OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

Charles W. Thompson, Jr.
County Attorney

MEMORANDUM

September 22, 1999

TO: Ellen Scavia
Department of Environmental Protection

VIA: Marc Hansen, Chief
Division of General Counsel

FROM: Walter E. Wilson
Assistant County Attorney

RE: Advice of Counsel–Storm Water Management Facilities

You have requested an opinion from this office in response to a series of questions presented to the Department of Environmental Protection by Ms. Cleo Tavani, the designated representative from the Montgomery County Taxpayers League to the County's Storm Water Finance Work Group. These questions concern matters pertaining to the county taking responsibility for capital maintenance of storm water management facilities located either on private property or non-county public property. We respond to your specific questions as follows:

1. Who decides what is a public utility?

Deciding what is legally a public utility is a policymaking function of the legislative body for the jurisdiction in which the law is to be applied. For our purposes, the ultimate authority on this subject would be the State of Maryland.

2. What does it mean legally to be a public utility?

"Public utility" can be defined as a business or service that is engaged in regularly supplying the public with some commodity or service which is of public consequence and need, such as electricity, gas, water, transportation, or telephone or telegraph service. It is always a virtual monopoly. "Public utility" also means a privately owned and operated business whose services are so essential to the general public as to justify the grant of special franchises for the

use of public property or of the right of eminent domain, in consideration of which the owners must serve all persons who apply, without discrimination. The term also refers to an agency, instrumentality, business industry or service which is used or conducted in such a manner as to affect the community at large, that is, which is not limited or restricted to any particular class of the community. The test for determining if a concern is a public utility is whether it has held itself out as ready, able and willing to serve the public. The term implies a public use of an article, product, or service, carrying with it the duty of the producer or manufacturer, or one attempting to furnish the service, to serve the public and treat all persons alike, without discrimination. It is synonymous with "public use," and refers to persons or corporation charged with the duty to supply the public with the use of property or facilities owned or furnished by them. Black's Law Dictionary ©1978. The Maryland Annotated Code contains a short definition of "public utility," which is "a person who provides electric or communications facilities." Md. Code Ann., Public Utility Companies § 12-301 (h). The Montgomery County Code also contains a definition of public utility in the chapter dealing with forest conservation, which says that "public utility" means "the transmission lines and the electric generating stations licensed under Article 78, Section 54A and 54B or 54-I of the Maryland Code; and water, sewer, electric, gas, telephone, and cable service facilities and lines. Montgomery County, Md., Code § 22A-3 (ii).

3. What authority would county agents have to go on private property? What about facilities completely within a structure, e.g., holding tanks?

The issue of county agents' access to private property to inspect and/or maintain storm water management facilities is governed under Chapter 19 of the Montgomery County Code and is presently addressed through a system of easements and covenants in effect throughout the county. As a condition of receiving a building permit to construct a new development that contains on-site storm water management facilities in Montgomery County the property owner must execute an easement coupled with an inspection and maintenance agreement binding on all future landowners granting county agents a right of access to those facilities to carry out inspection and, where necessary, maintenance activities. Montgomery County, Md., Code § 19-30. The county code makes no distinction with respect to county agents having access to outdoor facilities versus those located inside a structure when storm water inspection and maintenance easements and covenants are involved. Therefore, the relevant provisions in Chapter 19 of the Montgomery County Code that would cover residential developments with outdoor ponds could be equally applied to nonresidential properties that contain underground water detention facilities or holding tanks. See also id. § 19-25. County inspectors can also enter private property if the county has accepted dedication of a storm water management facility in lieu of an inspection and maintenance agreement. The dedication must provide for "adequate and perpetual access," by easement or some other mechanism, that allows for county inspection and regular maintenance. Id § 19-30. In the absence of an easement, county agents seeking to gain entry onto private property to carry out an inspection activities must obtain permission from the property owner.

When gaining consensual access is not possible, then court-issued administrative search warrants are another option available to county inspectors.

4. What liabilities would the county incur if a private citizen is injured as a result of poor maintenance of a private facility post-county assumption of maintenance responsibility?

The type of liability that the county would face in this instance depends on whether the county's maintenance of a storm water management facility is ultimately determined to be a governmental function or a proprietary function. Though not always an easy determination to make, the distinction between the two functions has significant legal implications. A local government is said to be acting in a governmental capacity when it acts as an agent of the state and undertakes a function primarily to benefit the local community. However, when that local jurisdiction takes on a function to benefit itself as a corporate entity, it is said to be engaged in a proprietary function. In the latter instance, the activity is usually, though not always, conducted for the purpose of producing a pecuniary profit.

The county, if sued in its own capacity, enjoys full immunity from tort liability for negligence if engaged in a governmental function. The legal test in Maryland to determine whether a particular function is governmental can be stated as follows: Where the act in question is sanctioned by legislative authority, is solely for the public benefit, with no profit or emolument inuring to the municipality, and tends to benefit the public health and promote the welfare of the whole public, and has in it no element of private interest, it is governmental in nature. Tadjer v. Montgomery County, 479 A.2d 1321, 1324-25 (Md. 1984). In those instances, immunity attaches to the county.

