

PASSING THE BUCK: THE IMPACT OF MARYLAND'S NEW STORMWATER FEES ON COMMERCIAL LEASES

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During its 2012 legislative session, the Maryland General Assembly passed HB 987, a bill which required that the ten separate EPA-licensed storm sewer system (MS4) jurisdictions in Maryland (Baltimore City and nine counties- Anne Arundel, Baltimore, Carroll, Charles, Frederick, Harford, Howard, Montgomery, and Prince Georges Counties) create dedicated local Watershed Protection and Restoration Funds, funded by stormwater remediation fees to generate the revenue necessary to comply with each jurisdiction's permit requirements. HB 987 required that the programs be adopted and implemented by July 1, 2013.

The response of the ten affected jurisdictions to the requirement to adopt a stormwater fee system has varied widely. BOMA has monitored how these jurisdictions have responded, because the opportunities they will provide to reduce these fees could have a significant impact on the pocketbooks of commercial property owners and their tenants.

Structure of Stormwater Fee Credits

Dubbed a "rain tax" by its critics, the legislation imposes the stormwater remediation fees on all property owners except for property used for a public purpose and owned by the state, a unit of the state, a County, a municipality or a regularly organized volunteer fire department. The fee amount must be based on the share of stormwater service related to the property provided by the city or county, and in general will be calculated on the area of impervious surfaces (parking lot, roof, etc.) on each property.

The ten local jurisdictions have been afforded wide latitude to establish policies and procedures for the stormwater fees, and to extend fee credits for actions taken by a property owner to improve the quality or reduce the quantity of stormwater discharge from the property. Each jurisdiction has approached the structure of the fees as well as the credit system differently. As a result, the systems which have been adopted vary widely from jurisdiction to jurisdiction, resulting in the equivalent of per-acre fees of zero (Carroll County) to as high as \$2,489 (Baltimore City).

Effect on Maryland Commercial Leases

Both Landlords and Tenants of commercial properties should review their leases to determine whether these fees can be passed through under the lease terms. The place to start will be the lease language, and specifically those sections establishing the right of the landlord to pass through operating expenses and taxes to the tenant. During lease negotiations, landlords usually seek to define operating expenses broadly, with language such as "all expenses and costs relating to the operation, maintenance and repair of the building, including . . .", followed by non-

exclusive list of specific inclusions. Tenants will respond with a narrower formulation, as well as a lengthy list of specific items to be excluded from the definition.

In some leases, operating expenses may also include taxes, or there may be a separate provision governing the tenant's obligation to pay a proportionate share of taxes. Whether in the section defining operating expenses or separate section covering taxes, the term "taxes" may include "impositions" in order to fold into the definition any assessments, charges and other costs that may not be considered as taxes. This is important, as several courts considering the distinction between taxes and assessments have found that a requirement to pay real estate taxes does not also include an obligation to pay assessments.

Generally, the broader the language, the better the chances for a landlord to pass through and collect the stormwater fees. In the section governing operating expenses, helpful language for a landlord would include the ability to pass through "all expenses incurred in connection the Building's ownership or operation," or similar broad language. In the section governing the right to pass through taxes, favorable language would include an obligation for the tenant to pay any governmental "levy," "charge" or "imposition." Without this or similar language, a landlord may have difficulty passing through and collecting a stormwater fee.

Fee or a Tax?

It is important to note that, while critics of the stormwater legislation have labeled it a "rain tax," the legislation authorizes imposition of a fee and not a tax. Courts in several other states have recently considered whether stormwater fees are in fact taxes. The Idaho Supreme Court ruled in November, 2011, that a stormwater fee levied by the City of Lewiston was really a hidden tax and not a fee, and as such had not been duly authorized by the Idaho legislature. More recently in August, 2013, the Michigan Court of Appeals ruled that a local ordinance adopted by the City of Jackson creating a storm water utility and imposing a storm water management charge on all property owners within the city was actually an unauthorized tax, and not a fee.

In Maryland, the enabling legislation required that the ten applicable Maryland jurisdictions adopt and implement local laws or ordinances necessary to establish a "stormwater remediation fee." Nonetheless, Anne Arundel County's legislation authorizing the stormwater assessments specifically characterizes the charges as an excise tax, and not as a fee. Several opinions of the Maryland attorney general support the conclusion that charges similar to these stormwater fees are actually a tax and not a fee. Accordingly, landlords may be able to argue with some legitimacy that the stormwater assessments are pass-through expenses which are collectible as either a fee or a tax.

Right to Appeal

As the ten affected jurisdictions mail out stormwater fee assessments, commercial property owners will need to review the assessments closely to determine whether they accurately

calculate the relevant impervious surfaces. If not, each jurisdiction has established opportunities to appeal these assessments. In addition, commercial property owners should be aware of and understand the details of the credit systems which have been adopted, in order to ameliorate the effects of these fees. Tenants of commercial properties should similarly review their lease terms to carefully monitor landlord actions with respect to these fees and to ensure that landlords are taking all appropriate steps to reduce these fees.

Some leases may afford a tenant the right to contest real estate taxes. If the language is broad enough, this right might extend to the various appeals available to ameliorate or reduce the impact of the stormwater fees. In the context of a single tenant building, this might be an important right. In a multi-tenant building, a small tenant applying a cost-benefit analysis is unlikely to exercise a right to contest a stormwater assessment. However a small group of tenants might find this right to be important.

Although there has been significant controversy about the stormwater fee legislation and the various programs the affected jurisdictions have promulgated in response, there is likely to be only a limited response in the General Assembly in its 2014 session. Predictably, there will be calls to scrap the stormwater assessments altogether. It is more likely, though, that any amendments will nibble around the edges of the existing legislation to, for example, remove the exemption for state-owned property, or perhaps to offer relief to religious institutions (churches, synagogues, etc.). Accordingly, landlords and tenants will need to get used to this new and in some cases costly imposition, and adjust their lease documents accordingly.

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