 20, 1991

TO: Edward U. Graham, Director
Department of Environmental Protection

FROM: Karen L. Federman Henry *Karen L. Federman Henry*
Associate County Attorney

RE: Code Enforcement on Public Agencies -- Washington
Suburban Sanitary Commission

This is in response to your request for an opinion concerning which County permits the Washington Suburban Sanitary Commission (WSSC) must comply with when engaged in construction projects in Montgomery County. Specifically, this opinion reviews the following Code provisions in relation to WSSC:

- Zoning Ordinance, Chapter 59
- Subdivision Regulations, Chapter 50
- Building Permits, Chapter 8
- Sediment Control and Storm Water Management Permits, Chapter 19
- Fire Safety Code, Chapter 22

For the reasons discussed below, it is my opinion that WSSC remains exempt from all of these local regulations, and that the County may not enforce these County laws against the WSSC. The WSSC must comply, however, with State law requirements regarding sediment control and fire safety. These issues are addressed in further detail in the paragraphs that follow.

As a general matter, zoning regulations and restrictions do not apply to the state or any of its subdivisions or agencies. 8 McQuillin, The Law of Municipal Corporations §25.15 (3d ed. 1983). Absent a statutory requirement, it is presumed that the state agency remains immune from local restrictions. 1 McQuillin, The Law of Municipal Corporations, §3A.19 (3d ed. 1987). As a result, a state agency may construct a building for a governmental purpose without regard to municipal zoning regulations, without obtaining a building permit, and without regard to the local fire laws. 2 Anderson, American Law of Zoning §12.06 (3d ed. 1986).

The WSSC has been described as a "body corporate organized under the laws of the State of Maryland...[and] an agency of the State, even though it operates principally in Prince George's and Montgomery Counties." Prince George's County v. Blumberg, 288 Md. 275, 294, 418 A.2d 1155, 1166 (1980), cert. denied, 449 U.S. 1083 (1981); accord, Donocam Associates v. WSSC, 302 Md. 501, 510, 489 A.2d 26, 30 (1985). This derives from the Maryland Constitution, which provides that "[a]ny law so drawn as to apply to two or more geographic subdivisions of this State shall not be deemed a Local Law...." Md. Constn. Art. XI-A, §4; see also Board of Appeals of Montgomery County v. Marina Apartments, Inc., 272 Md. 691, 698, 326 A.2d 734, 738 (1974). Based upon the general principles delineated above, this would render the WSSC immune from County permit requirements because it is a State agency unless a specific statutory provision to the contrary exists. The only provision that seems to comply with this principle appears in Md. Ann. Code, Art. 29 §1-205 (1990 Repl. Vol.), and states that approval by Montgomery County "is required before the construction of any new administration building of the WSSC or any substantial addition to an existing administration building." No explanation is given, however, of what type of approval the section is intended to include.

1. Zoning Ordinance. Montgomery County derives its zoning authority from the Express Powers Act and the Regional District Act. See Md. Ann. Code, Art. 25A, §5(X) (1990 Repl. Vol.) and Md. Ann. Code, Art. 28 §8-101 (1990 Repl. Vol.), respectively. These statutes provide the County with authority "[t]o enact local laws, for the protection and promotion of public safety, health, morals, and welfare, relating to zoning and planning...." Md. Ann. Code, Art. 25A, §5(X). More specifically, the County Council, sitting as the District Council,

[M]ay by ordinance adopt and amend the text of the zoning ordinance and may by resolution or ordinance adopt and amend the map or maps accompanying the zoning ordinance text to regulate, in the portion of the regional district lying within its county, (i) the location, height, bulk, and size of buildings, other structures, and units therein, building lines, minimum frontages, depths and areas of lots, and percentages of lots which may be

occupied; (ii) the size of lots, yards, courts, and other open spaces; (iii) the erection of temporary stands and structures; (iv) the density and distribution of population; (v) the location and uses of buildings and structures and units therein for trade, industry, residence, recreation, agriculture, public activities, and other purposes; and (vi) the uses of land, including surface, subsurface, and air rights therein, for building, trade, industry, residence, recreation, agriculture, forestry, or other purposes.

Md. Ann. Code, Art. 28 §8-101(b).

