

**BEFORE THE PHILADELPHIA WATER, SEWER AND STORM WATER RATE BOARD**

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Application of the Philadelphia Water Department :  
to Implement Change in Stormwater Rates for :  
Community Gardens :

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**BRIEF SUBMITTED ON BEHALF OF  
THE PHILADELPHIA WATER DEPARTMENT**

This Brief is submitted, by the undersigned counsel, on behalf of the Philadelphia Water Department (“Department” or “PWD”) to summarize the Department’s position with regard to its request to implement a new rate discount policy for Community Gardens consistent with the requirements of Bill No. 160523, passed by City Council and approved by the Mayor on June 28, 2016 (hereinafter, the “Ordinance” or “Community Gardens Ordinance”).

**I. INTRODUCTION AND PROCEDURAL HISTORY**

On June 28, 2016, Mayor James F. Kenney signed an ordinance passed by Philadelphia City Council that allows community gardens a special discounted rate for stormwater management services. The ordinance directs the Philadelphia Water, Sewer, and Storm Water Rate Board (“Rate Board” or “Board”) to establish a special discounted stormwater charge, in an amount up to and including a 100% discount, for approved community gardens.

By letter dated July 20, 2016, the Philadelphia Horticultural Society, the Neighborhood Gardens Trust (NGT), and the Public Interest Law Center (by their respective representatives) requested the initiation of this proceeding to establish an exemption from stormwater rates and charges for approved community gardens operated for community benefit and producing food or non-food crops (hereinafter, “Community Gardens”), as authorized by the Ordinance.<sup>1</sup>

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<sup>1</sup> See PWD Statement 1 at 2-3 and Exhibit DM-1.

On September 12, 2016, the Department initiated this proceeding by notifying Philadelphia City Council and the Rate Board of its intent to file proposed changes in stormwater rates and charges, consistent with the Ordinance to become effective January 1, 2017 (“Advance Notice”). On October 12, 2016, PWD filed its formal notice of such proposed changes (“Formal Notice”). By letter dated October 19, 2016, NGT, the Village of Arts and Humanities and the Norris Square Neighborhood Project notified the Board of their desire to be included in this proceeding as Participants, as such term is defined in the Board’s regulations.

In connection with this proceeding, the Rate Board appointed Nancy Brockway, Esquire (“Hearing Officer”) to preside over the hearings and to prepare a report to the Board summarizing the hearing record.<sup>2</sup> The Department proffered the prepared testimony of Debra McCarty and Melissa LaBuda in support of its proposal. Joanne Dahme also participated in the Department’s presentation to the Board and at the public input hearings. The Rate Board held four public input hearings<sup>3</sup> at which numerous individuals and community garden organizations provided information to the Board and personnel from the Department were available to answer questions.<sup>4</sup> The testimony at the public input hearings was transcribed, and the transcripts are available on the Board’s website. The Board also received written comments which also are posted on the Board’s website.<sup>5</sup>

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<sup>2</sup> The Rate Board did not appoint a Public Advocate to serve in this proceeding.

<sup>3</sup> Public input hearings were held at the Philadelphia Horticultural Society (100 N. 20th Street) on October 25, 2016; CARIBE (167 W. Allegheny Avenue) on November 14, 2016; City Hall (Broad and Market Streets) on November 16, 2016; and the Fumo Library (2437 S. Broad Street) on November 18, 2016. All hearings were open to the public and were advertised consistent with Rate Board Regulations and the Hearing Officer’s directives.

