

MEMORANDUM

June 15, 2018

TO: County Council

FROM: Amanda Mihill, Legislative Attorney *amihill*

SUBJECT: Expedited Bill 24-18, Forest Conservation – Amendments

PURPOSE: Introduction – no Council votes required

Expedited Bill 24-18, Forest Conservation – Amendments, sponsored by Lead Sponsor Council President Riemer at the request of the Planning Board, is scheduled to be introduced on June 19. A public hearing is tentatively scheduled for July 10, 2018 at 1:30 p.m.

Bill 24-18 would exempt from the requirement to submit a Forest Conservation Plan a modification to an existing non-residential developed property if the pending development application does not propose residential uses; exempt from the requirement to submit a Forest Conservation Plan a modification to an existing residential development property if the pending development application does not propose new buildings or parking facilities; exempt from the requirement to submit a Forest Conservation Plan certain demolition projects under certain circumstances; and remove ability to pay as a factor for consideration when assessing an administrative penalty.

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Expedited Bill No. 24-18
 Concerning: Forest Conservation --
Amendments
 Revised: 6/13/2018 Draft No. 1
 Introduced: June 19, 2018
 Expires: December 19, 2019
 Enacted: _____
 Executive: _____
 Effective: _____
 Sunset Date: None
 Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsor: Council President at the request of the Planning Board

AN EXPEDITED ACT to:

- (1) exempt from the requirement to submit a Forest Conservation Plan a modification to an existing non-residential developed property if the pending development application does not propose residential uses;
- (2) exempt from the requirements to submit a Forest Conservation Plan a modification to an existing residential development property if the pending development application does not propose new buildings or parking facilities;
- (3) exempt from the requirement to submit a Forest Conservation Plan certain demolition projects under certain circumstances;
- (4) remove ability to pay as a factor for consideration when assessing an administrative penalty; and
- (5) generally amend the Forest Conservation Law.

By amending

Montgomery County Code
 Chapter 22A, Forest Conservation – Trees
 Sections 22A-3, 22A-5, and 22A-16

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:

Sec. 1. Sections 22A-3, 22A-5, and 22A-16 are amended as follows:

22A-3. Definitions.

In this Chapter, the following terms have the meanings indicated:

* * *

Tract means [the property subject to a development application or sediment control permit, as described by deed or record plat.]

- (a) The property subject to a development application or a sediment control permit, the boundaries of which are described by deed or record plat;
- (b) The entire property subject to a development application or a sediment control permit if it is developed as a single project; or
- (c) The length and width of the right-of-way or the limits of disturbance, whichever is greater, for a linear project.

* * *

22A-5. Exemptions.

The requirements of Article II do not apply to:

* * *

- (t) a modification to an existing:
 - (1) non-residential developed property if:
 - (A) no more than 5,000 square feet of forest is ever cleared at one time or cumulatively after an exemption is issued;
 - (B) the modification does not result in the cutting, clearing, or grading of any forest in a stream buffer or forest located on property in a special protection area which must submit a water quality plan;
 - (C) the modification does not require approval of a preliminary or administrative subdivision plan; [and]

27 (D) the modification does not increase the developed area by
28 more than 50%, and the existing development is retained;
29 [or] and

30 (E) the pending development application does not propose any
31 residential uses; or

32 (2) residential developed property if:

33 (A) forest is not impacted or cleared;

34 (B) the modification is not located in a stream buffer [or located
35 on property in a special protection area which must submit
36 a water quality plan];

37 (C) the modification does not require approval of a preliminary
38 or administrative subdivision plan;

39 (D) the modification does not increase the developed area by
40 more than 50%; [and]

41 (E) the existing structure is not modified; and

42 (F) the pending development application does not propose any
43 new buildings or parking facilities.

