

MEMORANDUM

TO: Transportation, Infrastructure, Energy and Environment Committee

FROM: ~~Mike~~ Mike Faden, Senior Legislative Attorney
Amanda Mihill, Legislative Attorney *A. Mihill*

SUBJECT: **Worksession:** Executive Regulation 22-13, Trees – Tree Canopy Conservation

Background

Executive Regulation 22-13 was submitted for method 2 Council review on February 25, 2014. See ©1. Executive Regulation 22-13 establishes procedures for implementing Chapter 55 of the Montgomery County Code, Trees – Tree Canopy Conservation.

Under Method 2, the Council has 60 days to act on the regulation or extend time for Council action. It was advertised in the December 2013 issue of the County Register with a comment deadline of December 30, 2013. The Department received comments from 4 individuals. A summary of those comments, and the Department's response, is attached at ©11-14.

Council staff does not have significant issues to raise regarding the proposed regulation. Section 55-9 of the Code requires the Department to issue regulations that include a technical manual to implement the Tree Canopy law. The Department responses to comments received indicate that the technical manual will be forthcoming. If this regulation needs to be revised, there are language changes that Council staff would recommend, but substantively, this regulation seems to be consistent with the Tree Canopy law and the intent of the law. A draft resolution approving the proposed regulation is attached at ©15.

This packet contains:	<u>Circle #</u>
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EXEC REG



OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

Isiah Leggett
County Executive

MEMORANDUM

February 25, 2014

Method 2

TO: Craig Rice, President, Montgomery County Council
FROM: Isiah Leggett, County Executive *[Signature]*
SUBJECT: Executive Regulation 22-13 Trees – Tree Canopy Conservation

Attached for the Council's consideration is the executive regulation which establishes procedures for implementing Chapter 55 of the Montgomery County Code, Trees – Tree Canopy Conservation. The proposed regulation was advertised in the December 2013 issue of the *Montgomery County Register* and the comment period expired December 30, 2013. Comments were received from four individuals. As a result, minor revisions were made to the proposed regulation. Copies of the comments and the Department of Permitting Service's responses to the comments are attached. A copy of the fiscal impact statement will be provided under separate cover.

This proposed regulation is being promulgated under Method 2 of Section 2A-15 of the Montgomery County Code. Please contact Richard Brush, Chief, Land Development Division, Department of Permitting Services at (240)777-6343 if you have any questions or would like additional information.

Attachments

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MONTGOMERY COUNTY EXECUTIVE REGULATION

Offices of the County Executive • 101 Monroe Street • Rockville, Maryland 20850

Subject Tree Canopy	Number 22-13
Originating Department Department of Permitting Services	Effective Date March 1, 2014

Montgomery County Regulation on

TREE CANOPY

DEPARTMENT OF PERMITTING SERVICES

Issued by: County Executive
Regulation No. 22-13
COMCOR No. 55.00.01

Authority: Montgomery County Code (2004) Section 55-9
Supersedes: Executive Regulation N/A
Council Review: Method 2 under Code Section 2A-15
Register Vol. 30 No. 12

Effective Date: March 1, 2014
Comment Deadline: December 30, 2013
Sunset Date: None

Summary: This executive regulation is to establish procedures for implementing the Tree Canopy Law, Chapter 55 of the Montgomery County Code.

Staff contact: For further information or to obtain a copy of this regulation, contact Rick Brush at 240-777-6343.

Address: Written comments on these regulations should be sent to:

Department of Permitting Services
255 Rockville Pike, 2nd Floor
Rockville, Maryland 20850



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COMCOR 55.00.01 TREE CANOPY

55.00.01.01 Purpose

This regulation implements the Tree Canopy Law, Chapter 55 of the Montgomery County Code as adopted by Bill No. 35-12.

55.00.01.02 Definitions

Definitions of the terms used in the regulation are provided in Section 55-3 of the County Code. For the purpose of this regulation, the following additional words and phrases will have the meaning respectively ascribed to them in this regulation:

Growing zone: a contiguous area at least 400 square feet of open surface area free of any impervious surface, utility, stormwater management system, or any other impediment to tree and root growth and development.

