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MEMORANDUM

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VIA: Leon Rodriguez
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DATE: September 24, 2008

RE: Forest Conservation--Enforcement: Bill 14-07; Bill 37-07; and Resolution Setting Penalties

This memorandum explains that certain enforcement provisions of Bill 14-07, Forest Conservation—Enforcement; Bill 37-07, Forest Conservation—Amendments; and Resolution to set fees and penalties under Chapter 22A, Forest Conservation—Trees (introduced 12/11/07), may exceed the power of the County to impose. This memorandum suggests certain amendments to the enforcement provisions of these legislative initiatives to address some of the legal concerns raised in this memorandum.

I. Bill 14-07

A. Enforcement Approach of Section 8-25 (c).

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Section 8-25 (c) provides that no building permit may be issued for property on which a violation of Chapter 22A has occurred. This sanction is problematic because it: 1) puts the burden of proof as to whether a violation has occurred on the Director of the Department of Permitting Services; and 2) provides that once Chapter 22A is violated, no applicant may obtain a building permit for the property on which the violation occurred—this sanction may result in an unconstitutional taking of the applicant's property and a violation of the due process rights of the applicant.

1. The Burden Of Proof.

Section 8-25 (c) requires the Director of Permitting Services to deny a building permit if the applicant seeks the permit for property on which a violation of Chapter 22A has occurred. How is the Director to know that a building permit applicant (or the applicant's predecessor in title) has cut, cleared or graded the property in violation of Chapter 22A? Presumably the applicant is in a better position to know the history of tree clearing on the property than the Director.[1] Consideration should be given to shifting the burden of proof to the applicant, not the Director, to certify that no violation of Chapter 22A has occurred on the property.

Conversely, the compliance provisions currently enumerated in Section 8-26 prohibit the issuance of permits *until* compliance with other Code provisions have been *demonstrated by the applicant*, thereby placing the burden of proof on the applicant. For example, subsection (f), provides that no building permit will be issued "until evidence has been presented that the plans of the proposed building comply with all applicable regulations relating to water supply, sewerage, drainage, plumbing and gas fitting." The no-permit-without-proof-of-compliance approach may be applied to the Forest Stand Delineations and Forest Conservation Plans required under Sections 22A-11, which are subject to three rounds of inspections under Section 22A-15.

2. Unconstitutional Taking.

Section 8-25 (c) provides that once Chapter 22A has been violated, a building permit may never be issued for property on which a violation has occurred—even if the violation has been subsequently cured. Such an approach will result, in some cases, in an unconstitutional regulatory taking of the applicant's property.

Both the Fifth Amendment to the United States Constitution and Article Three, Section 40 of the Constitution of Maryland prohibit the taking of private property for public use without just compensation. In order for a private property owner to demonstrate that a government regulation affecting the use of his or her private property constitutes a taking such that he or she must be compensated for it, the owner must "affirmatively demonstrate that the legislature or administrative determination deprives him of *all* beneficial use of the property." *Governor of Maryland v. Exxon Corp.*, 279 Md. 410, 437, 370 A.2d 1102, 1117 (1977), quoting *Baltimore City v. Borinsky*, 239 Md. 611, 622, 212 A.2d 508 (1965), quoting in turn *Goldblatt v.*

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[1] This assumption may not be true with respect to activity that may have occurred on the property before the applicant for a building permit purchased the property. See discussion concerning substantive due process, *infra*.

Hempstead, 369 U.S. 590, 592, 82 S.Ct. 987, 1104, 8 L.Ed.2d 1228 (1958). (Emphasis added). It is not enough for the property owner "to show that the . . . action results in substantial loss or hardship." *Id.* Further, the regulation must render the *entire property*, not just a segment or aspect thereof, economically barren, except in instances where the property owner has "fragmented the property for distinct development or uses." *City of Annapolis v. Waterman*, 357 Md. 484, 526, 531, 745 A.2d 1000, 1022, 1024 (2000). *See also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

Moreover, even if the regulation leaves a particular property economically barren, the County would not be obligated to compensate the property owner if, in promulgating or enforcing the regulation, the County is preventing the creation of a nuisance. *Neifert v. Dep't of the Env't*, 395 Md. 486, 518-19, 910 A.2d 1100, 1120 (2006), quoting *Erb v. Maryland Dep't of the Env't*, 110 Md. App. 246, 264-66, 676 A.2d 1017, 1026-28 (1996).

