

October 2, 2022

Hon. Gabe Albornoz  
President, Montgomery County Council  
Stella Werner Council Office Building  
100 Maryland Avenue  
Rockville, MD 20850

**Re: Bill 25-22, proposed changes to Chapter 22A. Forest Conservation Law & Chapter 22A- Forest Conservation Trees Regulations of the Montgomery County Code**

Dear President Albornoz and Councilmembers,

The Maryland Building Industry Association (MBIA) is submitting testimony in response to Bill 25-22, the proposed changes to Chapter 22A- Forest Conservation Law (“Forest Law”) & Chapter 22A- Forest Conservation Trees Regulations (“Trees Regulations”) of the Montgomery County Code. The MBIA appreciates the opportunity to offer the following comments on the proposed changes to the forest law.

MBIA understands the importance of maintaining healthy forest and tree canopy for future generations. MBIA also understands that this need must be carefully balanced with other policy objectives and is concerned that the proposed changes do not:

1. Acknowledge that over the last decade development in Montgomery County achieved no net loss of forest and that far less changes than proposed are necessary to continue to meet no net loss of forest in the future.
2. Consider the impacts that the proposed changes will have on redevelopment, which is needed to build resiliency in the face of climate change and address the housing shortage and affordability crisis.
3. Provide incentives for enhancing the quality of existing forest in addition to quantity since increased requirements will require conservation of forest regardless of quality.

**Achieving No Net Loss**

The goal of the initiative is to achieve No Net Loss of Forest in Montgomery County. Data that tracks the Forest Law presented by the planning department at a December 1<sup>st</sup> stakeholder meeting shows that over the last decade (2011-2021) Montgomery County lost 112 acres of forest over a ten-year period.

*Data Presented by the Planning Department- December 1, 2021*

**From 2011-2021 projects subject to the Montgomery County Forest Conservation Law:**

- Cleared **805 acres** of forest
- Planted (and protected) **693 acres** of forest
- Protected **2,685 acres** of pre-existing forest
- Planted and protected a total of **3,378 acres** of forest

The MBIA has identified several projects with master plan or SPA requirements, or projects related to forest banking that were too recent to have been included in the data. Specifically, two projects within the limited master plan amendment for 10-mile creek will plant approximately 97 acres of forest above what is required by Chapter 22A Forest Law (Creekside at Cabin Branch (820200160)- 82+/- acres & Ashford Woods (820210110)- 15+/- acres). Mt Prospect (82017016 B) in Darnestown MD, provides around 4+/- acres of planting required by the master plan that was not counted because it may be placed in a mitigation bank. In this case the applicant retained the right to pursue banking in the future but may not exercise that option. Similarly, 10+/- acres of planted mitigation banking credit in the MDR Phase II Forest Mitigation Bank (FB2013003) was not approved for sale until 2022. Forest banks are planted and exist as forest before the credit is debited. These are just four projects that taken together close the 112-acre gap.

Additionally, an analysis contained in the staff report for the April 28<sup>th</sup> planning board hearing analyzed the impacts of the proposed changes over 15 recent projects. The analysis showed of the 15 projects analyzed 50.22 acres of mitigation was provided for the removal of 15.52 acres of forest. That is 223% more mitigation than forest removed.

*Table 2: Summary of 15 projects with Forest Conservation Plans, comparing current requirements with requirements resulting from proposed 'No Net Loss of Forest' Amendment to Montgomery County Forest Conservation Law*

	<b>Forest Conservation Law Effective 2/22/21</b>	<b>Proposed Amendment to the Forest Conservation Law as of 4/28/22</b>
<b>Total Forest Removed (from 7 of 15 projects)</b>	15.52 acres	15.52 acres
<b>Total Forest Mitigation Required for 7 Projects that Removed Forest</b>	14.95 acres	Within same or priority watershed: 17.58 acres Outside same or priority watershed, within county: 25.24 acres
<b>Total Forest Mitigation Required for all 15 Projects</b>	50.22 acres	Within same or priority watershed: 58.79 acres Outside same or priority watershed, within county: 66.35 acres

Master plan and SPA requirements that require unforested stream valley buffers be planted in addition to the requirements of the Forest Law add significant amounts of forest. An amendment contained in the proposed regulations expands this to require all unforested stream valley buffers be planted regardless of master plan or SPA requirement (22A-12 (e) (1) (B)), which could achieve no net loss into the future.