This enabling legislation contains no indication that the County has authority to apply its local zoning regulations to State agencies. Absent a clear provision in the zoning enabling law, the State and its agencies remain exempt from local zoning requirements. Board of Child Care v. Harker, 316 Md. 683, 691, 561 A.2d 219, 223 (1989). In Harker, the Court of Appeals reviewed the issue of whether a State-licensed and regulated child care facility must comply with county zoning regulations. The Court noted that the Express Powers Act specifies that a county's zoning powers may not supersede the regulatory authority of a State agency. Ultimately, the Court concluded that, although the State's agencies and instrumentalities enjoy the same exemption from county zoning regulations as the State itself, this protection does not extend to an organization that has a license from the State. Harker, 316 Md. at 693-695, 561 A.2d at 224-225; Md. Ann. Code, Art. 25A §5 (X)(2)(v)(4). Recently, the Court of Appeals reaffirmed the immunity of State agencies from zoning regulations and held that a county was exempt from zoning when carrying out a governmental function, because it was a political subdivision of the State. Glascock v. Baltimore County, 321 Md. 118, 121-122, 581 A.2d 822, 823-824 (1990).

As a result, the provisions of Chapter 59 of the Montgomery County Code (the Zoning Ordinance) do not apply to WSSC and may not be enforced against it. The WSSC is an agency of the State and has the same exempt status from local zoning regulations as the State.

2. Subdivision Regulations. The Montgomery County Council may adopt subdivision regulations pursuant to Md. Ann. Code, Art. 28 §7-116(a). No provision appears in this enabling legislation to authorize application of local subdivision regulations to State agencies. Moreover, Chapter 50, Subdivision of Land, Montgomery County Code, contains no indication that it applies to public agencies, either County or State.

Traditionally, Montgomery County has been considered exempt from the subdivision regulations and must comply only with the mandatory referral process conducted by the Maryland-National Capital Park and Planning Commission (MNCPPC), pursuant to Md. Ann. Code, Art. 28 §7-112 (1990 Repl. Vol.). Inasmuch as counties and State agencies derive their immunity from the State's sovereignty, and because WSSC also is subject to the mandatory referral process, it follows that WSSC remains exempt from the County's subdivision regulations as well. See Harker, supra. It is my opinion, therefore, that WSSC does not have to comply with the County subdivision regulations contained in Chapter 50 of the Montgomery County Code.

3. Building Permits. The Express Powers Act authorizes the County to:

"[E]nact local laws enabling the county council to adopt from time to time, after reasonable notice and opportunity for public hearing and with or without modifications, ordinances and amendments thereof for the protection and promotion of public safety, health, morals, comfort and welfare, relating to...the erection, construction, repair and use of buildings and other structures...."

Md. Ann. Code, Art. 25A §5(T) (1957, 1990 Repl. Vol.) Based on this enabling legislation, Montgomery County has enacted Chapter 8 of the Montgomery County Code 1984, as amended, the provisions of which apply "to all buildings and structures and their appurtenant construction...and shall apply with equal force to public and private buildings, except where such buildings are otherwise specifically provided for by statute." §8-1(c), Montgomery County Code.

Although the language of §8-1(c) of the County Code indicates that it applies to public buildings, which would include State and local government buildings, the enabling legislation does not provide specific authority for the application of local building codes to State agencies. As noted above, no provision exists in State law that would require the WSSC to obtain a building permit from the County. Rather, only a general requirement exists that the WSSC may not construct an administration building without prior approval of the County. See Md. Ann. Code, Art. 29, §1-205, supra. Consequently, pursuant to the immunity enjoyed by state agencies absent a statutory requirement that the agency be subject to local restrictions, the WSSC remains exempt from the requirements of Chapter 8 of the County Code and does not have to obtain a building permit from Montgomery County.

4. Sediment Control and Storm Water Management Permits.
The authority to enact laws regarding sediment control and storm water management derives from several sources. First, the Express Powers Act provides that the County has authority to:

"[E]nact local laws enabling the county council to adopt from time to time...ordinances and amendments thereof for the protection and promotion of public safety, health, morals, comfort and welfare, relating to...the control of problems of soil erosion...."

Md. Ann. Code, Art. 25A §5(T). The Express Powers Act further authorizes the County:

"To enact local laws providing for the creation of a storm drainage district or districts and the...construction and maintenance of storm drainage projects, and the regulation of storm drainage facilities."