Maryland courts have found unconstitutional takings when a County has, by ordinance, required a developer to reserve land within a proposed subdivision for a new state road, for an indefinite period, during which the developer could not use the land for any other use, *Howard County v. JJM, Inc.*, 301 Md. 256, 482 A.2d 908 (1983), and when the County, by ordinance, reserved a private property owner's entire property for a period of three years for possible future park development, thereby prohibiting the owner from putting the land "to any use whatsoever," *Maryland-Nat'l Capital Park and Planning Comms'n v. Chadwick*, 286 Md. 1, 5, 405 A.2d 241, 243 (1979).

Whether the denial of a building permit would create an unconstitutional taking depends on the location of the property, e.g. whether there are alternative uses for the property if, as a result of the denial of the permit, no structure can be constructed on it. In some instances, the property may still be farmed or used for agricultural purposes. If, however, the property has not yet been improved, and has no alternative uses because of zoning requirements and other restrictions on the land's use, the property owner will most likely be able to demonstrate that the denial of the permit has deprived him or her of all beneficial use of the property and thus constitutes an unconstitutional taking of the owner's property.

3. Due Process.

Another problem with the enforcement approach taken by Section 8-25 (c) is its potentially devastating impact on a *bona fide* purchaser of the property. There is no credible means by which a potential purchaser of property can determine if illegal tree cutting activity has occurred on a parcel of property. Such illegal activity will not appear in the land records to put the potential purchaser on notice of the violation.

It is easily conceivable that when the purchaser applies for a building permit, neighbors, who can demonstrate that violations of Chapter 22A have occurred on the property before the current owner purchased the property, could appear to contest the issuance of a building permit. Despite the innocent status of the current owner, Section 8-25 (c) would require the Director to deny the permit.

This result may, in the case of an undeveloped lot, have a very significant impact on the new property owner. This result may well violate the substantive due process rights of the purchaser. *Maryland-National Capital Park and Planning Commission v. Chadwick,* 286 Md. at 9-10, 405 A.2d at 245 (government action violates due process property rights if the means chosen to enforce the law are too burdensome on the individual property owner).

4. Suggested Amendment.

The denial of a building permit for property on which a violation of the forest conservation law has occurred may avoid the twin legal problems presented by a regulatory taking by the government of private property and the due process guarantee of the Maryland Constitution, if the property owner is permitted by the statute to obtain a permit if the violation is corrected either by obtaining an approved plan or the payment of an "in lieu" fee under § 22A-27.

B. Section 22A-16—Private Cause of Action.

Section 22A-16 (c) and (d) provide that, in addition to any enforcement action brought by the Maryland-National Capital Park and Planning Commission, an "aggrieved person may file a civil action in any court with jurisdiction to enforce this Chapter or any forest conservation plan."[2] This provision is legally problematic because it creates a judicial cause of action in violation of *McCrory v. Fowler*, 319 Md. 12, 570 A.2d 834 (1990), and the provision remains problematic even if the provision were construed as creating a private attorney general action.

1. New Cause Of Action Between Private Citizens—*McCrory v. Fowler Problem*.

Section 22A- 16 (d) provides that "[a]n aggrieved person may file a civil action in any court with jurisdiction to enforce this Chapter or any forest conservation plan, administrative order, or other regulatory approval under it" and seek damages "entitled to them by law." This Section, in essence, creates a new judicial cause of action between private citizens in violation of *McCrory v. Fowler*, and its progeny.

