



**MONTGOMERY COUNTY PLANNING DEPARTMENT**  
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

MCPB  
Item # 11  
October 30, 2008

**MEMORANDUM**

TO: Montgomery County Planning Board

VIA: Jorge A. Valladares, P.E., Chief, Environmental Planning

FROM: Mark Pfefferle, Forest Conservation Program Manager

DATE: October 24, 2008

SUBJECT: Forest Conservation Discussion

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The purpose of this discussion item is to obtain guidance from the Planning Board on three separate issues related for forest conservation. The three issues are:

- A. Fee-in-lieu expenditures
- B. Onsite planting requirements
- C. Compensation for amending forest conservation plans and conservation easements.

Staff is seeking confirmation of the approach either currently utilized or proposed.

**A. Fee-in-lieu expenditures**

The Planning Department has collected more than \$500,000 from the forest conservation in-lieu fees and has assumed planting requirements equaling 21.23 acres of forest. According to the Section 22A-27(a) of the County code, funds deposited into the in-lieu account can only be expended for forest plantings. Individual tree planting can occur only after the forest planting requirements are satisfied. Spring 2008 was the first expenditure of in-lieu fees when 1.5 acres of forest was planted within the Reddy Branch stream buffer. The Reddy Branch is within the Patuxent River watershed. An additional 5.0 acres of planting is scheduled for November. This will include an additional 2.5 acres of planting along Reddy Branch and 2.5 acres of forest planting along Rock Creek near East-West Highway. The budgeted cost for the fall 2008 planting is just under \$22,000 per acre. This per acre cost includes site preparation, purchase of the trees, planting labor and materials, maintenance mowing, and projected drought watering. This cost does not include costs associated with acquiring the land or easements since the planting will occur on land owned by the Commission.

After the 5.0 acre planting occurs, the Planning Department will still have a 15.23 acre

planting deficit and more than \$400,000 remaining in the account. The Department of Parks has agreed that in-lieu funds can be utilized for additional forest planting on Commission owned properties. The Department of Parks has committed to provide locations for up to 7.0 acres of new forest to be planted each year funded by in-lieu fees. The Department of Parks has also agreed that trees can be planted at the Pope Farm with in-lieu fees. These trees would be used exclusively at future in-lieu fee planting areas. Utilizing the Pope Farm nursery to grow trees, and parkland to locate the new forest will keep per acre planting costs lower than what is otherwise possible.

A second initiative is that the Planning Department is considering promoting a tree planting coupon that would incentivize individual property owners to plant trees on their land. The program would be modeled after the coupon program in Baltimore County. The Baltimore County program provides a \$10 coupon for trees purchased from participating nurseries. The participating nursery collects the coupons and submits payment requests to the County. The County provides a \$5 reimbursement to the nursery for each coupon.

As previously mentioned, the in-lieu fee planting requirements are not satisfied; therefore staff does not believe an in-lieu fees can be used to reimburse a planting coupon. However, there is a second dedicated fund, the forest conservation penalty fund that could be utilized. Staff has recently learned that the Maryland Department of Natural Resources will offer individual property owners a \$25 coupon for acquiring and planting trees. Staff believes the Planning Department should piggy back onto this program and provide an additional \$25 coupon on selected trees from participating nurseries. However, staff believes the funding for the first year should not exceed \$20,000.

Staff has approached selected nurseries and they are interested in participating in the program. Staff will continue to expand the network of participating nurseries. Additional requirements for this program still need to be established such as the type and size of trees which must be purchased for reimbursement. Staff believes the trees should be limited to native canopy trees.

Staff would like the Planning Board to confirm the approach for in-lieu fees and authorize staff to complete and publicize the coupon program to promote individual tree planting for the spring 2009.