44 * * *

45 (v) a stream restoration project for which the applicant for a sediment
46 control permit has:

47 (1) executed a binding maintenance agreement of at least 5 years
48 with the affected property owner or owners;

49 (2) agreed to replace every tree removed and plant the new trees
50 before the end of the first planting season after final stabilization;
51 and

52 (3) confirmed that the tract is not included in a previously approved
53 forest conservation plan; [and]

54 (w) cutting or clearing any tree by an existing airport operating with all
55 applicable permits to comply with applicable provisions of any federal
56 law or regulation governing the obstruction of navigable airspace if the
57 Federal Aviation Administration has determined that the tree creates a
58 hazard to aviation[.]; and

59 (x) the project is for the demolition of an existing structure if:

60 (1) there is no proposed future development and existing impervious
61 surfaces are substantially removed from the tract of land;

62 (2) the site is returned to natural topography;

63 (3) the property will not be used for a parking lot, material or
64 equipment storage, or used as a recreational playing field;

65 (4) trees and groundcover will be planted so that all disturbed areas
66 are immediately stabilized;

67 (5) no forest or specimen trees are removed;

68 (6) a tree save plan is submitted to protect existing forest and trees;

69 (7) the property is not already subject to Article II of this Chapter; and

70 (8) a Declaration of Intent is filed with the Planning Director stating
71 that the property will not be the subject of additional development
72 activities under this Chapter within 5 years of demolition of the
73 existing structure.

74 **22A-16. Penalties and other remedies.**

75 * * *

76 (d) *Administrative civil penalty*

77 * * *

78 (2) In determining the amount of the civil administrative penalty, or
79 the extent of an administrative order issued by the Planning

80 Director under Section 22A-17, the Planning Board or Planning
81 Director must consider:

- 82 (A) the willfulness of the violations;
- 83 (B) the damage or injury to tree resources;
- 84 (C) the cost of corrective action or restoration;
- 85 (D) any adverse impact on water quality;
- 86 (E) the extent to which the current violation is part of a recurrent
87 pattern of the same or similar type of violation committed
88 by the violator;
- 89 (F) any economic benefit accrued to the violator or any other
90 person as a result of the violation; and
- 91 (G) [the violator's ability to pay; and]
- 92 [(H)] any other relevant factors.

93 **Sec. 2. Expedited Effective Date.**

94 The Council declares that this legislation is necessary for the immediate
95 protection of the public interest. This Act takes effect on the date that it becomes law.

96 *Approved:*

97 _____
Hans D. Riemer, President, County Council Date

98 *Approved:*

99 _____
Isiah Leggett, County Executive Date

100 *This is a correct copy of Council action.*

101 _____
Megan Davey Limarzi, Esq., Clerk of the Council Date

LEGISLATIVE REQUEST REPORT

Expedited Bill 24-18

Forest Conservation - Amendments

DESCRIPTION: Expedited Bill 24-18 includes minor changes to the Forest Conservation Law to clarify sections of the law by using a consistent definition of "tract" between the law and regulation, further clarify the modification to existing development property exemption from submitting a forest conservation plan, create a new exemption from submitting a forest conservation plan for property owners that demolish existing structures and return the land to natural conditions, and remove the ability to pay factor as one factor that must be considered in determining an administrative civil penalty.

PROBLEM: Property owners that wish to demolish existing structures and return the land to natural conditions may be required to obtain a forest conservation plan even though the proposed activity diminishes impervious surfaces and storm water runoff. The ability to pay in assessing an administrative civil penalty is difficult for this includes obtaining confidential financial information from individual homeowners which can be disclosed during public hearings.

GOALS AND OBJECTIVES: To update the code for consistency, protect an individual's financial information, and remove a burden on activities that are environmental beneficial.

COORDINATION: Planning Department

FISCAL IMPACT: To be requested

ECONOMIC IMPACT: To be requested

EVALUATION: To be requested.

EXPERIENCE ELSEWHERE: To be researched.

SOURCE OF INFORMATION: Mark Pfefferle, M-NCPPC

APPLICATION WITHIN MUNICIPALITIES: To be researched.