Planting area: any location within a growing zone where a shade tree can be planted.

Planting plan: an approved sediment control plan that shows all approved potential growing zones, approved potential planting areas within each growing zone, and an approved planting detail.

Record drawing plan or as-built plan: at a minimum, a set of drawings comparing the approved planting plan requirements with what was constructed. The Director may require additional information as needed.

55.00.01.03 General Administration

Except as otherwise provided in this regulation, procedures for application, implementation, review, approval, denial, and appeal are the same as the procedures for sediment control permits under Chapter 19 of the County Code.



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55.00.01.04 Documents Incorporated by Reference

The following documents are incorporated by reference as if fully set forth. Whenever the provisions of this regulation and those of the following documents are in conflict, the provisions of this regulation will govern and be enforced in the County:

- A. *American National Standards for Tree Care Operations*, ANSI A300, American National Standards Institute, hereinafter referred to as ANSI A300, in effect as of December 1, 2013.
- B. *American Standard for Nursery Stock*, ANSI Z60.1, American Nursery & Landscape Association, hereinafter referred to as ANSI Z60.1, in effect as of December 1, 2013.

55.00.01.05 Exemptions

Any person exempt under Section 55-5 of the County Code must include the exemption on the sediment control plan at the time of application, on all approved revisions, and on any record drawing plans or as-built plans.

55.00.01.06 Required Number of Shade Trees

- A. The number of shade trees required shall be as specified in Section 55-6(b) of the County Code.
- B. If the square footage of the limits of disturbance is more than 40,000, then the number of shade trees required must be calculated using the following formula:

$$(\text{Number of Square Feet in Limits of Disturbance} \div 40,000) \times 15$$

If necessary, the number of shade trees required shall be rounded to the nearest whole number using standard rounding rules. No less than one additional shade tree shall be required for any square footage above the first 40,000 square feet within the limits of disturbance.

55.00.01.07 Submissions

- A. *Required submissions for application.* In addition to other required information and supporting certifications as required for submission of sediment control plans under Chapter 19 of the County Code and as required by Section 55-7 of the County Code, a person subject to this Chapter must also submit to the Director the following information with each application for a sediment control permit:



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- (1) a planting plan delineating:
 - (a) boundaries for all potential growing zones;
 - (b) all acceptable planting areas within each potential growing zone;
 - (c) a tree planting detail if trees can be planted on-site to satisfy mitigation requirements under Section 55-6 of the Code.

- (2) a table summarizing:
 - (a) the square footage of the property;
 - (b) the square footage of the limits of disturbance of the proposed activity as shown on the sediment control permit application;
 - (c) the square footage of each potential growing zone;
 - (d) the number of shade trees required under 55-6 of the County Code;
 - (e) the number of shade trees to be planted on site; and
 - (f) the amount of fees to be paid under Section 55-6 of the County Code.

B. *Issuance of sediment control permit.* The Director must not issue a sediment control permit to a person that is subject to this regulation until:

- (1) the Director has approved the applicant's planting plan if no exemption under Section 55-5 of the County Code applies;
- (2) the applicant provides all fees required under Chapter 55-6 of the County Code; and
- (3) the applicant has satisfied all applicable requirements under Article I of Chapter 19 of the County Code.



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C. Revisions to Approved Plans.

- (1) If the limits of disturbance or disturbed area are increased after issuance of the sediment control permit, the shade tree planting requirements must be recalculated based upon the revised area. The table required in Section 55-7(a)(2) of the County Code must be revised accordingly.
- (2) If any approved growing zones shown on the approved sediment control plan are later revised, or if additional growing zones are added, the sediment control plan must be revised and resubmitted for review. The fee for reviewing the revised plans must be the minimum fee for the review of a sediment control plan.
- (3) If the disturbed area, or limits of disturbance, are decreased, without changes to approved growing zones, after issuance of the sediment control permit, the tree planting requirements may not be decreased if any disturbance has occurred under that permit.