While this means that the county itself could not successfully be sued, the same cannot be said for any county employees directly involved. Those employees remain subject to lawsuits, and if the claim is for simple negligence, then the county would be required to defend and indemnify them and could not assert its own immunity to avoid doing so. Md. Code Ann., Cts. & Jud. Proc., § 5-303 (b). However, the county's liability for any judgment rendered against its employees in such a situation would be capped at $200,000 per claim or $500,000 in the aggregate.

On the other hand, if there were a judicial determination that the county's maintenance of a storm water management facility is a proprietary function, the county could be exposed to tort liability for injuries directly attributable to poor maintenance as would a private entity. However, even under those circumstances, the Local Government Tort Claims Act would still limit plaintiffs' recovery to $200,000 per individual claim and $500,000 per total claims arising from the same occurrence. The alleged tortious acts or omissions at the heart of any claim for damages against the county would also need to involve a county employee who committed the

acts or omissions while engaged within the scope of his or her employment. Md. Code Ann., Cts. & Jud. Proc., § 5-303 (a), (b).

Applying the generally accepted legal test for determining the type of function in which the county is involved, one could conclude that the county is engaging in a governmental function when it takes on the responsibility of maintaining a storm water management facility on private property even if it charges user fees to fund those activities. At the same time, however, it is important to note that resolving the question of what is governmental is strictly a judicial determination, not a legislative one, and there are currently no reported cases in which a Maryland court has addressed the proprietary-versus-governmental question concerning storm water management facilities.

5. If a storm water facility also serves a recreation purpose, how are county liabilites sorted out from those of the property owner?

This issue is not likely to arise very frequently because the types of debris and substances that collect in storm water facilities would limit the recreational purposes to which most of them could suitably be put to use. There are some exceptions, however, such as boating. Under a scenario in which Montgomery County assumes the responsibility for maintaining a recreational pond or lake as a storm water management facility without assuming ownership, the county's exposure to liability versus that of the property owner would first of all depend on whether a potential plaintiff's injuries were directly attributable to some failure on the county's part to properly maintain the facility, and secondly, on whether county's role in maintaining the facility is deemed to have been undertaken pursuant to a governmental function or proprietary function. See, e.g., Mayor and City Council of Baltimore City v. State, for Use of Blueford 195 A. 571 (Md. 1938) (despite charging nominal fee to use city-operated pool, city not liable for alleged negligence resulting in youngster's drowning death); and Town of Brunswick v. Hyatt, 605 A.2d 620 (Md. App. 1992) (town-operated pool facility was a governmental function). If an injury is not directly attributable to any negligence on the county's part to properly maintain a recreational pond or lake as a storm water management facility, then only the property owner could be subject to liability.

6. Can a county tell a federal or state government agency that the county is going to levy a fee on these entities and take over responsibility for maintaining storm water facilities on their lands?

Not likely. Aside from the fact that there are no provisions in the county's enumerated powers under Article 25A or elsewhere in the Maryland Code that would allow such an action to take place, federal property falls completely outside the county's jurisdiction. Also, since the state is a sovereign entity not subject to local legislation, the state could also raise that issue with

regards to storm water user fees or any other type of special assessment that a local government sought to make mandatory in the manner suggested by this question. Besides, in at least one respect, state law already limits to some degree the role of local governments with regard to storm water management when state or federal entities are involved by requiring that those entities submit their storm water management plans to the Maryland Department of the Environment instead of to the county before undertaking any development project; although local governments are allowed, upon request, to review those plans and add their comments. Md. Code Ann., Envir. § 4-205 (b), (c). State and federal agencies are explicitly exempted from the state law provisions that authorize counties to institute a system of charges to fund their storm water management programs and require the submission of pre-development storm water management plans to counties for approval. Id. § 4-205 (a). Therefore, an assertion of county authority over state or federally maintained storm water management facilities as described above would be very questionable legally. But the county could execute a memorandum of understanding with the state or federal agency that is currently responsible for inspecting and maintaining storm water facilities located on state or federal property to provide for payment of user fees.

7. Can "maintenance" be narrowly defined to exclude daily maintenance, e.g., mowing grass, picking up litter and major reconstruction of worn-out or damaged facilities?

Montgomery County has the option of legally defining "maintenance" as narrowly or as broadly as it chooses. However, to define it so narrowly as to exclude an essential, even if non-routine, function like major reconstruction of damaged or dilapidated facilities would be inconsistent with other county code provisions that require the party responsible for maintenance to undertake sufficient measures to ensure that the facility remains in sufficiently good condition to serve its intended purposes. A good example of such a provision is Section 19-29 of the Montgomery County Code, which specifically requires the county to prevent the structural failure of any facility that the county has accepted for maintenance. That same provision also requires the county to keep that facility in good working condition. A very narrow definition of "maintenance" would also be incompatible with the county's goals of complying with the federal Clean Water Act by ensuring that storm water management facilities are inspected and maintained in a way that satisfies the requirements of the NPDES [National Pollutant Dischage Elimination System] permit that the state issued to Montgomery County in 1996. On the other hand, to exclude routine tasks such as picking up litter and cutting grass from the definition of "maintenance" does not, in my view, present a problem.

I trust that this memorandum is fully responsive to your request. If you have any further questions or comments on these matters, please do not hesitate to contact me.

cc: Ms. Cleo Tavani, Montgomery County Taxpayers League
Ms. Jennifer Hughes, Office of the Montgomery County Council