Md. Ann. Code, Art. 25A §5(W). In addition, each county or municipality must adopt grading and building ordinances to protect the natural resources of the State by reducing or preventing erosion and sedimentation. Md. Env't. Code Ann. §§4-101 and 4-103 (1987). Ordinances to implement a storm water

May 20, 1991
Page 6

management program also must be enacted by local governments. Md.Env't.Code Ann. §4-202.

Pursuant to these provisions, the County Council has enacted Chapter 19, "Erosion, Sediment Control and Storm Water Management," Montgomery County Code 1984, as amended. Although the erosion and sediment control requirements, as well as the storm water management provisions, purport to apply to State agencies, the enabling legislation does not delegate such authority to the County. See §§19-1(20) and 19-21, Montgomery County Code. Furthermore, State agencies remain exempt from local regulation as to sediment control based on the provision that "[i]f a State unit undertakes any land clearing, soil movement, or construction activity, the [Maryland] Department of the Environment shall review and approve this action." Md.Env't.Code Ann. §4-106. This State law preempts any local regulation of the same matter. A State agency also submits its storm water management plan to the Maryland Department of the Environment, although a county or municipality may request an opportunity to review and comment upon the plan. Md.Env't.Code Ann. §4-205.

These provisions apply to the WSSC based on its status as a state agency and, therefore, it appears that WSSC may be exempt from County sediment control and storm water management restrictions. The only input that the County may have occurs when it requests the chance to review WSSC's storm water management plans, as permitted by State law. Md.Env't.Code Ann. §4-205.

5. Fire Safety Code. The fire safety requirements for Montgomery County appear in Chapter 22 of the Montgomery County Code as the "Fire Safety Code." The authority to promulgate these regulations derives from the Express Powers Act provision, which states that the County Council may "pass all ordinances, resolutions or bylaws, not inconsistent with the provisions of [the Express Powers Act] or the laws of the State, as may be proper in executing and enforcing any of the powers enumerated...as well as such ordinances as may be deemed expedient in maintaining the peace, good government, health and welfare of the county." Md.Ann.Code, Art. 25A §5(S). See also §2-12 Montgomery County Code 1984, as amended (police powers generally). The Fire Safety Code also is consistent with the

May 20, 1991
Page 7

State law regarding fire prevention. Md. Ann. Code, Art. 38A (1990 Repl. Vol.).

As illustrated, the enabling legislation does not grant authority to the County to regulate the State and its agencies regarding fire safety. In fact, the Fire Safety Code specifically excludes state agencies, by providing, in pertinent part:

(b) The provisions of this chapter shall apply to all buildings, structures, areas, or premises within the county which are owned or occupied by any agency of Montgomery County government, Montgomery County public schools or Montgomery College, even though such building, structure, area, or premises is located within a municipality otherwise exempt from this chapter.

(c) The provisions of this chapter shall not apply to any building, area or premises within the county which is owned by any department or agency of the government of the United States or the state.

§22-3(b) and (c) Montgomery County Code 1984, as amended. This specific exclusion recognizes that, although the WSSC is exempt from the County Fire Safety Code, it remains subject to the fire prevention requirements contained in the State Fire Prevention Code. Specifically, the State law provides that:

[T]he State Fire Marshal shall inspect all State, county, and municipally owned institutions, all schools, theatres, churches and other places of public assembly as to fire exits and reasonable safety standards and report his findings and recommendations to the proper administrative heads.

May 20, 1991
Page 8

Md. Ann. Code, Art. 38A §8(d). Thus, the WSSC is not exempt from all fire safety standards, but only those imposed directly by the County.

Conclusion

Based on the foregoing discussion, it is my opinion that the WSSC is not required to obtain the permits issued by the County regarding construction projects. As noted herein, however, the WSSC is subject to State laws imposed and enforced by the Maryland Department of the Environment and the State Fire Marshal. Of course, WSSC may submit itself voluntarily to obtaining appropriate County permits.

If you have additional questions or comments, please do not hesitate to contact me. I will continue to review these issues as they affect the Maryland-National Capital Park and Planning Commission, Montgomery County Public Schools, and Montgomery College, and hope to have a response available within several weeks.

cc: Joyce R. Stern, County Attorney
A. Katherine Hart, Senior Assistant County Attorney
William B. Payne, Department of Environmental Protection

KLEH:kh
1199:91.02051

¹Pursuant to Md. Ann. Code, Art 38A §7(c)(1), the county fire marshal may serve as assistant State fire marshal to carry out the provisions of the State law within the county or municipality. This does not render a State agency subject to the County Fire Safety Code, but only reflects the practical aspect that the same individual may serve in both State and local capacities.