In *McCrory*, the Court of Appeals struck down a County provision permitting "a private citizen to seek redress for another private citizen's violation of a county anti-employment discrimination ordinance" in State courts, "independent of any county administrative proceeding." *Id.* at 19-20, 570 A.2d at 837. The Court began its analysis in that case by explaining that the Home Rule Amendment of the Maryland Constitution only empowers the County to enact *local laws* on matters covered by the Express Powers Act. *Id.* at 17, 570 A.2d at 836. The Court then set forth a two-prong test for determining whether a law should be classified as local or general. The first prong looks at the geographical parameters of the law; a local law is one that "'in subject matter and substance' is confined in its operation to prescribed territorial limits." *Id at 18.* The second prong takes into consideration that "'some statutes, local

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[2] Councilmember Elrich has proposed to add this provision to Bill 37-07, and to broaden the definition of an aggrieved person to "any Montgomery County resident or organization."

in form,' [*i.e.* limited to the territorial limits of the enacting jurisdiction] are 'general laws, since they affect the interest of the whole state.'" *Id.* at 18, 570 A.2d at 837. Thus, the second prong examines whether the law, though serving an "immediate objective" of achieving a goal that is "local in character," "indirectly affect[s] matters of significant interest to the entire state," and therefore should be classified as a general law. *Id.* at 19, 570 A.2d at 837.

The Court held in *McCrory* that the County did not have the authority to create a new judicial, as opposed to administrative, cause of action between private citizens because "'[t]here are . . . affairs exclusively those of the state, . . . not essentially local,'" which include "'**the organization of courts, the procedures therein.**'" *id.* 21, 570 A.2d at 838, quoting *Adler v. Deegan*, 167 N.E. 705, 713 (N.Y. 1929) (Cardozo, C.J., concurring). In reaching this conclusion, the Court elucidated that:

> In creating a new *judicial* cause of action between private individuals, § 27-20 (a) encroaches upon an area which heretofore had been the province of state agencies. In Maryland, the creation of new causes of action *in the courts* has traditionally been done either by the General Assembly or by this Court under its authority to modify the common law of this State. See, e.g., Adler v. American Standard Corp., 291 Md. 31, 432 A.2d 464 (1981) (recognizing tort actions for abusive discharge). Furthermore, the creation of new *judicial* remedies has traditionally been done on a statewide basis.

Id. at 20, 570 A.2d at 838 (emphasis added).[3]

Thus, a law enacted by a home rule county that creates a new judicial cause of action **automatically** fails the second prong of the *McCrory* test. Creation of a judicial cause of action impacts on a resource historically controlled by the State and so "affects the interest of the whole State." *Id* at 18.

In this instance, although the private cause of action permitted under Section 22A-16 passes the first prong of the *McCrory* test, it fails the second because it encroaches upon a State resource – State courts –without the State's authorization, a requisite discussed *infra*. Such encroachment is not permitted under the Home Rule Amendment. Thus, Section 22A-16 (d) does not pass constitutional muster.

2. Private Attorney General Actions In State Courts—Still a *McCrory* Problem.

As already noted, Councilmember Elrich proposes to amend Bill 37-07 to authorize any Montgomery County resident or organization to initiate a legal action in the Circuit

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[3] *See also Holiday Universal, Inc. V. Montgomery County*, 377 Md. 305, 319, 833 A.2d 518, 526-27 (2003) (holding that County law prohibiting the sale of certain future services contracts, and placing contracts primarily performed or signed in Montgomery County under the regulation of the County, was not a local law because it "substantially affect[ed] persons and entities outside of Montgomery County," and was therefore unconstitutional).

Court to enforce the forest conservation law. Substituting a private action by an aggrieved person with an action brought by a "private attorney general", on behalf of the public, instead of solely in the private interest of an aggrieved citizen, does not resolve the legal impediment created by *McCrory*.

