
MCPB
Item # 5
10/10/05**MEMORANDUM**

TO: Montgomery County Planning Board

VIA: Jeff Zyontz, Chief
Countywide Planning Division

FROM: Katherine Nelson, Planner Coordinator 
Countywide Planning Division
(301) 495-4622

SUBJECT: Expedited Bill 27-05, Forest Conservation Penalties

Recommendation

Transmit comments to the County Council. Staff recommends that the Planning Board not support this Expedited Bill as drafted and direct Staff to work with Council Staff to amend the bill in accordance with the analysis below.

Expedited Bill 27-05

On September 20, 2005 Bill 27-05 was introduced before the County Council (Attachment 1). The purpose of this Bill is to repeal the \$1 per square foot limit on the administrative civil penalty for noncompliance with the County's Forest Conservation Law ("FCL") set forth in Section 2 of Chapter 4 of the Laws of Montgomery County 1992 ("Section 2"), an uncodified portion of the FCL. Section 2 sets both in lieu fees and the maximum administrative penalty. The expedited bill only proposes to eliminate the maximum administrative penalty. It does not propose a new maximum amount. A public hearing is set for October 11, 2005 and comments from the Planning Board have been requested.

Analysis

Expedited Bill 27-05

Bill 27-05 proposes to eliminate the maximum administrative penalty rate of \$1/square foot. This maximum amount is set pursuant to § 22A-16(d)(1), which states, in full, as follows:

In addition to other remedies provided under this Article, a person who violates this Chapter, any regulations adopted under it, a forest conservation plan, or any associated agreements or restrictions is liable for an administrative civil penalty imposed by the Planning Board. This civil penalty may not exceed the rate set by the County Council, by law or resolution, but not less than the amount specified in Section 5-1608(c) of the Natural Resources Article of the Maryland Code. Each day of a violation is a separate violation.

(Emphasis added.) Thus, the practical effect of eliminating the \$1 per square foot maximum from Section 2 without replacing it with a new maximum amount is to reduce the penalty amount to a flat rate of \$.30 per square foot which is the rate established under § 5-1608(c) of the Natural Resources Article of the Maryland Code. However, Councilmember Silverman does propose setting up a new upper limit via resolution at the time the Council acts on the legislation, as noted in the cover memorandum to Bill 27-05.¹ Nonetheless, given the practical effect of approving Bill 27-05 as drafted, which would reduce the penalty amount to \$.30 per square foot, and the fact that the new maximum amount has not yet been proposed, Staff recommends that the Planning Board not support this bill as drafted.

Maximum Administrative Civil Penalty Rate

With respect to Councilmember Silverman's proposal for recommendations from the Planning Board on what would be an appropriate maximum administrative civil penalty rate², Staff offers the following analysis:

¹ It is important to note that any lapse between the enactment of Bill 27-05 and the adoption of a resolution by the County Council setting a new maximum limit will potentially effect all violations pending or occurring during that time period.

² The cover memorandum introducing Expedited Bill 27-05, from Michael Faden, Senior Legislative Attorney, to the County Council, dated September 20, 2005, states that Councilmember Silverman noted, among other things, that "My own view is that the upper limit should be at least ten times what it currently is. We can decide this question after receiving recommendations from the public and the Planning Board." (Emphasis added.)

The current upper limit for the administrative civil penalty for noncompliance with the forest conservation law has been in place since 1992. As a result of recent application of this penalty, concerns have been raised that they are not commensurate with the damage done to forested areas, or are high enough to be a sufficient deterrent.

Staff and Board practice with regard to application of administrative civil penalties has been to require that the penalty be used to compensate for a violation by providing specific acreage of on-site or off-site forested area (in addition to the area cleared) rather than cash payment. Thus, the administrative penalties assigned so far have been related to the projected cost of forest protection or planting expected to be provided. In practice, the minimum acreage required has been two to three times the amount of the area disturbed.

Currently, the county code sets the upper limit of the administrative civil penalty at \$1 per square foot, which is 3.3 times the \$.30 per square foot allowed for fee-in-lieu, the estimated cost of planting forest. Given our rationale to achieve 2 to 3 times the acreage disturbed in replacement forest, Staff believes that this ratio between fee-in-lieu and administrative penalty should be maintained. This will allow civil penalties to be exacted at a rate of approximately 3 three times the cost to remedy the violation.