PRIVILEGED AND CONFIDENTIAL

M E M O R A N D U M

May 24, 1993

TO: Edward U. Graham, Director
Department of Environmental Protection

VIA: Joyce R. Stern *Joyce R. Stern*
County Attorney

FROM: Karen L. Federman Henry *Karen L. Federman Henry*
Associate County Attorney

RE: Code Enforcement Regarding Public Agencies:
Maryland-National Capital Park and Planning Commission
(M-NCPPC); Montgomery County Public Schools (MCPS);
Montgomery College

This is the next segment of the comprehensive analysis that has been conducted by this office regarding the applicability of various County laws and regulations to certain entities during the construction process. In this memorandum, the following provisions will be reviewed regarding M-NCPPC, MCPS, and Montgomery College:

- Zoning Ordinance (Chapter 59)
- Subdivision Regulations (Chapter 50)
- Building Permits (Chapter 8)
- Sediment Control and Stormwater Management (Chapter 19)
- Fire Safety Code (Chapter 22)
- Electricity (Chapter 17)

As discussed in previous memoranda, the determination of whether Montgomery County may enforce the above-referenced requirements against a particular agency depends upon the status of the agency as State, County, or private, and whether any statutory provision specifies how the agency is to be treated. For example, a State agency remains immune from local laws, unless a State law requires compliance with local code provisions.

M-NCPPC

The Maryland-National Capital Park and Planning Commission (M-NCPPC) was established by the General Assembly of Maryland and, therefore, enjoys the status of a State agency. See Md. Ann. Code, Art. 28, §1-101. As a State entity, the M-NCPPC is not required to comply with the provisions of the Montgomery County Code absent a specific statutory requirement

Edward U. Graham, Director
May 24, 1993
Page 2

in the State Code. This would exempt M-NCPPC from the requirements of the zoning ordinance (Chapter 59) and building permits (Chapter 8).

It appears that M-NCPPC is subject to the mandatory referral provisions of the Regional District Act, rather than the more specific subdivision regulations contained in the Montgomery County Code. See Md. Ann. Code, Art. 28, §7-112. As a state agency, M-NCPPC does not have to comply with the local sediment control and storm water management restrictions (Chapter 19), but Montgomery County may review and comment on any proposed plan of the M-NCPPC in accordance with Md. Env't. Code Ann. §4-205.

The State Code provides for fire safety regulations and electrical codes in Article 38A of the Maryland Annotated Code. Montgomery County is exempted from the inspections otherwise conducted by the State Fire Marshal regarding electricity, and the County has enacted its own Fire Code and Electrical Code. Additional authority for the promulgation and enforcement of an electrical code derives from Md. Bus. Occupns. & Prof. Code Ann. §6-301 (1989). Although M-NCPPC would be exempt from pure local regulation, it would have to comply with the State requirements regarding these issues. As a result, to the extent that Md. Ann. Code Art. 38A, §63 has delegated inspection authority to Montgomery County, the M-NCPPC would have to obtain the necessary inspections from Montgomery County. Similarly, the distinct delegation of authority to the County set forth in Md. Bus. Occupn. & Prof. Code Ann. would permit the application and enforcement of the County Electrical Code regarding M-NCPPC.

MCPS

The Montgomery County Public Schools are created by State law and in many respects operate as a hybrid of State and County status. The State Code, however, specifies that MCPS must obtain all applicable permits and must comply with local building, electric, fire, and plumbing regulations and codes. See Md. Educn. Code Ann. §4-116. No provision appears in the State Code that would render MCPS subject to zoning restrictions, although MCPS must comply with the mandatory referral process. See Md. Ann. Code, Art. 28 §7-112 (1990 Repl. Vol.). Also, the building requirements referenced in the Education Article seem to encompass sediment control and storm water management issues, inasmuch as these provisions are extensively intertwined with the general building code in Montgomery County.