## **B. Onsite planting requirements**

Under Section 22A-12 of the County code property owners with planting requirements must maintain the planted materials for a minimum of 2 years. The Planning Board approved *Environmental Guidelines for Development in Montgomery County* requires a 5 year maintenance period for developments with planting requirements within Special Protection Areas. Section 22A-12(i) of the County code requires applicants provide a financial security to ensure all requirements of an approved forest conservation plan, including forest planting and maintenance is performed. The Planning Department can release up to 50 percent of the financial security upon successful planting and the forest

conservation inspector starting the maintenance period. Some developers request a bond reduction but not all make this request. At the end of the 2 year maintenance period the Planning Department is required to release the complete bond if more than 50 percent of the trees are alive. Release of the performance bond and the end of the maintenance period does not address the proliferation of non native and invasive materials or deer predation. Soon after the applicant is released after their obligations, the planted trees may be negatively impacted by invasives, deer and drought.

The Planning Board, in September 2007, forwarded recommended changes to the forest conservation law that would increase the maintenance and management period from 2 to 5 years. The Council introduced Bill 37-07, an amendment to the forest conservation law in December 2007 reflecting the change. Since the introduction of the bill there has been considerable discussion with Council members and staff concerning the increase in the maintenance period.

At the last Council subcommittee meeting on the amendments to the forest conservation law, there was preliminary discussion on possibly allowing someone other than the applicant be responsible for the planting and the maintenance of the forests. Staff still supports an increase in the maintenance and management period to five years, however; staff believes there is another option that would release the applicant from their onsite forest conservation planting obligation. This option would allow the applicant with onsite forest planting requirements to pass that responsibility to the Planning Department. The applicant would have to select this option prior to staff approval of the final forest conservation plan. If the applicant selects this option they would have to contribute funds equal to the in-lieu fee rate plus 5 years of maintenance. If the applicant does not select this option they will be required to plant and maintain the planting areas for 5 years. The Planning Department would retain vendors to plant new forests and maintain those plantings for 5 years. If the Council does not extend the maintenance period, staff does not recommend the Planning Department assume the developers planting responsibilities. There are a number of pros and cons with this option. The pros for this approach include:

1. The applicant would not need to provide financial security for the plantings; rather they would make a payment prior to any clearing or grading activities occurring on site.
2. The applicant would not need to hire contractors to plant the forests or provide the maintenance of the planted materials.
3. Planting of the onsite forest could occur sooner in the process. Under the forest conservation law, applicants are not required to plant forests until final stabilization is complete. If the planting area is not within the active limits of disturbance, the forest planting could occur simultaneously with the construction activities or prior to construction.

Some of the cons with this approach include:

1. Conservation easements would need to be revised that would provide permission for the Planning Department to enter the property to conduct planting and

- maintenance of the forests.
2. Liability and access issues during active construction would need to be addressed so the construction sequencing is not compromised.
  3. The Planning Department would need to issue requests for proposals (RFPs) and award contracts to vendors that would then bid on individual planting jobs.
  4. Additional staff, most likely a part-time contract employee, would be required to manage the contractors and to work with the developers that utilize this option. This person could be funded through the forest conservation penalty fund.

If the applicant chooses not to accept this approach, a 5 year maintenance period should be required. As previously mentioned there is already a process that allows for the release of up to 50 percent of the financial security after planting occurs. Under the current law the entire financial security is returned after two years if the planted forest meets the established survival requirements. If the maintenance period is extended to 5 years with the passage of the proposed amendments, staff would support a second financial security reduction after 3 years. The second reduction should not exceed an additional 25 percent of the original bond. If the planted material does not meet a pre-established survival requirement after 3 years, there should be no additional reduction until reinforcement planting occurs and the reinforcement plantings have survived at least one growing season. If after this additional year of growth and the survival threshold is achieved, then release of another 25 percent of the original bond could be authorized. If after 5 years the plantings do not meet the survival requirements, or the non native and invasives are not controlled, the maintenance period should be extended.

Staff requests guidance from the Planning Board as to whether or not this option should be presented to the Council.

### **C. Compensation for amending forest conservation plans and conservation easements**

Environmental Planning staff is receiving an increasing number of requests to modify approved final forest conservation plans and abandon conservation easement on recorded single lots. Staff is requesting confirmation from the Planning Board that the approach taken by staff for the review of plans and required compensation is the right approach.