<sup>4</sup> The following witnesses testified at the first three public hearings: Bob Jobin (Bouvier Community Garden); Jenifer Gold; Janet Finegar (Liberty Lands, Oriental Hill Park, Emerald Park, Green Acres); Justine Navarro and Russ Troyar (Spring Gardens); Linda Zaimis (Schuylkill River Park Community Garden); Fee Sephai (Point Breeze Community Garden); Misako Scott (Urban Tree Connection); Tom Hardenbergh, Shawn Flanagan and Edward Bell (Southwark Queen Village Community Garden); Sharon Hildebrand (Brewerytown Garden); Robert Ballinger (Community Legal Services); Jenny Greenberg (Neighborhood Gardens Trust); Amy Laura Cahn (Public Interest Law Center); Avia Kapust (Village of Arts and Humanities); Julianne Ortega (Pennsylvania Horticultural Society); Paul Cherisher (Liberty Lands); Justin Trezza and Marian Drake (Norris Square Neighborhood Project); Paul Horner (Pastorius Garden); Audra Wolfe (Warrington Garden); Jane Winkel (Moore Street Garden); Chris Van De Vlede (Awbury Arboretum); Margaret McCarvill on behalf of Susan Bell (Seedy Acres Garden).

<sup>5</sup> The Board’s website can be accessed at <http://www.phila.gov/water/rateboard/Pages/default.aspx>.

## II. GOVERNING LEGAL STANDARD

The Community Gardens Ordinance provides for the implementation of a special discounted stormwater rate or exemption for Community Gardens. It amends Title 19 of the Philadelphia Code related to finances, taxes and collections (Section 19-1603 of the Philadelphia Code) and authorizes the Department to promulgate regulations to establish a Community Gardens classification eligible to receive discounted stormwater rates and charges (subject to various requirements set forth below) and to otherwise effectuate the legislation. The Ordinance further directs the Rate Board to establish a special discounted stormwater charge for approved Community Gardens in an amount up to and including a 100% discount pursuant to Section 13-101(4) of the Philadelphia Code.<sup>6</sup>

Under Section 1 of the Ordinance, a Community Garden is defined as any parcel of land used for growing crops whether food or non-food, for personal consumption, donation or sale that meets the following criteria:

- the parcel's principal use is devoted to regularly planted crop bed and such other related uses as are reasonable and necessary to growing such crops and maintaining the garden;
- at least 80% of the gross area of the parcel is effectively pervious;
- a community or non-profit organization, or a group of individuals ascertainable to the Department and associated for purposes of operating the garden for public benefit, operates the parcel and possesses written evidence of the right to use the parcel as a Community Garden;
- gardening activities are conducted primarily by members of the organization or group of individuals as defined in the Ordinance; and
- the parcel is appropriately maintained so as not to cause blight or nuisance.

The Ordinance provides that the Department will review applications for the discount and may inspect any parcel to determine whether it is eligible for the discount. The discount will expire after a period

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<sup>6</sup> Paragraph three of the Ordinance states: "Pursuant to § 13-101(4) of this Code, the Board shall establish a special discounted storm water charge for approved Community Gardens, in an amount up to and including a 100% discount." Prior cases interpreting similarly worded provisions in this Section of the Philadelphia Code (regarding reduced rates for charities) suggest, by analogy, that the Board is required to establish reduced rates for Community Gardens, but that the Board ultimately has the discretion to adopt either a discount or an exemption. *See Ass'n of Community Organizations for Reform Now v. Guarino*, 99 Pa. Commonwealth Ct. 93, 512 A.2d 1312 (1986).

determined by PWD, but may be reapplied if the parcel continues to meet program requirements. The Ordinance does not authorize the exemption of rates and charges for water or sanitary sewer service.

Section 2 of the Ordinance states that the Ordinance shall be effective January 1, 2017, and provides that the discounted charge shall be without prejudice to any prior arrangement for relief of storm water management and disposal fees between the Water Department and a Community Garden, provided that such relief was granted on or after July 1, 2010, and further provides that no such relief may be presumed to continue beyond the effective date of the Ordinance except pursuant to the terms of Section 1 or when extended in writing by the Water Department. This section does not make the Board's decision as to the discount retroactive, but instead provides that the discount will be without prejudice to any prior arrangement for relief of stormwater fees under certain conditions. As noted in the Water Department's response to written questions, it is anticipated that Section 2 will be implemented through payment arrangements and/or settlements negotiated by the Law Department.

As discussed below, the revenue loss from the implementation of the Ordinance (even assuming a 100% discount) is estimated to be so small as not to trigger the need for additional revenues for the current rate period (FY 2017 and FY 2018).