D. Closure of Sediment Control Permit. Upon completion of a project that is subject to this section and before the sediment control permit is closed by the Department, the applicant must submit a record drawing plan or as-built plan that includes the following:

- (1) all information required by 55.00.01.07(A)(1) and (2) of this regulation;
- (2) any revisions to plans, specifically to growing zones and planting areas including those approved in the field;
- (3) any revisions to the table summarizing requirements in Section 55-6(b) of the County Code; and
- (4) all other requirements under Chapter 19 of the County Code.

55.00.01.08 Shade Tree Planting

The planting of each shade tree under Chapter 55 of the County Code must conform to the following requirements:

- A. Each shade tree must be planted within the planting area within a growing zone as defined under this regulation and as approved on the sediment control plan.



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- B. The growing zone may be of any shape subject to the following:
- (1) The distance from any point on the growing zone boundary to any other point must not be greater than 30 feet.
 - (2) It must be possible to draw a straight line from every point in the growing zone to the stem of the planted tree without going outside the boundary.
 - (3) The entire growing zone must be completely within the boundary of the subject property; except open surface area on an adjacent right-of-way may be included if no utility, public utility easement, stormwater management system, or impervious surface is located in that part of the right-of-way.
 - (4) The growing zone must not contain any impediments to tree and root growth and development, including:
 - (a) No part of the growing zone can be closer than 5 feet, measured horizontally, from any electric, gas, water, sewer, telephone, cable television, or other overhead or underground utility.
 - (b) No part of the growing zone can be closer than 5 feet, measured horizontally, from any stormwater management system.
 - (c) The growing zone must not include any concrete, asphalt, brick, gravel, or other impervious surface.
 - (d) The growing zone must not include any retaining walls, clean construction fill (including but not limited to brick, block, stone, or sand), underground storage tanks, bedrock, compacted soil, or other impediment to root growth.
 - (e) The growing zone must not include any area within a septic easement or a septic reserve.
- C. The stem of any shade tree planted within a growing zone must:
- (1) Be planted such that a straight line can be drawn from the stem to any point on the growing zone boundary without going outside the growing zone.



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- (2) Be no closer than 5 feet from any point on the growing zone boundary.
 - (3) Be no closer than 10 feet from any structure with a building foundation below grade.
 - (4) Be no closer than 15 feet, measured horizontally, from the closest point on the ground directly below an electric, telephone, cable television, or other overhead wire.
 - (5) Be on the subject property and no closer than 5 feet from any property boundary, right-of-way, public utility easement or other public improvement easement.
- D. Each shade tree must conform to the following:
- (1) Shade trees must meet all requirements for plant material in ANSI Z60.1;
 - (2) Shade trees must be a minimum of 2" caliper.
- E. The installation of each shade tree must:
- (1) meet all requirements of ANSI A300.
 - (2) At the time of planting:
 - (a) Tree guards to protect trees from deer rubbing, mowers, weed eaters, other equipment, and large rodents must be installed on all shade trees.
 - (b) Mulch must be applied.
 - (c) Sufficient water must be applied to aid in proper planting.
- F. Timing of Plantings
- (1) Shade trees must be installed between October 15th and May 15th as long as the ground is not frozen, saturated, or covered with snow such that a suitable hole cannot be dug to plant the tree properly.
 - (2) Shade trees must not be installed between May 16th and October 14th of each year.



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- (3) If shade trees are installed prior to final stabilization of the land disturbing activity then no additional disturbance must occur within five feet of the stem of the tree. Protective fencing must be installed at edge of this area at the same time the tree is installed and must remain in place until final stabilization occurs.
- (4) If installation of shade trees to meet the requirements of Chapter 55 of the County Code cannot occur between October 15th and May 15th for any reason, or will not be planted for any other reason, the applicant must pay the required fees.

55.00.01.09 Field Markings

- A. Field markings must exist on site before and during installation of all newly planted shade trees, sediment and erosion control measures, construction, or other land disturbing activities.
- B. The location of all potential growing zones must be clearly marked in the field prior to any land disturbing activity.
- C. The location of all potential growing zones and planting areas must be clearly marked in the field prior to installation of any shade trees.

55.00.01.10 Inspections

- A. A copy of the approved sediment control plan showing all approved growing zones and planting areas, must be available on the site at all times.
- B. At least one inspection must occur after all construction activities are completed to determine the level of compliance with shade tree planting requirements.