**Impacts of the Proposed Changes**

The proposed changes are not necessary to achieve “No Net Loss of Forest”. However, the additional regulatory costs and hurdles the proposed changes will create will result in a net loss in housing and affordability.

In 2019, the county’s housing targets contained in its new economic development strategy were based on COG’s report, as well as research from the Urban Institute projecting Montgomery will need 23,100 low-cost units, 18,100 mid-cost units, and 6,300 high-cost units.” Roughly 43,000 units by 2030. This amount of housing is not being achieved for a variety of reasons including a lack of developable land, increased land development costs, supply chain issues, and regulatory hurdles.

The future of development in Montgomery County is different than other Maryland jurisdictions. Development is increasingly urban, infill, and redevelopment. Adjusting thresholds and planting ratios impacts these types of projects differently than greenfield projects on agricultural and forested sites prevalent in other counties. The handful of greenfield projects that remain already must comply with other master plan and special protection area (SPA) requirements of development that increase forest cover in addition to the requirements of the Forest Law.

#### *Forest Conservation Law Framework*

The forest law was developed in the mid to late 1990’s to balance forest conservation with development, particularly on the larger greenfield projects. To understand the implications of adjusting threshold percentages and planting mitigation ratios it helps to begin with a brief explanation of the laws components and how they work to determine mitigation requirements.

Beginning with a Natural Resources Inventory (NRI), a forest stand delineation characterizes the size, composition, and overall health of each forest stand and inventories other natural features on the site such as streams, wetlands and associated buffers, and floodplains to see how they relate. The NRI provides the base map that is used to avoid impacts to high priority forests and identify high priority areas to plant new forest.

After the NRI is a Forest Conservation Plan. To determine forest conservation requirements a worksheet provided by the planning department is completed. Components of the worksheet includes:

- Net Tract Area
  - The net tract area includes the overall site boundary and is increased to include disturbances outside of the site boundary.
  - Thresholds are based on the net tract area.
- Conservation Threshold
  - Development on sites that contain existing forest are subject to a conservation threshold. The conservation threshold is a percentage of the net tract area and varies based on Land Use Category.
  - The conservation threshold is a means to conserve forest on sites with existing forest.
- Planting Mitigation Ratios
  - Clearing forest below the conservation threshold requires 2 acres of mitigation for each acre cleared (2:1 ratio).
  - Clearing a certain amount above the conservation threshold requires ¼ acre of reforestation for each acre cleared (¼:1 ratio).
- Afforestation Threshold

- Sites with little or no existing forest must plant new forest up to an afforestation threshold.
- This threshold is currently 20% for lower density land use categories and 15% for higher density land use categories.
- Based on existing site conditions and/or the amount of clearing required, Forest conservation requirements must be met as prioritized:
  - Conserve forest on-site
  - Plant forest on-site
  - Plant forest off-site
  - Purchase credit from a forest mitigation bank
  - Pay in-lieu fee (\$1.30 per SF, adjusted bi-annually based on the CPI)

**Proposed Changes**

The proposed threshold changes (in blue) to the forest law are as follows:

- increases to conservation thresholds
- increases to afforestation thresholds (removed by Planning Board in red)

