



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

MCPB
Item # 12. (2)
November 5, 2009

MEMORANDUM

TO: Montgomery County Planning Board

FROM: Mark Pfefferle *mp*
Acting-Chief, Environmental Planning
Forest Conservation Program Manager

DATE: October 30, 2009

SUBJECT: Forest Conservation Bonds/Financial Security

The forest conservation law and regulation are silent on how funds collected from non-performance should be used. The purpose of this roundtable discussion is to establish a policy on how to use the funds collected for non-performance with an approved forest conservation plan. The options proposed by staff are the following:

- Option A. Retain the services for a contractor to plant on unplanted easements that are in default.**
- Option B. Provide funds to current property owners for planting on their properties.**
- Option C. Use all funds to supplement the in-lieu fee and "Leaves for Neighborhoods" planting programs.**
- Option D. Provide funds to current property owners for planting on their properties. Use all unallocated funds after one year to supplement the in-lieu fee and "Leaves for Neighborhoods" planting programs.**

Regardless of which option is utilized the conservation easements should remain on the properties for the conservation easement is not only for the protection of existing and future forests but also provides water quality benefits.

BACKGROUND

The Planning Department has collected and is holding financial securities for forest conservation plans since the inception of the program. Under section 22A-12(i) of the County code forest conservation plan applicants with planting requirements must submit an approved financial security instrument to ensure compliance with the forest conservation plan, in particular planting

of trees and creating new forests. The financial security is required prior to any land disturbing activities. The preferred financial security is cash, irrevocable letter of credit, certificate of guarantee, or surety bond. The most commonly used methods are letter of credits and surety bonds. The financial security must be in effect until all requirements have been fulfilled to the satisfaction of the Planning Director, or his designee.

Under Section 22A-12(e)(5) of the County code the plantings must be installed within one year or 2 growing seasons after the development project is complete. After the plants are installed the forest conservation inspector conducts an inspection of the planted materials to begin the two-year maintenance period. Pre- and post planting inspections must be requested by the developer/applicant. The developer/applicant can request a partial release of the financial security when the Forest Conservation Inspector starts the mandatory maintenance and management period. The entire financial security amount is not released until the Forest Conservation Inspector has inspected the planted areas at the end of the maintenance and management period and has made a determination that the planted trees meet or exceed the survival requirements established under 108.E. of the forest conservation regulation.¹ If the survival requirements are less than 50% the financial security instrument can be extended. If the survival is less than 75% but greater than 50% the applicant needs will need to conduct reinforcement planting and then the financial security is released.

Needless to say not all applicants have conducted planting within the timelines established by the forest conservation law. Others may have planted but did not request inspections to start or end the maintenance and management period, or the plantings failed. As a result many financial securities remain outstanding. Since the inception of the forest conservation program in late 1992, the Planning Department has received more than 400 financial securities (not including cash placed in escrow accounts) and has released over 220 financial securities.

FORFEITURE PROCESS

In the past year, Environmental Planning has had a determined effort to close forest conservation plans. This involved comparing approved final forest conservation plans with aerial photographs and onsite visits. In most instances the plans are complete and the file is archived, however, the investigation has revealed instances where the developer/applicant has failed to plant forest and trees, or the plantings were unsuccessful.

The forest conservation inspector contacts the developer/applicant to perform the required planting. When the developer/applicant is non-responsive or refuses to plant the required trees the Planning Director's designee sends a letter, by certified mail, to the developer/applicant, at the address of record, notifying them that they have 30 days from the receipt of the notice to show cause why the financial security should not be forfeited. If the developer/applicant fails to show cause, the financial security instrument must be forfeited and the Director's designee follows the procedures on the financial security instrument for filing claims. The forfeiture process is established in Section 22A-12(i) of the County code. When filing a claim the Director's designee includes a signed statement from the Forest Conservation Inspector

¹ Under section 108.E. of the Forest Conservation Regulation applicants must achieve a survival rate of 75% or greater for all trees planted that are less than 1 inch caliper and 100% for trees 1 ½ to 2 inches in diameter.

indicating that the obligee has failed to comply with the approved plans and the original letter of credit endorsed by the Planning Director's designee. Payment is received shortly thereafter.

To date, the Director's Designee has requested forfeiture on three forest conservation plans. There are still other outstanding financial securities to be forfeited. The funds received to date were deposited into a special revenue fund.

DISCUSSION

The purpose of this roundtable discussion is to develop a Board policy on how to use the funds collected from the forfeiture of forest conservation performance bonds. Staff has identified four options for discussion. Each option has its own set of pros and cons.

Option A. Retain the services for a contractor to plant on unplanted easements that are in default.

Pros

1. Trees are planted in the same location where they were intended.
2. Trees are planted at the same time with one maintenance and management agreement and inspected at once.

Cons

3. The forest conservation easement does not provide the Commission the explicit ability to plant on private land when a developer/applicant fails to perform the required planting.
4. Written permission will be necessary from the current property owners and if permission is not granted from all property owners only portions of the easement area are planted.
5. Older financial sureties are based on costs estimates that do not reflect current planting standards or costs and therefore it is unlikely the entire easement area can be planted per the approved plan.

Option B. Provide funds to the current property owners for planting on their properties.

Pros

6. Trees are planted in the same area where they were intended.
7. Property owner's costs are reduced with financial assistance from the Planning Department.
8. Homeowners plant trees and therefore become stewards of the area.

Cons

9. Funds collected may be insufficient to fully plant according to the approved plan.
10. Tracking the allocation of the funds to ensure each property receives their fair distribution. This could be done through a weighted average based on the amount of existing easement on each lot.
11. Staff may be requested to review and approve planting plans that reflect individual property owner desires.
12. Planting will occur on timelines established by property owners which could result in multiple inspections to ensure trees are planted and maintained.
13. High administrative costs to track property owner allocations, multiple inspections, and repayment to multiple property owners.

14. Establish timeframes for property owners to plant and submit reimbursements.

Option C. Use all funds collected to supplement the in-lieu fee and “Leaves for Neighborhoods” planting programs.

Pros

15. Permission from multiple property owners not needed.
16. Lower administrative costs for funds would supplement existing programs.
17. Funds could be leveraged to obtain grant money to plant more trees than what would be planted with existing funds.
18. Trees can be targeted for environmentally sensitive areas or for increase tree canopy in already developed areas.
19. Accelerate large scale plantings in areas of greatest need, such as unforested stream buffers.

Cons

20. Funds collected may not reflect current planting costs.
21. Trees not planted in areas where they were supposed to have been planted.

Option D. Provide funds to the current property owners for planting on their properties. Use all unallocated funds after one year to supplement the in-lieu fee and “Leaves for Neighborhoods” planting programs.

Pros

22. Same as Options B and C.

Cons

23. Same as Options B and C.

RECOMMENDATION

Staff recommends adopting Option D as Board policy. If the property owners are unwilling or unable to use the funds allocated to their property by a weighted average, all unallocated funds should be used to supplement the in-lieu fee and “Leaves for Neighborhoods” planting programs. Staff recommends the Board establish a one year period for individual property owners to request funds and an additional 6 months after that to submit invoices for repayment.