PENALTIES: Penalties for violations of the Forest Conservation law are in Chapter 22A-16.

Bill



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

AM
CC
Mihill
Pfefferle
JZ

May 29, 2018

The Honorable Hans Riemer
President, Montgomery County Council
100 Maryland Avenue
Rockville, MD 20850

Dear Mr. Riemer:

At its regularly scheduled meeting on May 24, 2018, the Montgomery County Planning Board recommended, by a 5-0 vote, to transmit an **expedited bill** to the County Council for changes to Chapter 22A of the County Code (Forest Conservation Law). Changes are needed to the Forest Conservation Law to clarify sections of the law and to create an exemption from submitting a forest conservation plan for property owners who wish to demolish existing buildings, remove impervious surfaces, and restore the topography to natural conditions. The proposed changes are the following:

1. A modification to the definition of "tract" so that the definition is the same as the one used in the forest conservation regulations.
2. Further clarifying the modification to existing developed properties exemption from submitting a forest conservation plan so that the current use is maintained and no new residential uses are added to a property.
3. Creating a new exemption from submitting a forest conservation plan for property owners who wish to demolish an existing structure, return the land to natural conditions and topography, remove impervious surfaces, and stabilize the land can be exempt from submitting a forest conservation plan.
4. Remove the "ability to pay" factor as an item the Planning Board must consider in assessing an administrative civil penalty.

Enclosed is a complete copy of the proposed amendment that the Planning Board would like to be introduced as an expedited bill and a copy of the staff report dated May 18, 2018. Members of the Planning Board and Staff of the Maryland-National Capital Park and Planning Commission are available to assist the Council in its review of the proposed legislation.

Sincerely,


Casey Anderson
Chair

RECEIVED
MONTGOMERY COUNTY
PLANNING BOARD

MAY 31 PM 1:33

Cc: Amanda Mihill
Mark Pfefferle

Attachment



MONTGOMERY COUNTY PLANNING DEPARTMENT

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

MCPB
Item No. 7
Date: 5/24/2018

Forest Conservation Law Amendments - Modifications

MP

Mark Pfefferle, Chief, DARC, Mark.Pfefferle@montgomeryplanning.org, 301-495-4730

Completed: 5/16/18

SUMMARY

Minor changes to Chapter 22A of the Montgomery County Code (the Forest Conservation Law) are currently needed to clarify sections of the law and to create an exemption from submitting a forest conservation plan for property owners that wish to demolish existing buildings, remove impervious surfaces, and restore the topography to natural conditions. The proposed changes are the following:

1. A modification to the definition of "tract" so that the definition is the same as the one used in the forest conservation regulations.
2. Further clarifying the modification to existing developed properties exemption from submitting a forest conservation plan so that the current use is maintained and no additional uses are included.
3. Creating a new exemption from submitting a forest conservation plan where property owners who wish to demolish an existing structure, return the land to natural conditions and topography, remove impervious surfaces, and stabilize the land can be exempt from submitting a forest conservation plan.
4. Remove the "ability to pay" factor as an item the Planning Board must consider in assessing an administrative civil penalty.

Staff requests the Planning Board to approve the recommended changes and transmit the proposed changes to Chapter 22A of the County code to the Montgomery County Council President for introductions as an expedited bill. The proposed changes are included in Attachment A.

PROPOSED CHANGES

Below is a more detailed discussion of the proposed changes to the Forest Conservation Law by Section:

Section 22A-3. Definitions

Proposal. Lines 7 through 12 of the proposal is to revise the "Tract" definition in the Forest Conservation Law to make it consistent with the Forest Conservation Regulations.

Analysis. The proposed definition ensures the definitions are consistent between the forest conservation law and the regulations. The definition in the regulations is clearer and any ambiguity is removed between the law and regulations if the definitions are identical.

Section 22A-5. Exemptions. (t)(1) Modification to an existing non-residential developed property:

Proposal. Line 23 adds the word "forest" before "located on a property in a special protection area which must submit a water quality plan".