Edward U. Graham, Director
May 24, 1993
Page 3

MONTGOMERY COLLEGE

Like the M-NCPPC and MCPS, Montgomery College is established by State law. As a State entity, the College remains immune from the various permit requirements of Montgomery County absent a specific statutory provision rendering the College subject to local regulation. See Board of Trustees of Howard Community College v. John K. Ruff, Inc., 278 Md. 580, 586-87 (1976). Most of the local controls are strictly budget matters, and I was unable to find any provision that would render these buildings subject to the Montgomery County Code. See, e.g., Md. Educn. Code Ann., Art. 16; see also Md. State Fin. & Proc. Code Ann. §4-409 (State conducts inspections of college facilities). As with the other State agencies, the College would have to comply with State fire safety regulations and sediment control provisions, which are administered by Montgomery County. Also, the College must comply with the mandatory referral process contained in the Regional District Act. See Md. Ann. Code, Art. 28 §7-112, supra.

CONCLUSION

Based upon the foregoing analysis, the most extensive enforcement authority exists in relation to the MCPS. Although the M-NCPPC and Montgomery College enjoy a certain level of immunity from the local regulations pertaining to building permits, these entities could agree to comply with the appropriate local requirements as a matter of comity. Although the County cannot enforce its laws if these entities refuse to comply with the local regulations, there is nothing to prevent the State agencies from voluntarily seeking review of a proposed project by the appropriate County agency or agencies to promote compliance with local regulations.

The remaining segment of this series of opinions involves the Revenue Authority and the Housing Opportunities Commission. I will transmit a memorandum discussing these agencies and the permits required of them once I have had the opportunity to research the status of these entities. If you have any questions or comments in the interim, please do not hesitate to contact me.

2075.KLFH
90.00265

cc: A. Katherine Hart, Senior Assistant County Attorney
William B. Payne, DEP
Robert Hubbard, DEP



MDE

MARYLAND DEPARTMENT OF THE ENVIRONMENT
2500 Broening Highway • Baltimore, Maryland 21224
(410) 631-3000

Parris N. Glendening
Governor

Jane T. Nishida
Secretary

OCT 09 1996

Mr. Robert Hubbard, Acting Director
Department of Permitting Services
Development Services & Regulation
Montgomery County
Department of Environmental Protection
250 Hungerford Drive
Rockville MD 20850

Dear Mr. Hubbard:

In response to Montgomery County's reorganization to create a Department of Permitting Services which is now responsible for a number of functions formerly performed by the Montgomery County Health Department and the Montgomery County Department of Environmental Protection and pursuant to the provisions of Environment Article §1-301, this will serve to designate Mr. Robert Hubbard, Acting Director of the Department of Permitting Services as "Approving Authority" in Montgomery County for enforcing the requirements of the following regulations in accordance with the Maryland Department of the Environment (MDE) policy direction, guidance, and the existing delegation agreements which will be significantly revised in the near future:

- COMAR 26.04.02, "Sewage Disposal and Certain Water Systems for Homes and Other Establishments in the Counties of Maryland Where a Public Sewage System is not Available",
- COMAR 26.04.03, "Water Supply and Sewerage Systems in the Subdivision of Land in Maryland",
- COMAR 26.04.04, "Well Construction"
- COMAR 26.04.05, "Shared Facilities"
- COMAR 26.08.09, "Public Bathing Beaches"
- COMAR 26.04.01, "Quality of Drinking Water in Maryland", (pertaining to noncommunity water supplies)

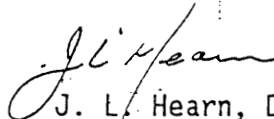
The Secretary of MDE retains the ultimate authority for assuring satisfactory implementation of these regulations and through the Groundwater Permits Program of the Water Management Administration will evaluate the implementation effort of the County and provide assistance as necessary.

This letter supersedes previous delegation letters to Montgomery County for the above-listed areas of regulatory enforcement and is effective for Mr. Hubbard's successors in the position of Director of the Department of Permitting Services and is binding upon my successors to the position of Director of the Water Management

Montgomery County Delegation Letter
Page 2

Administration of the MDE. This delegation is effective October 1, 1996 and shall continue in effect until it is explicitly superseded by a subsequent written delegation or written rescission.

