

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. Glascok 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

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

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.

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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.¹

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

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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.