Forest Conservation Threshold and Requirement Afforestation as a Percentage of net Tract Area			
Land Use Category	Forest Conservation Threshold	Required Afforestation Net Tract Area > 5 acres	Required Afforestation Net Tract Area < 5 acres
Agricultural and resource areas	<del>50%</del> 55%	20%	20%
Cluster medium-density residential areas	45%	20%	20%
Medium-density residential areas	<del>25%</del> 35%	20%	20%
Institutional development areas	<del>20%</del> 25%	<del>15%</del> 20%	20%
High-density residential areas	20%	15%	20%
Mixed-use development areas	20%	15%	20%
Planned unit development areas	20%	15%	20%
Commercial and industrial use areas	15%	15%	20%

- an increase in the mitigation ratio for clearing above the conservation threshold
  - (¼:1 increased to ½:1)

In addition, changes to mitigation planting ratios that are additive to the requirements above include:

- a mitigation planting increase from 2:1 to 2 ½ :1 for clearing below the conservation threshold when mitigation cannot be provided in the same 8-digit watershed
- a mitigation planting increase from ½:1 to 1:1 for clearing above the conservation threshold when mitigation cannot be provided in the same 8-digit watershed
- the 77% market rate increase as of April 2022 in the cost mitigation banking, if available, due to the impacts of state bill HB 991

- In-lieu fee based on increased planting ratios because the Planning Department cannot guarantee that the county will be able to provide mitigation in the same watershed as the project.

### ***In Practice***

#### *Conservation Threshold- Above the Threshold*

The proposal to increase the conservation threshold on medium density residential areas and the addition of a new land use category for cluster medium density residential areas combined with a doubling of the mitigation planting ratio for clearing above the conservation threshold will increase mitigation quantities for these types of developments. These types of residential development are increasingly rare in Montgomery County. Instead, this revision will mostly impact institutional developments increasing mitigation requirements and costs to construct new public schools and religious institutions.

#### *Conservation Threshold- Below the Threshold*

The conservation threshold has an outsized impact on redevelopment sites. Using a recent Montgomery County redevelopment project as an example, this site contained existing forest in an amount at or below the conservation threshold. The forest was located along the edges of the site and directly in the middle and required clearing to redevelop the site as envisioned in the master plan, to provide master planned roadways, tie into existing utilities, and make connections to existing roads. When forest was cleared below the conservation threshold it required mitigation at a 2:1 ratio. Planting twice as much forest than what previously existed on an urban redevelopment site is unrealistic and typically results in mitigation requirements being met through the purchase of forest bank credit or payment of in-lieu fee.

Finding credit in a mitigation bank is much more difficult due to a 2021 change to the state forest conservation law eliminating the ability to bank preserved forest, severely limiting the amount of available forest banking in the county. Revisions to the forest conservation law should consider the need to redevelop sites and take into consideration the benefits of redevelopment in terms of water quality improvements and resiliency gained by storing stormwater and treating it to modern water quality standards and increases in tree canopy.

On the example project, as approved, 5.78 acres of forest clearing required 11.74 acres of mitigation. Under current regulations and prior to HB 991 the cost of mitigation was anticipated to be \$305,240. If the available banking in the same watershed, the proposed regulations would increase the mitigation required to 14.68 acres and could increase the cost to provide mitigation by around a half million dollars to over \$800,000. As time goes on there simply won't be enough land to meet the requirements of the law.

#### *Afforestation Threshold*

Prior to the Planning Board hearing the MBIA was very concerned with the proposal to increase the afforestation requirement on most dense land use categories on sites less than 5 acres. Increasing afforestation thresholds on small urban sites does not make sense environmentally. The requirement essentially mandates small, fragmented patches of forests in urban areas (ex. 1 acre of forest on a 5-acre

site). By requiring such a small amount of forest on a small site it encourages sprawl to meet market demand because 20% of the site is taken up by newly planted forest. In practice, mitigation would likely have been provided via in-lieu fee adding costs to development and placing the burden of planting forest on the county.