Sincerely,



J. L. Hearn, Director
Water Management Administration

JLH:je

cc: Bruce Romer

bcc: Richard Helfrich
Larry Stephens
Carol Garvey
Jim Caldwell
David Kerr

Permitting Funds - Collection of Fees From Outside Agencies

OMB Issue Manager: Steve Davis

Date: January 19, 1997

Other Key Participants:

Paulette Bowles
Robert Hubbard, DPS
Harold Adams, DPS
John Fisher, CA

Dept/Agency: Permitting Services

Background Summary: Collection of fees from outside agencies is a legal issue as well as a serious funding issue for the Permitting Services Fund. During the formulation of the FY97 operating budget for the Department of Permitting Services (DPS) it was decided that services related to the building permit process would be re-organized to better serve the citizens of the County and that these services would be put into an enterprise fund. To enable to fund to be fully self-supporting, public agency projects were assumed to pay permit fees in the amount of \$965,090. It was further assumed that current Capital Project appropriations and funding levels were sufficient to cover the cost of fees. Permit fees were increased to cover the full cost of issuance within the limitations that exist. (Some fees are set by the State) These decisions were made a part of the approved Permitting Fund budget. Letters went out to all County agencies and departments notifying them of the change in policy. Unfortunately, until the letters went out, most agencies were not aware of the change in County policy, and they were caught by surprise. Most of the departments and agencies were unprepared to pay the fees, and they were concerned that they did not have specific budget allocations for the fees. +hl

Recent legal opinions indicate that, while charging fees to Montgomery County Government departments is simply a policy issue, charging fees to the other agencies (MCPS, M-NCPPC, WSSC, MC, and HOC) is problematic. The attached opinion (due in final by 2/24/97) indicates that:

1. MCPS, WSSC, MC, and the M-NCPPC may only be charged fees in instances where the entity is voluntarily seeking a permit even though they are exempt from the requirements of the permitting process. Negotiated agreements must be made prior to services being rendered. Information on HOC is due by the end of the month.
2. The Revenue Authority must go through the permitting process and pay all applicable fees by law.
3. MCPS is specifically exempted from permit fees by State statute. This exemption can not be circumvented by conditioning funding upon payment of fees.
4. Conditioning funding to State agencies on the payment of permitting fees may not be possible if the County is required to provide the funding.
5. In all other cases where the agency is required to comply with the permit process but is exempt from fee payment, the County cannot charge a fee.

Status/Decisions made to date:

Fiscal Analysis. The revenue budget for agency fees is \$965,090. To date, \$29,770 has been collected. Another \$99,026 is owed to DPS from a variety of departments and agencies, and work is ongoing to collect these sums. To date \$41,000 of work has been done on projects for MCPS, and, \$45,411 has been done for WSSC, they do not expect to collect these fees. One large County project that is outstanding is the Site 2 landfill which may need extensive sediment water control permits if the final decision results in building the landfill. Fee totals for these activities to date are \$128,796. This data (for the first six months of FY97) is far below what is needed to reach the budget amount. However, expenditures are running low due to staff vacancies. As a result it is expected that the fund may end the year with a very small fund balance. FY98 budget assumptions to be made based on outcome of this issue.

FY98 CIP. Permit fees were added to MCG projects only.

Current Status of Fee Collection. DPS has suspended efforts to collect fees from outside agencies and is issuing permits to them as needed.

County Attorney Opinion. We have a draft opinion and follow-up memo (attached) which were summarized above. A final opinion (including analysis of RA and HOC) is expected in the near future.

Other. The MFP Committee is working on the interagency fees issue with a meeting scheduled for February 3rd.

Discussion Items:

MOU's. No work has been done to date on the MOU's. There was confusion on who was assigned this task. If they are needed, OMB will need to draft and negotiate them with the agencies. If it were possible to negotiate agreements, funds would likely need to be added to these agencies budgets/projects. The net effect on the tax-supported funds would be the essentially the same as a direct general fund transfer into the Permitting Services fund except with greater overhead.

Council Interest. In addition to the MFP meeting, Jennifer Hughes, of the County Council staff, has requested additional information on the scope of the problem of revenue for the Permitting Services Fund. She has requested that we also meet with the agencies involved. Plans are to meet with them when the MOU's are available.

Time Considerations: A decision should be made prior to the MFP Committee meeting on February 3rd.

Decisions to be Made:

1. **Option A (recommended):** Suspend all efforts to collect fees from exempt agencies. Do not attempt to negotiate agreements. Notify agencies and the Council that we have determined that the law prohibits charging fees from these agencies, therefore we are recommending a level of general fund support to the enterprise fund in lieu of these fees; such amount to be sufficient to maintain adequate fund balance.
2. **Option B:** Work to pursue negotiated agreements with the agencies on voluntary payment of fees. Issues to be addressed would include retroactive payments and budgeting of fee payments in the affected projects.
3. **Option C:** Pursue amendments to State law. This could not be accomplished until next year's session.

Attachments: Legal Opinion.