### **III. ARGUMENT**

#### **A. The Department's Proposal to Implement the Community Garden's Stormwater Rate Discount Policy.**

The Department's proposal to revise stormwater charges, consistent with the Community Gardens Ordinance, is set forth in the testimony of Water Commissioner Debra A. McCarty (PWD Statement 1). This testimony specifically describes (i) the Ordinance, (ii) the letter received by the Department from the Philadelphia Horticultural Society, the NGT and Public Interest Law Center requesting that the Department initiate this proceeding (the "Community Gardens Letter"); and (iii) the proposed implementation of revised rates and charges for qualifying Community Gardens. The description of the Ordinance and Community Gardens Letter are summarized in the previous section of this brief. The

discussion below focuses on the mechanical implementation of the Ordinance (upon authorization by the Rate Board).

As described in the Commissioner's testimony, upon authorization, the Department would revise Section 5.2 of its schedule of rates and charges to establish a new group of special customers with parcels eligible for discount on stormwater charges as Community Gardens. The proposed language for Section 5.2 revisions and associated procedures for formal implementation of the Rate Board's determination in this proceeding are set forth in the Exhibit DM-2. Proposed changes in the schedule of rates and charges would include, in pertinent part, a new special customer group (Group VI) for Community Gardens:

Customers with parcels eligible for a discount on the stormwater management service charge as a qualified Community Garden pursuant to Section 19-1603 of the Philadelphia Code and regulations promulgated by the Water Department under that Section.

Also, a section describing charges for Group VI Special Customers would be added under a new Section 5.2(g) which would state in relevant part:

Group VI: Effective with bills issued on or after [insert date<sup>7</sup>], Group VI Special Customers will receive a [insert percentage discount] on the stormwater management service charge for parcels classified by the Department as Community Gardens upon approval of an application for a discount consistent with Section 19-1603 of the Philadelphia Code and regulations promulgated by the Department under that Section.<sup>8</sup>

In addition to the foregoing changes in rates and charges, the Department would promulgate regulations to further define program requirements and applicable procedures, subject to filing/hearing requirements prescribed by the Philadelphia Home Rule Charter.<sup>9</sup> It is noteworthy that only a change in stormwater discount policy is proposed for Community Gardens (no other proposed change in water and wastewater rates and charges is before the Rate Board).

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<sup>7</sup> It is anticipated that the effective date of the rate determination will be January 1, 2017.

<sup>8</sup> As requested by Hearing Officer Brockway, a mock-up of the proposed changes in Section 5.2 of the current Rates and Charges is attached hereto as Attachment 1.

<sup>9</sup> PWD Statement 1 at 3. The Water Department filed proposed regulations with the Department of Records on December 1, 2016. The proposed regulations may be reviewed on the Department of Records website at: <http://regulations.phila-records.com/>

## **B. Revenue Impact of the Board's Decision.**

The Department proffered the testimony of Deputy Water Commissioner Melissa LaBuda to summarize the revenue impact associated with the implementation of the Community Gardens Ordinance. The analysis supporting the testimony was performed by the Water Department's rate consultant, Black & Veatch. It conservatively assumes the impact of a 100% discount for the known parcels where community gardens are located during the full rate period (FY 2017-2018).<sup>10</sup>

As part of the analysis, Black & Veatch compared the billable gross area (GA) and billable impervious area (IA) for all billable parcels city-wide and for the identified community garden parcels.<sup>11</sup> This analysis shows that the loss of stormwater billable units of service due to a 100% discount for Community Gardens is less than 0.1% for both GA and IA.<sup>12</sup> The revenue impact, calculated in the above testimony and shown in Table 3 of Exhibit ML-1, is \$46,489.86 in FY 2017 and \$48,374.34 in FY 2018. On its face this is a small amount for a utility with over \$600 million in operating revenues.<sup>13</sup> Taken together, a decision by the Board to approve an exemption or 100% discount will have only a *de minimis* revenue impact during the current rate period.