"A 'private attorney general action' is a private cause of action devised to effectuate a public purpose usually accomplished by the government. By providing private parties incentive, in the form of attorney's fees and costs for example, to sue wrongdoers, it is thought that the misconduct will thereby be eliminated." Michael C. Griffaton, "Forewarned is Forearmed: The Crime Awareness and Campus Security Act of 1990 and the Future of Institutional Liability for Student Victimization," 43 Case Wes. Res. 525, 5__n. 360 (1993). The purpose of a private attorney general action is, not only to obtain compensation, but also to vindicate important public interests by enforcing various statutes through private causes of action. Hannah L. Buxbaum, "The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation," 26 Yale J. Int'l L. 219, 220, 222 (Winter 2001).

The term "private attorney general" found its genesis in *Associated Industries of New York State v. Ickes*, 134 F.2d 694 (2d Cir.1943), in which coal consumers brought an action against the former National Bituminous Coal Commission for price-fixing actions taken by the Commission pursuant to the Bituminous Coal Act of 1937. The Respondents sought to have the lawsuit dismissed on the grounds that the coal consumers had no standing to bring such an action, and that the lawsuit could only be brought by a particular government official, the Bituminous Coal Consumers' Counsel, who the Respondents alleged was appointed by the President to protect the rights of coal consumers. *Id.* at 699. In denying the Respondents' motion to dismiss, the United States Court of Appeals for the Second Circuit explained that,

> While Congress can constitutionally authorize no one, in the absence of an actual justiciable controversy, to bring a suit for the judicial determination either of the constitutionality of a statute or the scope of powers conferred by a statute upon government officers, it can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with authority, in such a controversy, to vindicate the interest of the public or the government. Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorney Generals.

Id. at 704. The Court affirmed the coal consumer's standing to bring the action after looking to the specific provisions of the Bituminous Coal Act of 1937, as well as its legislative history, and determining that Congress intended for consumers to have standing before the National Bituminous Coal Commission, and therefore to have standing to appeal the decision of the Commission. The Court's holding in *Ickes* therefore makes clear that, without the conferment of standing by Congress upon private citizens, the coal consumers in that case would not have standing, even as private attorney generals, to bring their action.

Since the United States Court of Appeals for the Second Circuit's holding in *Ickes*, Congress has enabled an award of attorneys' fees to finance private attorney general actions to supplement enforcement of a number of federal statutes, such as the Clayton Act, 15 U.S.C. § 15, the Securities Exchange Act, 15 U.S.C. §§ 78i(e), 78r(a), the Communications Act, 47 U.S.C. § 206, and the Endangered Species Act, 16 U.S.C. § 1540 (g)(4). Common to each of these private attorney general provisions is Congress's delegation of standing to private citizens to sue under those acts in federal courts.

In Maryland, several state statutes provide for the award of attorney fees to a person who brings a successful action under the state stature. These statutes include Maryland Code (1984, 1999 Repl. Vol.), Section 10-623 of the State Government Article, also known as the Maryland Public Information Act, Maryland Code (1992, 1998 Repl. Vol.), Section 6-509 (b)(3) of the Business Regulation Article, which provides accountability in charitable solicitations, and Maryland Code (1975, 2005 Repl. Vol.), Sections 13-407 and 13-408 of the Commercial Law Article, also known as the Consumer Protection Act. *See also Montgomery v. Eastern Correctional Instit.*, 377 Md. 615, 637-38, 835 A.2d 169, 183 (2003), for a listing of attorney fee shifting statutes. In each of these fee shifting statutes the person seeking relief must be personally aggrieved. But no Maryland statute has been found "empowering any person, official or not, to institute a proceeding . . . even if the sole purpose is to vindicate the public interest." *Ickes* at 704.

