

February 7, 2023

Hon. Evan Glass
President, Montgomery County Council
100 Maryland Avenue
Rockville, MD 20850

Re: Bill 25-22 - Forest Conservation Law & Chapter 22A- Forest Conservation Trees Regulations of the Montgomery County Code

Dear President Glass and Councilmembers:

On behalf of the Maryland Building Industry Association (MBIA), this letter is in response to proposed changes to Chapter 22A- Forest Conservation Law (“Forest Law”) & Chapter 22A- Forest Conservation Trees Regulations (“Trees Regulations”) of the Montgomery County Code. The MBIA appreciates the opportunity to offer the following comments on the proposed changes to the forest law.

MBIA understands the importance of maintaining healthy forest and tree canopy for future generations. However, we believe that the proposed changes to forest law are not necessary since the activities regulated by the forest law have already achieved not net loss of forest based on Montgomery Planning data. We are also concerned that the proposed changes create an unnecessary obstacle to supplying more homes.

Achieving No Net Loss

The goal of the initiative is to achieve No Net Loss of Forest in Montgomery County. Data that tracks the Forest Law provided by the planning department shows that over the last decade (2012-2022) Montgomery County lost net 92 acres of forest over a ten-year period.

Data Provided by the Planning Department

From **2012-2022** projects subject to the Montgomery County Forest Conservation Law:

- Cleared **762 acres** of forest
- Planted (and protected) **670 acres** of forest
- Protected **2,637 acres** of pre-existing forest
- Planted and protected a total of **3,307 acres** of forest

The MBIA has identified at least two projects that were not included in the data. Specifically, two projects within the limited master plan amendment for 10-mile creek will plant approximately 97 acres

of forest above what is required by Chapter 22A Forest Law (Creekside at Cabin Branch (820200160)- 82+/- acres & Ashford Woods (820210110)- 15+/- acres). These projects together exceed the 92-acre gap.

Additionally, an analysis contained in the staff report for the April 28, 2022, planning board hearing analyzed the impacts of the proposed changes over 15 recent projects. The analysis showed of the 15 projects analyzed 50.22 acres of mitigation was provided for the removal of 15.52 acres of forest. That is 223% more mitigation than forest removed.

Table 2: Summary of 15 projects with Forest Conservation Plans, comparing current requirements with requirements resulting from proposed 'No Net Loss of Forest' Amendment to Montgomery County Forest Conservation Law

	Forest Conservation Law Effective 2/22/21	Proposed Amendment to the Forest Conservation Law as of 4/28/22
Total Forest Removed (from 7 of 15 projects)	15.52 acres	15.52 acres
Total Forest Mitigation Required for 7 Projects that Removed Forest	14.95 acres	Within same or priority watershed: 17.58 acres Outside same or priority watershed, within county: 25.24 acres
Total Forest Mitigation Required for all 15 Projects	50.22 acres	Within same or priority watershed: 58.79 acres Outside same or priority watershed, within county: 66.35 acres

Master plan and SPA requirements that require unforested stream valley buffers be planted in addition to the requirements of the Forest Law add significant amounts of forest. An amendment contained in the proposed regulations expands this to require all unforested stream valley buffers be planted regardless of master plan or SPA requirement (22A-12 (e) (1) (B)).

Impacts of the Proposed Changes

In 2019, the county's housing targets contained in its new economic development strategy were based on COG's report, as well as research from the Urban Institute projecting Montgomery will need 23,100 low-cost units, 18,100 mid-cost units, and 6,300 high-cost units." Roughly 43,000 units by 2030. This amount of housing is not being achieved for a variety of reasons including a lack of developable land.

The forest law was developed in the mid to late 1990's to balance forest conservation with development, particularly on the larger greenfield projects. Large tracts of land generally have more opportunities to minimize forest clearing and meet mitigation requirements onsite. The future of development in Montgomery County is different than other Maryland jurisdictions. Development is

increasingly urban infill and redevelopment. The forest law affects these types of projects differently than greenfield projects prevalent in other counties.