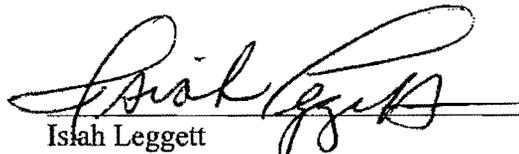
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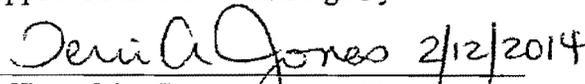
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55.00.01.11 Severability

If a court holds that a portion of this regulation is invalid, the other portions remain in effect.


Isiah Leggett
County Executive

Approved as to form and legality:


Office of the County Attorney/Date

Larry Cafritz comments –

1. “Planting area and growing zone definitions seem to be slightly mixed. A growing zone (stem must be 5’ away from growing zone boundary) should be able to go right up to a drywell or any other storm water management system, for instance, but your regs show you need another 5’ of buffer beyond the growing zone. Why is this, and can it be corrected?”

DPS Response - The reason for having the 5 foot buffer outside the growing zone is that the growing zone is intended to be an area that likely will remain undisturbed. When maintenance is necessary for utility lines and stormwater structures the amount of land disturbance required for excavation will go beyond the specific location of the lines or structures. Therefore the 5 foot buffer makes sense.

RESOLUTION – Leave as drafted.

2. “I thought the shade trees were to be 1.5” to 2” caliper, not minimum 2” caliper.”

DPS Response – While we agree that some species of trees are notoriously skinny and smaller calipers may be warranted, we do not think a global reduction to 1.5” will result in sufficient survival rates. This level of detail should go in the technical manual and that the regs will be amended when the manual is adopted.

RESOLUTION – Leave as drafted.

3. “There is no mention of “fee in lieu” amount of \$250 each in the canopy regs.”

DPS Response - Section 55-6(d) of the County Code states, “The fee must be equal to the applicable rate the Department sets for bonding trees in the right-of-way.” To reduce redundancy with the law, there is no need to add a specific amount.

RESOLUTION – Leave as drafted.

4. “Is there some other minimal fee for a small tree planting revision on the approved sediment control plan other than the fee to review a revised Sediment Control plan, since it is so excessive? How about a small fee for “tree planting” revisions?”

DPS Response – There is currently no specific fee for “tree planting revisions” or “minor revisions” to approved plans. Creating one would require revising Executive Regulation 9-13 “Schedule of Fees for Permits, Licenses and Inspections”, and would also require modification to the sediment control permit application forms. It would also create a need to define what a “minor” revision and what is a “major” revision. In most cases, the addition or modification of a growing zone on an approved plan will likely involve additional plan revisions

such as relocating proposed utilities, stormwater management, sediment controls, etc. that would require a plan revision.

RESOLUTION – Leave as drafted. Modification of fee schedules is a topic that should be addressed separately.

Bob Spalding's Comments –

1. 55.00.01.07 Section D. Revise “Upon completion of the project ...” to “Upon completion of a project that is subject to **this section** ...”

DPS Response - Agreed.

RESOLUTION – Add proposed revision to regulation.

Mark Buscaino's Comments –

1. 55.00.01.07 Section A(1)(c) – Revise “... if trees can be planted ...” to read “...if trees are to be planted ...”

DPS Response – The applicants are to identify all potential growing zones on the plans even if they don't intend to plant at the time of application. This is to help eliminate the need for a new review if they change their mind, find a buyer who wants the trees, etc. Along with these potential growing zones, we need the planting detail.

RESOLUTION - Leave as drafted.

2. 55.00.01.07 Section (2)(e) – Revise “(e) the number of shade trees to be planted on site;” to read “(e) the number of shade trees to be planted on site, if any;”

DPS Response – This seems more consistent with the comment above.

RESOLUTION – Leave as drafted. The “number of shade trees to be planted on site” can be zero on the table. This might be more clear and consistent also.

3. 55.00.01.07 Section B – Revise “The director must not ...” to read “The Director shall not ...”

DPS Response –The County Attorney for DEP recommends “must” as part of the plain language requirements.