### *Increased Mitigation by Watershed*

On top of the increases to thresholds and planting ratios as discussed above is a proposal to increase mitigation ratios based on whether planting or the purchase of mitigation banking credit is provided in the same 8- digit watershed. If mitigation cannot be provided in the same watershed, clearing below the conservation threshold increases from 2:1 to 2 ½:1. Clearing above the conservation threshold increases from ½:1 to 1:1. As of April 2022 only 10 acres of mitigation banking credit is currently available in the entire county.

Mitigation banks and opportunities to provide off-site forest within the same watershed have historically been limited to non-existent down county and mid-county. One of the outcomes of the stakeholder meetings was to acknowledge this and allow mitigation in a priority watershed to avoid increases in planting ratios. However, at this time it is our understanding that these priority watersheds have not been delineated or defined. Increasing the mitigation ratios for not being able to provide mitigation in the same 8-digit watershed will not increase forest in these watersheds. Instead, it will increase the amount of in-lieu fee payments and burden placed on the county to provide the mitigation.

The MBIA does not support additional increases for mitigation by watershed because forest banking credits and off-site planting opportunities have historically been limited to unavailable in the most urban areas where redevelopment needs to occur and is not necessary to achieve no net loss.

### *Forest Mitigation Banking*

Forest mitigation banking has been a vital component of the Forest Law since its inception twenty years ago and historically consisted of the preservation of existing high priority forest, often large contiguous tracts protected in perpetuity in addition to newly planted forest. Forest credit based on preservation was purchased at a 2:1 ratio and forest credit based on planted forest at a 1:1 ratio. In 2021 the state of Maryland prohibited the creation of new forest banks based on preservation severely limiting forest banking as an option in Montgomery County. Before State Bill HB 991 banking credit could be purchased at a market rate of \$26,000 per acre in Montgomery County. Now what little mitigation is available costs around \$46,000 per acre as of April 2022.

### *In Lieu Fee*

The last option to meet mitigation requirements after forest mitigation banking is in-lieu fee. In-lieu fee cost more than forest mitigation banking at \$1.30 per sf or \$56,628 per acre and typically increases every two years based on the consumer price index. Significantly, the proposal to increase mitigation planting ratios for reforestation provided outside of the same 8-digit watershed means that the in-lieu fee rate will be based on the worst-case scenario because the planning department cannot guarantee that the mitigation planted provided by the in-lieu fee can be provided in the same watershed as the project.

### **Conclusion**

In summary, except for (22A-12 (e) (1) (B)) all the proposed revisions are not necessary to achieve No Net Loss of Forest, will make redevelopment more costly and difficult to implement. We appreciate the opportunity to provide comments and look forward to working with the county on solutions that achieve no net loss without creating unnecessary obstacles to the development of housing.

Comments on specific sections of the code proposed to be revised are as follows:

**1- Forest Law 22A-11 (b) (1)- Application, review, and approval procedures., Project requiring development plan, floating zone plan, project plan, sketch plan, preliminary plan of subdivision, or site plan approval.**

- a. The proposed requirement to obtain an approved forest stand delineation plan before the applicant can submit an application instead of with, as is the current regulation is problematic for the same reasons discussed and eventually agreed to in public comments provided to Park and Planning in the Spring of 2017.

“Per Section 7.3.3 Sketch Plan A (2), “A sketch plan describes a project at an early stage to provide the public and the Planning Board the chance to review a proposed development for general design, density, circulation, public benefits, and relationship to the master plan before a developer is required to expend significant resources on design and engineering.” Currently a Natural Resource Inventory/Forest Stand Delineation (NRI/FSD) is submitted concurrently with a Sketch Plan application and is required to be approved before the approval of the sketch plan. Requiring the NRI/FSD to be not only submitted but also approved prior to the submittal of a sketch plan adds additional costs and process at an even earlier stage in the process, which is inconsistent with the purpose of the sketch plan. Additionally, the time delay adds to the cost of doing business by delaying the start of the sketch plan review by several months and potentially adding to the carrying costs of the property.”