Oversized Impact on Redevelopment and Infill Projects

Using a recent Montgomery County redevelopment project as an example, this site contained existing forest in an amount at or below the forest conservation threshold. The forest was located along the edges of the site and directly in the middle and required clearing to redevelop the site as envisioned in the master plan, to provide master planned roadways, tie into existing utilities, and make connections to existing roads. When forest was cleared below the conservation threshold it immediately triggered mitigation at a 2:1 ratio. Planting twice as much forest than what previously existed on an urban redevelopment site is unrealistic and typically results in mitigation requirements being met through the purchase of forest bank credit or payment of in-lieu fee which are the last two options available after other priorities (onsite retention and planting, offsite planting) have been exhausted.

Forest Mitigation Banking

The proposal increases mitigation ratios for using forest banks if forest banking credit is not purchased in the same 8-digit watershed. If mitigation cannot be provided in the same watershed, clearing below the conservation threshold increases from 2:1 to 2 ½:1. Clearing above the conservation threshold increases from ½:1 to 1:1. As of February 2023 there is no mitigation banking credit available in the entire county.

Mitigation banks and opportunities to supply off-site forest within the same watershed have historically been limited to non-existent down county and mid-county. One of the outcomes of the stakeholder meetings was to acknowledge this and allow mitigation in a priority watershed to avoid increases in planting ratios. However, at this time it is our understanding that these priority watersheds have not been delineated or defined. Increasing the mitigation ratios for not being able to provide mitigation in the same 8-digit watershed will not increase forest in these watersheds.

Additionally, finding credit in a mitigation bank is much more difficult due to a 2021 change to the state forest conservation law eliminating the ability to bank preserved forest, severely limiting the amount of available forest banking in the county. Revisions to the forest conservation law should consider the need to redevelop sites and take into consideration the benefits of redevelopment in terms of water quality improvements and resiliency gained by storing stormwater and treating it to modern water quality standards and increases in tree canopy.

On the example project, as approved, 5.78 acres of forest clearing required 11.74 acres of mitigation. The cost of mitigation under current regulations and prior to HB 991 was anticipated to be \$305,240. Under the proposed law if there is no banking credit available in the same watershed the mitigation

increases to 14.68 acres and could increase the cost to provide mitigation by around a half million dollars to over \$800,000. As time goes on there simply won't be enough land to physically meet the requirements of the law. Instead, it will increase the amount of in-lieu fee payments and burden placed on the county to provide the mitigation.

In Lieu Fee

The last option to meet mitigation requirements after forest mitigation banking is in-lieu fee. In-lieu fee cost more than forest mitigation banking at \$1.30 per sf or \$56,628 per acre and typically increases every two years based on the consumer price index. Significantly, the proposal to increase mitigation planting ratios for reforestation provided outside of the same 8-digit watershed means that the in-lieu fee rate will be based on the worst-case scenario because the planning department cannot guarantee that the mitigation planted provided by the in-lieu fee can be provided in the same watershed as the project.

Conclusion

In summary, the proposed revisions are not necessary to achieve no net loss of forest but will make development in Montgomery County more costly and difficult to implement. We appreciate the opportunity to provide comments and look forward to working with the county on solutions that achieve no net loss without creating unnecessary obstacles to the development of housing.

Comments on specific sections of the code proposed to be revised are as follows:

1- Forest Law 22A-11 (b) (1)- Application, review, and approval procedures., Project requiring development plan, floating zone plan, project plan, sketch plan, preliminary plan of subdivision, or site plan approval.

- a. The proposed requirement to obtain an approved forest stand delineation plan before the applicant can submit an application instead of with, as is the current regulation is problematic for the same reasons discussed and eventually agreed to in public comments provided to Park and Planning in the Spring of 2017.

“Per Section 7.3.3 Sketch Plan A (2), “A sketch plan describes a project at an early stage to provide the public and the Planning Board the chance to review a proposed development for general design, density, circulation, public benefits, and relationship to the master plan before a developer is required to expend significant resources on design and engineering.” Currently a Natural Resource Inventory/Forest Stand Delineation (NRI/FSD) is submitted concurrently with a Sketch Plan application and is required to be approved before the approval of the sketch plan. Requiring the NRI/FSD to be not only submitted but also

approved prior to the submittal of a sketch plan adds additional costs and process at an even earlier stage in the process, which is inconsistent with the purpose of the sketch plan. Additionally, the time delay adds to the cost of doing business by delaying the start of the sketch plan review by several months and potentially adding to the carrying costs of the property.”