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<sup>10</sup> The Water Department's consultant, Black & Veatch, performed a financial impact analysis for Fiscal Years 2017 and 2018 based on a list of 286 known community garden parcels. The list was compiled based on information provided by the Neighborhood Gardens Trust, the Pennsylvania Horticultural Society and the Public Interest Law Center. Of these 286 garden parcels, 55 are vacant parcels exempt from stormwater charges pursuant to a prior ordinance and the remaining 231 parcels are currently billed for stormwater. Additional garden parcels on City-owned vacant land were identified but were not added to the list because they currently are exempt. *See* Response to Written Questions from Robert W. Ballenger. It should also be noted that assuming a January 1, 2017 implementation date for the discount or exemption, the projected revenue impact from the Board's decision for FY 2017 (which fiscal year began July 1, 2016) will likely be less than conservatively estimated by Black & Veatch.

<sup>11</sup> As noted in the Stormwater Units of Service Analysis performed by Black & Veatch in the last rate proceeding, the stormwater charge involves two components, namely, the Gross Area ("GA") Charge and the Impervious Area ("IA") Charge. These two charges are calculated based on the GA square footage and IA square footage of a property and the associated GA and IA Rates. *See* PWD Statement 9B, Exhibit BV-SR in the Rate Proceeding for FY 2017-2018.

<sup>12</sup> *See* Exhibit ML-1, Tables 1 and 2, attached to Philadelphia Water Department Statement 2. As shown in these tables, the garden parcels, excluding the currently exempt parcels, have a total billable GA of 1,121,000 square feet (0.0517% of the total city-wide GA for billable parcels) and a total billable IA of 102,000 square feet (0.0091% of the total city-wide IA for billable parcels).

<sup>13</sup> *See* Table C-1 in Appendix A of the Report of the Board on PWD Proposed Rate Change, FY17-18, filed with the Department of Records on June 7, 2016. In the last rate proceeding, Black & Veatch estimated the FY 2017 stormwater revenue requirement at \$153,690,000. *See* PWD Statement 9-B, p. 3, in the Rate Proceeding for FY 2017-18.

### **C. Rationale for Implementing Discount or Exemption for Community Gardens.**

The Department's proposal in this proceeding is also in harmony with the statements at the public input hearings and testimony of the other participants in this proceeding regarding the various benefits provided by Community Gardens and the need for rate relief (provided via the new discount policy). The major points raised in the written testimony and at the public input hearings are summarized below.

**Public Benefit** – At the public input hearings, Joanne Dahme described the potential public benefits of community gardens from the Water Department's perspective. These include the preservation of open space, the potential for gardens to reduce the amount of stormwater entering the sewer system due to regular tilling of soil, the ability of gardens to take runoff from public rights-of-way, and the beneficial effect of converting vacant properties to useful spaces. As previously noted, only gardens operated for public benefit and that have a high percentage of effectively pervious area will qualify for the discount.

Additional information on the public benefits was provided by representatives of community garden organizations at the public input hearings. The Norris Square Neighborhood Project testified that benefits include the beautification of neighborhoods and access to organic produce. Some of the garden representatives testified that their gardens provide produce to neighborhood food pantries, senior living facilities, and neighbors in need through programs such as the Pennsylvania Horticultural Society's "City Harvest" program.<sup>14</sup> Other garden representatives testified that improvements at their gardens have mitigated stormwater runoff.<sup>15</sup>

**Need for Relief** – Various garden representatives provided additional information on the need for relief from stormwater charges based on the nature of their organizations. NGT stated that the majority of the gardeners it serves live in low-income and moderate-income neighborhoods and added that the availability of an exemption is a critical factor for the viability of NGT and the community gardens across

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<sup>14</sup> See written statements of Chris Nicholson (Church Lane Garden) and RW Delaney (Queen Village Community Garden); See also testimony of Russ Traylor Tr. at 36:9-37:4 (10/25/2016), Julianne Ortega, Tr. at 57:15-59:6 (10/25/2016), Audra Wolfe, Tr. at 8:13-9:6 (11/16/2016), and Shanna Flanagan, Tr. At 16:21-17:15 (11/16/2016).