In the instant matter, Section 6-1612 of the Natural Resources Article, entitled *Enforcement*, states that "[i]n addition to the enforcement authority granted the Department [of Natural Resources], the enforcement provisions of this section may be exercised by any local authority that has adopted a forest conservation program, in addition to any enforcement provisions available to the local authority." Maryland Code (2002, 2005 Repl. Vol.), Section 5-1612 (a)(1) of the Natural Resources Article. Further, Section 15-1612 (d)(1) provides that the Department of Natural Resources or "a local authority" may bring a civil action to recover civil penalties for violation of the subtitle. Maryland Code (2002, 2005 Repl. Vol.), Section 5-1612 (d)(1) of the Natural Resources Article.

Thus, no State legislation enabling private attorney general actions under the Forest Conservation laws has been enacted. Without State authorization, Montgomery County does not have the authority to create a judicial cause of action for private citizens to enforce the County's forest conservation provisions, even if the action is brought by a private individual

acting on behalf of the public, because the Court of Appeals has held that creation of a judicial cause of action in State court is not a local law. *McCrory v. Fowler, supra.*[4]

Without question, however, *McCrory* does not prevent the County from bringing a legal action to vindicate its own law. The question arises, therefore, whether the Council could enact a law to authorize any person to bring an action on behalf of the County to vindicate the County's interest in enforcing its forest conservation law. The answer is no. Charter § 213 provides that the "County Attorney shall represent the County in all actions in which the County is a party." Thus, all legal actions brought on behalf of the County must be brought through the County Attorney.

The Maryland Constitution, Art. V, § 3 contains similar provisions regarding the relationship of the Attorney General to the State—and as previously noted the General Assembly has not enacted any law empowering a private attorney general action. On the other hand, the United States Constitution does not contain similar provisions regarding the United States Attorney General. As the *Ickes* court noted, "there is nothing **constitutionally** prohibiting Congress from empowering any person, official or not, to institute a proceeding . . . to vindicate the public interest". *Id.* at 704. (Emphasis added)

3. Potential Solution—An Administrative Cause of Action.

As *McCrory* suggests the County could create a quasi-judicial administrative body to hear a complaint brought by an aggrieved person in connection with an alleged violation of the forest conservation law. *See Montgomery County v. Investors Funding*, 270 Md. 403, 312 A.2d 225 (1973) (County may delegate to administrative agency authority to impose civil fines in connection with violation of the County's landlord tenant law, subject to certain safeguards). The Council could empower the administrative body to award a successful complainant, who has been aggrieved by the violation, damages as well as attorney fees. The Council could also establish a fund, from which the administrative body could award to whistleblower, who need not be personally aggrieved by the violation, a reward for disclosing a violation of the forest conservation law to the County.

II. Resolution To Set Certain Penalties And Fees Under The County Forest Conservation Laws:

Councilmember Elrich introduced a resolution on December 11, 2007 (Resolution) that proposes to increase significantly the penalties and fees assessed under the County Forest Conservation Laws. The Resolution is problematic because the County does not have the authority to impose the monetary penalties and fees at the level proposed by the Resolution.

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[4] The Court of Appeals did intimate in *McCrory v. Fowler*, however, that a municipality could create a private cause of action for violations of municipal laws in "matters of peculiarly local nature." *Id.* at 23-24, 570 A.2d at 839-40. Forest conservation in this instance is by no means a matter of a "peculiarly local nature." To the contrary, Montgomery County's forest conservation laws were enacted pursuant to a State mandate requiring *all* municipalities in the State of Maryland to create a local program.

A. The State Forest Conservation Act Limits The Amount Of Penalties And Fees A Local Jurisdiction May Impose.

Under the State Forest Conservation Act, Section 5-1603, Natural Resources Article, requires that all units of local government "having planning and zoning authority" develop a local forest conservation program "which meets **or is more stringent than** the requirements and standards of this subtitle." (Emphasis added)

The Resolution provides that "the maximum amount of the administrative civil penalty authorized by the County Code § 22A-16 (d) is $9/square foot for any violation of Chapter 22A." Section 22A-16 (d)(1) specifically provides that the Planning Board may impose civil penalties, which "may not exceed the rate set by the County Council by law or resolution . . . but must not be less than the amount specified in Section 5-1608 (c) of the Natural Resources Article of the Maryland Code."