Analysis. Clarifies that applicants can qualify for an exemption from submitting a forest conservation plan as a modification to an existing non-residential property if they do not remove any forest on a property required to submit a special protection area water quality plan. Under the existing forest conservation law, owners of development applications that were required to submit a special protection area water quality plan could not qualify for this exemption. Staff does not believe the original intent was to disqualify a property from qualifying for this exemption if they were required to obtain a special protection area water quality plan. Staff does believe the original intent was to disqualify an applicant from using this exemption if they were removing forest on a property required to obtain a special protection area water quality plan. Even if a property is exempt from submitting a forest conservation plan, development activities subject to a special protection area water quality plan are still required to plant unforested portions of the stream buffer under the "Environmental Guidelines: Guidelines for Environmental Management of Development in Montgomery County".

Proposal. Line 32 adds the phrase "the pending development application does not propose any residential uses".

Analysis. The purpose of this additional language is to clarify that to qualify for this exemption from submitting a forest conservation plan that the entire property must continue to be a non-residentially developed property and that a portion of the property cannot be converted to residential use. It was never staff's intent to create an exemption that would allow for a change in use from non-residential use to residential.

Section 22A-5. Exemptions. (t)(2) Modification to an existing residential developed property.

Proposal. Lines 38 and 39 of the proposed amendment deletes the phrase “or located on property in a special protection area which must submit a water quality plan”.

Proposal. Lines 48 and 49 of the proposed amendment clarifies that the development application does not proposed any new buildings or parking facilities.

Analysis. Exemption 22A-5(t)(2) was recently added to the forest conservation law and became effective on February 26, 2018. The purpose of this exemption was to allow existing residentially developed properties to be exempt from submitting a forest conservation plan if the proposed improvements did not modify the existing residential building. Since the exemption prohibits the removal of any forest staff does not believe the phrase “or located on a property in a special protection area which must submit a water quality plan” is necessary. It was never staff’s intent to exclude development applications that required a special protection area water quality plan from qualifying for this exemption. The addition of lines 48 and 49 prohibiting the construction of new buildings or parking facilities further lessens the reason that a special protection area water quality plan would be needed. An example of a project approved with this exemption includes an older condominium complex, of approximately 10 acres, that wanted to address drainage issues. The application did not include any changes to the buildings but required a sediment control permit to install stormwater management devices where none previously existed and therefore the exemption from submitting a forest conservation plan was granted.

Section 22A-5. Exemptions. (x) Demolition of an existing structure

Proposal. Lines 52 through 65 creates a new exemption from submitting a forest conservation plan that allows property owners to demolish existing structures and return the land to natural conditions by removing impervious surfaces and restore natural topography.

Analysis. The proposed amendment creates an exemption that is restrictive and is not intended to facilitate future development. The regulated activity associated with this exemption would be a sediment control permit that is required for the demolition of an existing structure. The restrictions include the following:

- No future development is proposed and once the structure is removed, impervious surfaces such as sidewalks, driveways, etc are removed. The restriction does not require the removal of all impervious surfaces; therefore, an entrance and driveway onto the property for the use of the property owner could be retained.
- The land is returned to natural topography. This restriction requires that the applicant not leave any unnatural depressions, such as a basement, once the above ground

structure is demolished. It also requires that if a retaining wall is removed that the land be graded to natural topography, and stabilized, so future erosion does not occur.