RESOLUTION – Leave as drafted.

4. 55.00.01.08 Section B(3)

Mark Buscaino - I would suggest eliminating this for two reasons: It is not possible to tell when the right of way may be needed for the purposes identified herein. Secondly, I do not believe the County allows developers to

use off-site land to count toward on-site requirements for other building aspects such as stormwater management calculations and the like (please ignore if I am incorrect on this assumption).

DPS Response – The current language adds some reasonable flexibility to the tree planting requirements. We do in fact include the disturbance within the right-of-way when calculating onsite stormwater management requirements.

It is our understanding that since it is in the law, it must remain a viable option. We don't believe it will be used very often as there aren't many ROWs without utilities. But in the cases where it is available, it provides the development community some flexibility.

RESOLUTION – Leave as drafted.

5. 55.00.01.08 Section C – Revise “The stem of any shade tree ...” to read “The mainstem or trunk of any shade tree ...”

DPS Response –It is not necessary. “Mainstem” and “main stem” are not in the Society of American Forester’s dictionary. It generally applies to large trees. Newly planted trees should only have one stem and should have a dominant leader such that the stem or trunk is easily discernible.

Additionally, we don't think it needs to be defined because it is a commonly accepted word in the general population.

RESOLUTION – Leave as drafted.

6. 55.00.01.08 Section F – Revise to add “(1) Installation of shade trees shall occur after final land disturbing activities are complete.”

Mark Buscainos additional comment - This is critical to protect the trees and to reduce inspection burdens. Trees that are planted before final grading and other land disturbing activities are at significant risk.

DPS Response – The current language in the regulation was used in order to add more flexibility to the planting requirements that would likely result in more trees being planted on site as opposed to the developer paying a fee. If the project is approaching the “no plant” season and the developer can install and protect the tree before the deadline, it is reasonable to allow this. If the fencing is removed or the tree is damaged the inspector would likely see that and not accept the tree. That being said, we understand Mark’s concerns and agree that trees planted before construction ends may be at risk. Yet, with the protective fencing, it does increase the builder’s options.

RESOLUTION – Leave as drafted.

7. 55.00.01.08 Section F(3)

Mark Buscaino’s comment - This paragraph creates a significant loophole and will almost guarantee damage to newly planted trees. In addition, it creates an enormous inspection burden. An analogous situation would be to

conduct an electrical inspection after the drywall of a home was already installed. In both cases the inspector cannot truly ascertain if the element (trees or electric) have been installed to plan and have not suffered any adverse damage due to the regular construction process. I strongly suggest this paragraph therefore be eliminated.

DPS Response – This was included in order to add more flexibility to the planting requirements that would likely result in more trees being planted on site as opposed to the developer paying a fee. If the project is approaching the “no plant” season and the developer can install and protect the tree before the deadline, that should be allowed. If the fencing is removed or the tree is damaged the inspector would likely see that and not accept the tree.

RESOLUTION – Leave as drafted.

Resolution No. _____
Introduced: _____
Adopted: _____

**COUNTY COUNCIL
FOR MONTGOMERY COUNTY MARYLAND**

By: County Council

SUBJECT: Approval of Executive Regulation 22-13, Trees – Tree Canopy Conservation

Background

1. On February 25, 2014, the Council received Executive Regulation 22-13, Trees – Tree Canopy Conservation. The proposed regulation would implement Bill 35-12, Trees – Tree Canopy Conservation which established a fee-based program to minimize and compensate for the loss and disturbance of tree canopy as a result of development.
2. The Council reviewed the regulation under Method (2). Under Method (2), if the Council does not approve or disapprove a regulation within 60 days after the Council receives the regulation, it is automatically approved and takes effect the day after the deadline for approval or a later date specified in the regulation.
3. On March 10, the Transportation, Infrastructure, Energy, and Environment Committee reviewed the proposed recommendation and recommended _____.

Action

The County Council for Montgomery County Maryland approves the following resolution:

Executive Regulation 22-13, Trees – Tree Canopy Conservation is _____.

This is a correct copy of Council action.

Linda M. Lauer, Clerk of the Council