Section 5-1608 (c) of the Natural Resources Article provides that any person found to be in noncompliance with any forest conservation plan adopted under the State Forest Conservation provisions "shall be assessed by the Department **or local authority**, the penalty of 30 cents per square foot of the area found to be in noncompliance with required forest conservation." (Emphasis added) Thus, the amount of $9/square foot proposed by the Resolution exceeds significantly (by a factor of 30) the penalty amount imposed under Section 5-1608.

Likewise, the Resolution also proposes to set the "in lieu fee," permitted under Section 22A-12 (g)(1), which requires payment of a set fee in lieu of compliance with reforestation or afforestation requirements, at $2/square foot. By comparison, Section 5-1610 (h) of the Natural Resources Article provides that "[t]he [in lieu] rate shall be 10 cents per square foot of the area required to be planted." Thus, the County provision again is significantly greater (by a factor of 20) than the rate set by the State Act.[5]

As noted earlier, Section 5-1603 (a)(2) of the Natural Resources Article permits local authorities to enact conservation programs "more stringent than the requirements and standards of [the State Act]." This "more stringent than" language must be considered to determine whether it enables local authorities to impose greater fines and fees than those assessed under the State Act.

We have concluded that Section 5-1603 (a)(2) does not provide authority to the County to impose greater fines and fees than those imposed by the State Act, because such an

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[5] Although a fee may produce revenue, it cannot exceed the costs incurred in providing a government service or implementing the regulatory scheme. If the fee unreasonably exceeds the cost to administer the program, it becomes either a penalty or a tax. *See Eastern Diversified Properties, Inc. v. Montgomery County,* 319 Md. 45 (1990) (Montgomery County impact fee invalid because it was held to be a tax).

In 2005, the Planning Commission conducted a cost analysis study on reforestation and afforestation and determined the actual cost to be ninety-cents per square foot of the required planting area. Further study on the cost of reforestation and afforestation should be conducted before the County affects a $1.30 per square foot rate increase in order to avoid the fee being classified as a penalty or tax. After the passage of 3 years, it may well be that a $2 per square foot rate is well within the range of the cost to re-forest land.

interpretation would be at odds with the specific language of Sections 5-1608 (c) and 5-1610 (h).[6] It would also mean that the General Assembly intended to allow local authorities to set unlimited penalties for violations of local forest conservation provisions - a result that would be, to our knowledge, unprecedented.

The legislative history of the State Forest Conservation Act supports the conclusion that the General Assembly intended to allow local land planning jurisdictions to impose more stringent forest conservation **programs**, but did not intend to allow local jurisdictions to impose fines and penalties that were different than those established in the State Act. For example, the Bill Analysis prepared by the Department of Legislative Reference explains that local programs must include a "technical manual outlining requirements of Forest Stand Delineations and Forest Conservation Plans and tree conservation criteria and protection techniques." The Bill Analysis then proceeds to state that "Persons violating the provisions of this Act, **a local program**, a forest conservation plan, or maintenance agreement are subject to a penalty of $.45 per square foot of the area of noncompliance."[7] (Emphasis added) Later the Bill Analysis states, "DNR and localities are given authority to take other enforcement actions that include: revoking a FCP for cause, issuing stop work orders, issuing penalties not exceeding $1000/day, and obtaining court injunctions to cease the violation and order corrective action." This indicates that the General Assembly anticipated that a local jurisdiction might, for example, impose stricter rules concerning when a forest conservation plan might be required (a program detail), but did not anticipate or intend that local jurisdictions had virtually unlimited authority to impose monetary penalties or fees (program enforcement). The Fiscal Note, Floor Report, and Bill Summary are in accord with the Bill Analysis.