In 1992 the estimated cost for planting forest was \$13,068.00 per acre or 30 cents per square foot. Based on research into current costs, staff is persuaded that the cost of planting and maintaining forest is now approximately triple the estimated amount in 1992. With this in mind, staff recommends a revision to the in lieu fee that would reflect this increase, and a commensurate increase in the upper limit of the administrative civil penalty. Updating the fee-in-lieu and maintaining an approximate 3.3 ratio between the fee-in-lieu and the maximum civil penalty would triple the maximum civil penalty rate.

This being said, Staff recognizes that penalties for illicit forest clearing on particularly important areas should not just compensate for violations, but also deter violations. Thus, Staff supports a two-tiered approach to the upper limit of the civil penalty. First, tripling the existing administrative civil penalty in order to fully compensate for violations. Second, create a maximum administrative civil penalty greater than the normal rate to allow the Planning Board to penalize the illicit clearing of forest in designated areas, such as public lands or publicly held easements. Environmental Staff is currently drafting a Green Infrastructure Functional Master Plan, which will identify these designated areas.

	In Lieu Fee (sqft)	Administrative Civil Penalty (sqft)	Maximum Administrative Civil Penalty (sqft)
Current Amount	30 cents	\$1.00	None
Recommended Amounts	Approximately 90 cents	Approximately \$3.00	To Be Determined

Finally staff suggests that an inflationary clause be added to the language that will allow the amount of the fee-in-lieu and the administrative penalty to be increased incrementally with the economy.

Conclusion


In conclusion, Staff recommends that these comments be transmitted to the County Council. Staff notes that these comments have not had the benefit of public testimony. Therefore, Staff recommends that the Planning Board direct Staff to work with Council Staff to develop more specific recommendations subsequent to the Council public hearing to be held on October 11th.

ATTACHMENT 1

**AGENDA ITEM 7
September 20, 2005
Introduction**

MEMORANDUM

TO: County Council

FROM:  Michael Faden, Senior Legislative Attorney

SUBJECT: Introduction: Expedited Bill 27-05, Forest Conservation – Penalties

Expedited Bill 27-05, Forest Conservation – Penalties, sponsored by Councilmembers Silverman, Denis, Floreen, Andrews, and Praisner is scheduled to be introduced on September 20, 2005. A public hearing is tentatively scheduled for October 11 at 1:30 p.m.

Expedited Bill 26-05 would repeal a \$1/square foot limit, contained in an uncodified part of the forest conservation law, on the amount of the administrative civil penalty for noncompliance with the forest conservation law. The law otherwise lets the Council set the maximum penalty amount by law or resolution (see County Code §22A-16(d)(1) on ©4). The minimum amount, set in state law, is 30¢/square foot. Councilmember Silverman, lead sponsor of this bill, noted that:

The law already provides for an alternative means to set an upper limit, via a Council resolution. I believe that is a more appropriate mechanism and propose that the Council set a new upper limit via resolution at the time we act on the legislation. My own view is that the upper limit should be at least ten times what it currently is. We can decide this question after receiving recommendations from the public and the Planning Board.

This packet contains:

Expedited Bill 27-05
Legislative Request Report
Forest conservation law penalty section

Circle #

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3
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Expedited Bill No. 27-05
Concerning: Forest Conservation -
Penalties
Revised: 9-12-05 Draft No. 1
Introduced: September 20, 2005
Expires: March 20, 2007
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Councilmembers Silverman, Denis, Floreen, Andrews, and Praisner

AN EXPEDITED ACT to:

- (1) repeal a limit on certain penalties for noncompliance with the forest conservation law; and
- (2) generally amend the enforcement provisions of the forest conservation law.

By amending

Laws of Montgomery County 1992
Chapter 4

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

LEGISLATIVE REQUEST REPORT

Expedited Bill 27-05

Forest Conservation – Penalties

DESCRIPTION: Repeals a \$1/square foot limit, contained in an uncodified part of the forest conservation law, on the amount of the administrative civil penalty for noncompliance with the forest conservation law

PROBLEM: The potential maximum penalty amount for serious violations is not commensurate with the damage done to forested areas.