<sup>15</sup> See written statements of Jenny Greenberg (NGT) and Bob Jobin (Bouvier Community Garden).

the City.<sup>16</sup> A gardener at the Bouvier Community Garden testified that 35% of the annual gardener dues for that garden would be paying for stormwater fees at current rates.<sup>17</sup> The Secretary of Warrington Garden in West Philadelphia testified that subjecting their garden to full stormwater charges would take up a significant amount of the garden's budget and severely limit their ability to continue to contribute vegetables to people in food insecure areas.<sup>18</sup> Similar testimony was provided by Board President of NGT on behalf of a community garden in the Northern Liberties.<sup>19</sup>

While the Water Department will defer to the Board on the amount of the discount, it is worth noting that a decision by the Rate Board to approve a discount up to a 100% discount would simplify the current billing system for community gardens. Currently, City-owned vacant parcels are exempt from stormwater charges, while garden parcels that are not owned by the City are billed the full charge or a discounted charge if they qualify for another discount.<sup>20</sup> Some of the witnesses at the public input hearings represented gardens with multiple parcels, with the various parcels billed differently depending on whether they are exempt from charges as City-owned vacant parcels.<sup>21</sup> This may have the adverse effect of discouraging non-profit garden associations from acquiring garden parcels that they maintain but that currently are exempt from stormwater charges as City-owned vacant property, as such parcels would lose their exemption once they are no longer owned by the City. By approving a 100% discount for all garden parcels that qualify under the Ordinance as eligible Community Gardens, the Board would eliminate this disincentive for transferring ownership of vacant parcels from the City to the garden organizations.

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<sup>16</sup> See written statement of Jenny Greenberg (NGT).

<sup>17</sup> See written statement of Bob Jobins (Bouvier Community Garden).

<sup>18</sup> See testimony of Audra Wolfe, Tr. at pp. 9:7-24 (11/16/2016).

<sup>19</sup> See testimony of Margaret McCarvill on behalf of Susan White, Tr. at 20:5-12 (11/16/2016).

<sup>20</sup> Garden organizations that qualify as institutions of purely public charity receive a 25% discount and parcels of the Philadelphia Housing Authority receive a 5% discount under Sections 13-101(e) and (f) of the Philadelphia Code.


<sup>21</sup> As noted by the Water Department in its response to Comment from Justin Navarro of The Spring Gardens on 10/25/2016, this garden consist of 27 parcels, with some parcels are exempt as City-owned vacant land and other parcels owned by the Philadelphia Housing Authority (PHA) are billed but receive the 5% discount applicable to parcels owned by PHA.



#### IV. CONCLUSION

For all of the reasons stated above the Department's proposal should be approved.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Scott Schwarz", is written over a horizontal line.

Scott Schwarz, Divisional Deputy City Solicitor  
Susan Crosby, Divisional Deputy City Solicitor  
Ji Jun, Deputy City Solicitor

Date: December 2, 2016

## PHILADELPHIA WATER DEPARTMENT

### RATES AND CHARGES

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#### 5.2 Special Customers.

The water, sewer and stormwater management service charges established in Sections 2.0 et seq., 3.0 et seq., and 4.0 et seq. shall be applied to all general Customers, except the following groups of special Customers:

##### (a) GROUP I

(1) Public and private schools which provide instruction up to or below the twelfth grade but not beyond that grade, and excluding service to any separate or adjoining facilities or structures not used exclusively for educational or instructional purposes.

(2) Institutions of “purely public charity”, as defined by Pennsylvania law, except universities and colleges and excluding service to any separate or adjoining facilities or structures not used exclusively for the principal purpose of the charity.

(3) Places used for actual religious worship.

##### (b) GROUP II

(1) Residences of eligible senior citizens provided that the senior citizen shall:

(i) Make application for such reduction to the Revenue Department within the first billing period for which reduction is sought; and

(ii) Submit satisfactory proof that the applicant is 65 years of age or older and that he or she makes payment directly to the City for water, sewer, and stormwater service to his or her residence which is located in the City of Philadelphia; and

(iii) Submit satisfactory proof to the Revenue Department that the applicant does not exceed the household income limitation of \$31,500 per year established by the Department. The above income limitation shall apply to those applying for this discount subsequent to June 30, 1982.