We are aware of no State law enabling any local government to impose unlimited civil or criminal penalties. If the State Forest Conservation Act intended such an unprecedented departure from past State policy, the Bill Analysis would have almost certainly explicitly noted that fact.

B. The Express Powers Act Cannot Rescue The Resolution.

Leaving aside a very creditable argument that the State Forest Conservation Act provides the exclusive authority for imposing monetary penalties for a violation of a Charter County's Forest Conservation Law, we have considered whether the Express Powers Act provides Montgomery County with some residual authority to impose monetary fines of up $9 per square foot of area in violation of the forest conservation law.

Article 25A, Section 5 of the Maryland Code enumerates the express powers conferred on charter counties, like Montgomery County. Among those express powers is the power to "enact laws for the county," and to provide for the enforcement of those laws by implementing criminal or civil fines and penalties not to exceed $1,000. Maryland Code (1957, 2006 Repl. Vol.), Article 25A, Section 5 (A)(1), (2) & (5).

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[6] A statute should be construed to avoid unreasonable results. *Comptroller of Treasury v. Fairchild Industries, Inc.*, 303 Md. 280 (1985).

[7] The $.45 per square foot penalty was amended to $.30 per square foot.

Specifically, Maryland Code (1957, 2006 Repl. Vol.), Article 25A, Section 5 (A) ("Section 5 (A)") provides that Counties may enact local laws:

> (2) [t]o provide for the enforcement of all ordinances, resolutions, bylaws and regulations adopted under the authority of this article by fines, penalties and imprisonment, enforceable according to law as may be prescribed. A penalty may not exceed $1,000 for any offense, unless otherwise authorized in this subsection, or provide for imprisonment for more than six months.
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> (3) [t]o provide for the enforcement of local fair housing laws by fines or penalties that do not exceed the fines or penalties provided in the federal Fair Housing Act Amendments of 1988 for enforcement of similar federal fair housing laws.
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> (4) [t]o provide for the enforcement of local employment discrimination laws or public accommodations discrimination laws by fines or penalties that do not exceed $5,000 for any offense.
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> (5) [t]o provide for enforcement of all ordinances, resolutions, bylaws, and regulations adopted under the authority of this article by civil fines and penalties.

At first blush, it would appear that Counties are not limited when imposing civil fines and penalties under subsection (5). A review of the evolution of the language of Section 5 (A), and its legislative history, however, supports the conclusion that all fines and penalties, except those enumerated in subsections (3) and (4), are limited to a maximum amount of $1,000.

The 1951 Maryland Code, Article 25A, Section 5 (A), *Local Legislation*, provided that counties were granted the express power to enact local laws "upon the matters covered by the express power in this Article granted," and to enforce those laws "by fines, penalties and imprisonment," but that "no such fine or penalty shall exceed $100 for any offense or imprisonment for more than six months." Thus, the 1951 version clearly required that all fines and penalties be limited to $100.

In the 1987 Maryland Code (1957, 1987 Repl. Vol.), Article 25A, Section 5 (A), however, we see a delineation between civil and criminal fines and penalties. The 1987 Code provided that counties could enforce local laws by fines, penalties and imprisonment, enforceable according to law as may be prescribed, but no such fine or penalty shall exceed $1,000.00 for any offense or imprisonment for more than six months; to provide for enforcement of all ordinances, resolutions, bylaws, and regulations adopted under the authority of this article by **civil** fines and penalties. (Emphasis added)

In 1991, a provision was added to Section 5 (A) that allowed counties to "provide for the enforcement of local fair housing laws by fines or penalties that do not exceed the fines or penalties provided in the Federal Fair Housing Act Amendments of 1988." 1991 Md. Laws, Chap. 566. *See also* Md. Code (1957, 1994 Repl. Vol.), Article 25A, Section 5 (A).[8] The fact

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[8] This provision was moved in 1996 to subsection (3), where it exists in today's Code. 1995 Md. Laws, Chap. 278. *See also* Md. Code (1957, 1996 Repl. Vol.), Article 25A, Section 5 (a) (3).