GOALS AND OBJECTIVES: To allow a more appropriate penalty to be levied.

COORDINATION: Planning Board

FISCAL IMPACT: Minimal

ECONOMIC IMPACT: Minimal

EVALUATION: To be requested.

EXPERIENCE ELSEWHERE: To be researched.

SOURCE OF INFORMATION: Michael Faden, Senior Legislative Attorney, 240-777-7905

APPLICATION WITHIN MUNICIPALITIES: To be researched.

PENALTIES: See §22A-16.

Sec. 22A-16. Penalties and other remedies.

- (a) *Class A violation.* Violation of this Chapter or any regulations adopted under it is a Class A violation. Notwithstanding Section 1-19, the maximum civil fine is \$1,000. Each day a violation continues is a separate violation under this Chapter.
- (b) *Enforcement authority.* The Maryland-National Capital Park and Planning Commission has primary enforcement authority under this Chapter. Administrative enforcement actions are to be initiated by the Planning Director in accordance with this Article.
- (c) *Civil actions.* The Commission may bring any civil action authorized to the County under Section 1-19 to enforce this Chapter or any regulation adopted under it. A civil action may also be brought to enforce a forest conservation plan and any associated agreements and restrictions or to enforce an administrative order. These remedies are in addition to any remedies that the Commission or County may initiate under state or local law to enforce the terms of a regulatory approval which incorporates a forest conservation plan.
- (d) *Administrative civil penalty.*
 - (1) In addition to other remedies provided under this Article, a person who violates this Chapter, any regulations adopted under it, a forest conservation plan, or any associated agreements or restrictions is liable for an administrative civil penalty imposed by the Planning Board. This civil penalty may not exceed the rate set by the County Council, by law or resolution, but not less than the amount specified in Section 5-1608(c) of the Natural Resources Article of the Maryland Code. Each day of a violation is a separate violation.
 - (2) In determining the amount of the civil penalty, or the extent of an administrative order issued by the Planning Director under Section 22A-17, the Planning Board or Planning Director must consider:
 - (A) the willfulness of the violations;
 - (B) the damage or injury to tree resources;
 - (C) the cost of corrective action or restoration;
 - (D) any adverse impact on water quality;

MONTGOMERY COUNTY CODE
Chapter 22A

- (E) the extent to which the current violation is part of a recurrent pattern of the same or similar type of violation committed by the violator; and
- (F) other relevant factors.

The Board or Director may treat any forest clearing in a stream buffer, wetland, or special protection area as creating a rebuttable presumption that the clearing had an adverse impact on water quality.

- (3) The reasons for imposing a civil penalty must be provided in a written opinion of the Planning Board and included in its administrative order.
- (e) *Fund.* Money collected under this Section must be deposited into the forest conservation fund. (1992 L.M.C., ch. 4, § 1; 2001 L.M.C., ch. 19, § 1)

Editor's note—2001 L.M.C., ch. 19, § 2, reads as follows:

Transition. Any amendment to Chapter 22A, inserted by Section 1 of this Act, does not apply to:

- (a) a preliminary or final forest conservation plan approved before this Act took effect [November 5, 2001], or
- (b) a county highway project individually listed in the County Capital Improvements Program and submitted to the Planning Board under mandatory referral review before this Act took effect [November 5, 2001].

Sec. 22A-17. Corrective actions.

- (a) *Administrative order.* At any time, including during an enforcement action, the Planning Director may issue an administrative order requiring the violator to take one or more of the following actions within a certain time period:
 - (1) stop the violation;
 - (2) stabilize the site to comply with a reforestation plan;
 - (3) stop all work at the site;
 - (4) restore or reforest unlawfully cleared areas;
 - (5) submit a forest conservation plan for the property;
 - (6) place forested or reforested land under long-term protection by a conservation easement, deed restriction, covenant, or other appropriate legal instrument; or
 - (7) submit a written report or plan concerning the violation.