(iv) Effective with each subsequent change in the water/sewer/stormwater charges, the Department shall adjust the Senior Citizen Income Limitation using the latest Consumer Price Index data available, as defined in the Philadelphia Code at Section 19-1901.

(c) GROUP III

(1) Universities and colleges, excluding service to any separate or adjoining facilities or structures not used exclusively for educational or instructional purposes.

(d) GROUP IV

(1) Public housing properties of the Philadelphia Housing Authority.

(e) GROUP V

(1) Group V Customers are Customers enrolled in the Income-Based Water Revenue Assistance Program (IWRAP) described in Section 19-1605 of the Philadelphia Code after the Water Revenue Bureau begins to issue IWRAP bills. Monthly bills for a Customer enrolled in IWRAP will be determined based on the Customer's family size and household income and will be charged in lieu of the service, usage and stormwater charges established in Sections 2.0 et seq., 3.0 et seq. and 4.0 et seq. for general Customers. Group V Customers will pay a percentage of his/her household income depending on where that Customer falls within the Federal Poverty Guidelines (FPL), subject to a minimum bill amount of \$12 per month.

(2) For determining the amount of service, usage and stormwater charges on monthly bills, Group V Customers will be defined according to three income tiers as follows:

(i) Group V-A. Group V Customers whose gross household income has been verified as being from 0% of FPL and up to and including 50% of FPL

(ii) Group V-B. Group V Customers whose gross household income has been verified as being greater than 50% of FPL and up to and including 100% of FPL.

(iii) Group V-C. Group V Customers whose gross household income has been verified as being greater than 100% of FPL and up to and including 150% of FPL.

(f) GROUP VI<sup>1</sup>

(1) Customers with parcels eligible for a discount on the stormwater management service charge as a qualified Community Garden pursuant to Section 19-1603 of the Philadelphia Code and regulations promulgated by the Water Department under that Section.

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<sup>1</sup> Amended effective January 1, 2017.

(f) Charges for Special Customers

(1) As of July 1, 2016, the charges to Groups I, II, and III of special Customers listed above shall be seventy-five percent (75%) of the charges as established in Sections 2.0 et seq., 3.0 et seq., and 4.0 et seq., including both the water and sewer service and quantity charges, and the SWMS charges. The charges to Group IV Customers shall be ninety-five percent (95%) of the charges as established in Sections 2.0 et seq., 3.0 et seq., and 4.0 et seq., including both the water and sewer service and quantity charges, and the SWMS charges.

(2) Group V Customers enrolled in IWRAP after the Water Revenue Bureau begins to issue IWRAP bills will be responsible for paying the following charges for service, usage and stormwater charges, or \$12 per month, whichever is greater:

- (i) Group V-A: 2.0% of household income.
- (ii) Group V-B: 2.5% of household income.
- (iii) Group V-C: 3% of household income.

(3) Group VI: Effective with bills issued on or after January 1, 2017, Group VI special Customers will receive a [insert percentage discount] on the stormwater management service charges for parcels classified by the Department as Community Gardens upon approval of an application for a discount consistent with Section 19-1603 of the Philadelphia Code and regulations promulgated by the Department under that Section.<sup>2</sup>

(g) All of these special Customers shall meter all water connections and they shall be subject to all provisions herein not inconsistent with Sections 2.0 et seq., 3.0 et seq., and 4.0 et seq.

(h) All special Customers are subject at any time to review as to their special charges by the Department or the Water Revenue Bureau and may be required to furnish adequate evidence supporting the continuance of such charges to the Department or the Water Revenue Bureau upon written notice to do so. Failure to furnish such evidence shall be sufficient ground for denial or termination of such special charges.

(i) Special charges may be granted subject to the Department's review and approval of the size of the meter installed.

(j) When the special use for which the special charge is granted ceases, the special charge ceases and the charges for general Customers shall apply thereafter.

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<sup>2</sup> Amended effective January 1, 2017.