that such a provision was added only makes sense if one concludes that Section 5 (A) generally limits the imposition of fines and penalties to a maximum of $1,000, whether imposed in a civil or criminal context. The provision's legislative history compels this conclusion. For example, a Bill Analysis prepared by the Senate Economic and Environmental Affairs Committee on House Bill 472, Chartered Counties – Express Powers – Fair Housing Law Offenses stated that the legislation was necessary in order to allow Counties to impose fines or penalties provided in the federal Fair Housing Act Amendments of 1988, which counties otherwise would not be able to do because "[u]nder current law, the Express Powers Act authorizes charter counties to enforce their local laws by a fine or penalty not to exceed $1,000 or imprisonment for no more than six months."

In 1995, subsection (4) was added to Section 5 (A) permitting counties to impose penalties and fines up to $5,000 for the violation of local employment discrimination or public accommodation laws. 1995 Md. Laws, Chap. 278. This addition also lends credit to the conclusion that all fines and penalties, unless otherwise expressly provided for, are limited in amount to $1,000. Further, the legislative history behind this provision also supports this conclusion. A Floor Report prepared by the Senate Economic and Environmental Affairs Committee on House Bill 711, Charter Counties – Local Discrimination Laws –Penalties stated that that bill was necessary to enable counties to impose fines for violations of local employment discrimination laws or public accommodations discrimination laws of up to $5,000 because:

> Under current law, a charter county is authorized to enforce its laws by imposing fines not to exceed $1,000 or imprisonment not to exceed 6 months for a violation of the county's ordinances, resolutions, bylaws, and regulations (Art. 25A, § 5 of the Annotated Code). The only exception is for a violation of a charter county's local fair housing laws which may be punishable by fines or penalties that do not exceed the fine or penalties provided in the Federal Fair Housing Act Amendments of 1988. The purpose of the bill is to create another exception by providing for an increased fine for the violation of a charter county's local employment or public accommodations discrimination laws.

Thus, the addition of subsections (3) and (4), and the legislative history behind Section 5 (A) of Article 25A, demonstrate that home rule counties are limited when imposing fines and penalties to a maximum amount of $1,000.

The imposition of a penalty of $9 per square foot seems likely to exceed the $1000 maximum set under the Express Powers Act. For example, a forest conservation violation on one acre of land would result in a fine of $392,040.

III. Proposed Bill 37-07

A. Section 8-25, Permits.

Councilmember Elrich proposes to amend Bill 37-07 to prohibit for a period of five years the Director of DPS from issuing a building for property on which a violation of the

Forest Conservation Law has occurred. The 5 year time limitation does not save this amendment from the same legal flaws that Bill 14-07's Section 8-25 suffers from. This five-year limitation on the denial period does not alleviate the potential unconstitutional taking problem explained above, because a temporary taking is also illegal. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 US 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) and *Maryland-Nat'l Capital Park and Planning Comms'n v. Chadwick*, 286 Md. 1, 405 A.2d 241 (1979). The 5 year limitation may mitigate a due process challenge, because it lessens the burden on the property owner as compared with a perpetual ban on development. Still under certain circumstance even a five year ban might seem to a court of impose an unconstitutional burden on a property owner.

B. Section 22A-16, Civil Action.

The original enforcement provisions of Bill 37-07 do not contain any legally problematic provisions. An amendment proposed by Councilmember Elrich, however, proposes to add Section 22A-16 of Bill 14-07 to Bill 37-07 with the addition that any "Montgomery County resident or organization" has standing to bring the private action in the Circuit Court. To give private citizens standing in State courts, counties are not only expanding the jurisdiction of those courts, but also are increasing the burden on those resources, without the State's permission. Therefore, this proposed change makes it even more likely that the Court would see this provision as an attempt to pass a law that is not "local" in nature. *McCrory v. Fowler*, 319 Md. 12.

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