In practice, since NRI’s are required to be submitted with any application the field work needed to complete the NRI and compile the data used to create the base map that proposed improvements shown on any development plan, floating zone plan, project plan, sketch plan, preliminary plan of subdivision or site plan are based on occurs as intended with enough time to factor in the preservation of sensitive environmental areas and priority forests. Additionally, the requirement of a licensed forester, licensed landscaper architect, or Qualified Forest Conservation professional requires the plan preparer to abide by a code of ethics or risk losing the privilege to prepare these plans in addition to other penalties. Any differing interpretations or accidental omissions identified by an environmental reviewer during the review process that may impact the proposed improvements can be easily coordinated while all plans are being reviewed simultaneously. Requiring an approved NRI prior to submittal simply delays the overall entitlement process adding unnecessary time and risk.

- 2- ***Forest Law 22A-12 (c) (1) & (2)- Retention, afforestation, and reforestation requirements., Reforestation***
 - a. See comments provided above to understand the implications of increasing planting ratios for clearing above the conservation threshold and for meeting mitigation requirements in other watersheds when mitigation options are not typically available in Areas 1 and 2.

- 3- ***Forest Law 22A-12 (d) (2)- Retention, afforestation, and reforestation requirements., Afforestation***
 - a. This proposed revision changes the requirement to provide afforestation, when required onsite, from should to must. As discussed above there are numerous instances, particularly for redevelopment projects, where it does not make sense environmentally to plant small, fragmented patches of forest on urban sites. Changing the standard from “should” to “must” opens these projects up to appeals and challenges that could otherwise be avoided by keeping the language the same.

- 4- ***Forest Law 22A-12 (e) (1) (B)- Retention, afforestation, and reforestation requirements., Standards for Afforestation and Reforestation***
 - a. As discussed at the beginning of this comment letter, the Master Plan and SPA requirements to afforest unforested stream valley buffer has resulted in no net loss due to development over the 10 years. This revision expands this requirement to all projects regardless of master plan or SPA requirement.

5- Forest Law 22A-12 (e) (4)- Retention, afforestation, and reforestation requirements., Standards for Afforestation and Reforestation

- a. Mitigation banks and opportunities to provide off-site forest within Areas 1 and 2 have historically been extremely limited to non-existent. Increasing the mitigation ratios for not being able to provide mitigation in the same 8-digit watershed will not increase forest in these watersheds. Instead, it will increase the amount of in-lieu fee payments and burden placed on the county to provide the mitigation.
- b. Adding a requirement to satisfy mitigation and afforestation requirements in the same 8-digit watershed in which a project is located, in addition to changing the standard from “may” to “must” opens these projects up to appeals and challenges that could otherwise be avoided by keeping the language the same. Furthermore, the pricing for mitigation banking is set by a market rate. Adding requirements that constrain the supply from which credits can be purchased increases the market rate based on availability.

6- Forest Law 22A-13 (g) (3)- Forest Mitigation Banks, Purchasing and selling forest mitigation bank credits.

- a. Mitigation banks and opportunities to provide off-site forest within Areas 1 and 2 have historically been extremely limited to non-existent. Increasing the mitigation ratios for not being able to provide mitigation in the same 8-digit watershed will not increase forest in these watersheds. Instead, it will increase the amount of in-lieu fee payments and burden placed on the county to provide the mitigation.
- b. Adding a requirement to satisfy mitigation and afforestation requirements in the same 8-digit watershed in which a project is located, in addition to changing the standard from “may” to “must” opens these projects up to appeals and challenges that could otherwise be avoided by keeping the language the same. Furthermore, the pricing for mitigation banking is set by a market rate. Adding requirements that constrain the supply from which credits can be purchased increases the market rate based on availability.

7- Considerations for previously approved projects that require an amendment

- a. Grandfathering- The MBIA recommends MNCPPC clarify how they plan to implement the proposed changes on projects or sites that were previously approved and designed based on the requirements of the current Forest Law if those projects or sites are required to be amended. For example, individual property owners with forest violations could be significantly impacted by the increased costs to provide mitigation to bring their property back into compliance. Amendments are done for a variety of reasons and a lack of grandfathering and/or clarifications to the applicability of how amendments will be treated could result in inconsistent application of the law or unintended consequences and costs associated with the amendment.

We appreciate the opportunity to provide comments on the proposed changes and are available to answer any questions that you may have.

Sincerely,



Matthew J Wessel, PLA, ISA Certified Arborist
Chair of the Environmental Committee, MBIA

Griffin Benton
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