- The property will not be used for a parking lot, material or equipment storage, or used a recreational playing field. These features do not require a permit other than a sediment control permit. This restriction is necessary to ensure the land is restored to natural conditions.
- No forest or specimen trees will be removed. Demolition of an existing structure should not require the removal of any forest. Under Section 22A-6(b) of the forest conservation law, if the only reason why a development activity is not exempt from submitting a forest conservation plan is because a specimen tree is being removed, it can still qualify for the exemption but it requires a tree save plan and potential mitigation for the loss of the specimen tree. Section 22A-6(b) would apply in this instance as well and mitigation could be requested if warranted.
- A tree save plan must be submitted to protect existing trees and forest. Under the forest conservation law, the tree save provision is only required if a specimen tree is removed. This provision requires a tree save plan be submitted with any property owner requesting use of this exemption and allows for the protection of existing forest and tree resources both on and off the subject property.
- The property is not already subject to a forest conservation plan. This restriction is necessary to reaffirm to applicants that once a property is subject to Article II of the forest conservation law that it cannot be exempt from Article II in the future. In those cases, the property must comply with the already approved forest conservation plan. The structure to be demolished was probably within the limits of disturbance on the already approved forest conservation plan and the property owner would need to comply with the previously approved limits of disturbance.
- The last restriction is that the applicant files a Declaration of Intent that the property will not be subject to additional regulatory activities within 5 years. This does not prevent property owners from applying for a new regulated activity for the property but that regulated activity would need to comply with Section 22A.00.01.12(D) of the forest conservation regulations.

Section 22A-16(d) Penalties and other remedies.

Proposal. The proposal is to remove the "violator's ability to pay", Line 82, as a factor that the Planning Board must consider in assessing a civil administrative penalty in a forest conservation law enforcement case.

Analysis. This factor was added to the forest conservation law in 2005 by Expedited Bill No. 27-05, which became effective on December 16, 2005. At the same time, the County Council

increased the maximum civil administrative penalty from three dollars a square foot to nine dollars a square foot.¹

Staff believes the “ability to pay” factor should be removed for three major reasons: (1) it is extremely difficult for the Department to access enough information to accurately determine a person’s current financial health; (2) when a property owner does provide the Department with personal financial information, that information may be made public; and (3) the factor has historically made it difficult for the Department to assess more than the statutory minimum penalty, even in cases of extreme environmental harm.

Staff’s first concern is that the “ability to pay” factor places a burden on the Department to present sufficient evidence for the Planning Board or a court to determine that a person has the resources to pay the assessed penalty. Without the cooperation of the alleged violator, however, the Department is limited to doing so with publicly-available information, such as property tax assessments and documents in the land records. These records do not present a complete financial picture, and many alleged violators counter this evidence with often unsubstantiated claims of other financial hardships, which the Department has no ability to disprove.

Staff’s second concern is that in certain past cases, property owners have provided the Department, perhaps inadvertently, with highly sensitive personal information in attempting to demonstrate a lack of ability to pay financial penalties. Because enforcement hearings are public, and because the Department’s records are subject to the Maryland Public Information Act, Staff is concerned that such information may not be adequately protected from public release in the Department’s custody.

Finally, the ability to pay factor often prevents the Department from assessing what it believes to be penalties commensurate with the extent of the forest conservation law violation. When, as is typically the case, the Department has limited evidence of an individual’s financial resources, it is more likely to assess a lower penalty. This minimizes the risk that the Department will be expected to have conducted a thorough financial analysis to support its penalty, something it does not have the information or resources to do. However, Staff believes this frustrates the Council’s intent to give the Planning Department and Board the ability to assess substantial financial penalties in particularly egregious cases.

¹. The County Council resolution required the Planning Board to reassess the maximum civil administrative penalty every two years based on the Consumer Price Index for the Washington-Baltimore area. The current maximum civil administrative penalty is \$11.05 a square foot.

CONCLUSION

Staff recommends the Planning Board approve transmittal of the proposed changes to Chapter 22A of the County Code to the President of the Montgomery County Council for introduction as an expedited bill. Staff requests the bill be expedited because it will clarify a problem with the existing forest conservation law and allow for environmentally beneficial projects that demolish structures and return the land to its natural topography to be exempt from submitting a forest conservation plan. There are numerous projects of this type currently in the pipeline, both from public and private entities, and time is of the essence to allow the work to move forward.

Attachment:

A. Proposed changes to Chapter 22A of the County Code