Requests to modified approved forest conservation plan are typically submitted by the original applicant or a developer. Request to abandon conservation easements are from the individual homeowners. Section 22A-11(a)(2) of the County code states that, the Planning Director, on a case-by-case basis, to approve modifications to an approved forest conservation plan when field inspections or other evaluation reveal minor inadequacies of the plan; or each modification is minor and does not impact any forest in a priority area. Section 113 of the Forest Conservation regulation clarifies minor and major amendments. Under this section, a major amendment entails clearing of 5,000 square feet of additional forest, and a minor amendment is any forest removal less than 5,000 square feet.

The requests from developers are typically necessitated because the other government agencies have determined that: a stormwater management facility needs to be enlarged; a stormwater management outfall needs to be extended into a tree save area; or an applicant did not locate the water and sewer connections to existing lines main lines. Most changes are addressed by staff because they do not involve more than 5,000 square feet of additional forest removal and they occur in the time frame between the approval of the preliminary forest conservation plan and the final forest conservation plan. However, sometimes it is necessary to have the Planning Board approve the modification when more than 5,000 square feet of additional forest is proposed for removal.

The second type of modification request is from individual homeowners. The individual property owners typically want to encroach into a conservation easement to make an improvement such as locating a shed, swimming pool, or building addition into a recorded conservation easement area. Environmental Planning staff has discouraged property owners from submitting these modifications in the past and will continue to do so, however, some property owners still wish to pursue the abandonment of the easement or a modification to the easement boundaries. In other instances, homeowners request to modify or abandon an easement after activities have occurred within the easement that violates the terms of the easement prohibitions. It is staff's desire to have the Planning Board approve requests to abandon recorded conservation easements on individual lots regardless of the size of the easement to be abandoned. The easement is granted to the Commission and the terms of the easement does not expressly allow the Director to authorize the abandonment of an easement. Therefore, the responsibility should be with the Planning Board.

It is staff practice to review each modification request on a case-by-case basis. Each review includes:

1. An assessment of the natural resource inventory/forest stand delineation to determine if the easement is for the protection of environmentally sensitive areas or existing high quality forests.
2. A review of the forest conservation plan to determine if the removal of the forest will still allow the subdivision to meet the minimum forest retention requirements, when it is required by Section 22A-12(f) of the County code.
3. A determination if the easement is for planted forest and if planting has occurred, what is the success of the planted forest.
4. A review of the Planning Board hearing and opinion/resolution to determine if the easement was to buffer incompatible uses.
5. How the applicant proposes to compensate for the removal of the easement.

In cases where staff supports a request to modify an approved plan or abandon/modify a conservation easement, staff requests the applicant replace the existing conservation easement area with a reforestation requirement at least 2 times the area to be abandoned. The basis of this decision is found in Section 22A-11(a)(2) and 22A-12(c)(1) of the County code. Section 22A-11(a)(2) allows the substitution of a marginal on-site conservation area for equal or greater amount of off-site priority area. Section 22A-

12(c)(1) requires that all existing forest removed below the conservation threshold be reforested at a ratio of 2 acres planted for every one acre removed. These two sections provide sufficient justification to exceed a 1:1 replacement requirement.

Some applicants have expressed a desire to use approved forest mitigation banks to meet the requirements. Under section 22A-12(e)(2) of the County code, if an applicant desires to meet the requirements through the protection of existing forest in a mitigation bank, the forest cover protected must be 2 times the planting requirements. Under the existing staff practice, an applicant can either plant an area 2 times the easement area to be modified/abandoned or protect an existing forest equal to 4 times the area to be modified/abandoned.

Staff does not support all amendments to approved forest conservation plans, or the removal of conservation easement in every case. In some cases it is warranted and required by other governmental agencies, in others the environmental impact is too detrimental, and the request is not supported by staff. Staff has been successful in reviewing and approving minor forest conservation plan modifications in the past. Few requests have resulted in major amendments that must be approved by the Planning Board. However, staff will soon present to the Planning Board numerous requests to abandon existing conservation easements that were required as part of a development plan.

Staff requests the Board confirm the existing staff practice, particularly as it relates for mitigating a modified or abandoned easement.