In practice, since NRI’s are required to be submitted with any application the field work needed to complete the NRI and compile the data used to create the base map that proposed improvements shown on any development plan, floating zone plan, project plan, sketch plan, preliminary plan of subdivision or site plan are based on occurs as intended with enough time to factor in the preservation of sensitive environmental areas and priority forests. Additionally, the requirement of a licensed forester, licensed landscaper architect, or Qualified Forest Conservation professional requires the plan preparer to abide by a code of ethics or risk losing the privilege to prepare these plans in addition to other penalties. Any differing interpretations or accidental omissions identified by an environmental reviewer during the review process that may impact the proposed improvements can be easily coordinated while all plans are being reviewed simultaneously. Requiring an

approved NRI prior to submittal simply delays the overall entitlement process adding unnecessary time and risk.

**2- Forest Law 22A-12 (a)- Retention, afforestation, and reforestation requirements., Table.**

- a. See previous comments provided above to understand the implications of changing conservation and afforestation thresholds on projects and why it is not necessary to achieve no net loss.

**3- Forest Law 22A-12 (c) (1) & (2)- Retention, afforestation, and reforestation requirements., Reforestation**

- a. See previous comments provided above to understand the implications of increasing planting ratios for clearing above the conservation threshold and for meeting mitigation requirements in other watersheds when mitigation options are not typically available in Areas 1 and 2.

**4- Forest Law 22A-12 (d) (2)- Retention, afforestation, and reforestation requirements., Afforestation**

- a. This proposed revision changes the requirement to provide afforestation, when required onsite, from should to must. As discussed above there are numerous instances, particularly for redevelopment projects, where it does not make sense environmentally to plant small, fragmented patches of forest on urban sites. Changing the standard from “should” to “must” opens these projects up to appeals and challenges that could otherwise be avoided by keeping the language the same.

**5- Forest Law 22A-12 (e) (1) (B)- Retention, afforestation, and reforestation requirements., Standards for Afforestation and Reforestation**

- a. As discussed at the beginning of this comment letter, the Master Plan and SPA requirements to afforest unforested stream valley buffer has resulted in no net loss due to development over the 10 years. This revision expands this requirement to all projects regardless of master plan or SPA requirement.

**6- Forest Law 22A-12 (e) (4)- Retention, afforestation, and reforestation requirements., Standards for Afforestation and Reforestation**

- a. Mitigation banks and opportunities to provide off-site forest within Areas 1 and 2 have historically been extremely limited to non-existent. Increasing the mitigation ratios for not being able to provide mitigation in the same 8-digit watershed will not increase forest in these watersheds. Instead, it will increase the amount of in-lieu fee payments and burden placed on the county to provide the mitigation.
- b. Adding a requirement to satisfy mitigation and afforestation requirements in the same 8-digit watershed in which a project is located, in addition to changing the standard from “may” to “must” opens these projects up to appeals and challenges that could otherwise be avoided by keeping the language the same. Furthermore, the pricing for mitigation banking is set by a market rate. Adding requirements that constrain the supply from which credits can be purchased increases the market rate based on availability.

**7- Forest Law 22A-13 (g) (3)- Forest Mitigation Banks, Purchasing and selling forest mitigation bank credits.**

- a. Mitigation banks and opportunities to provide off-site forest within Areas 1 and 2 have historically been extremely limited to non-existent. Increasing the mitigation ratios for not



being able to provide mitigation in the same 8-digit watershed will not increase forest in these watersheds. Instead, it will increase the amount of in-lieu fee payments and burden placed on the county to provide the mitigation.

- b. Adding a requirement to satisfy mitigation and afforestation requirements in the same 8-digit watershed in which a project is located, in addition to changing the standard from “may” to “must” opens these projects up to appeals and challenges that could otherwise be avoided by keeping the language the same. Furthermore, the pricing for mitigation banking is set by a market rate. Adding requirements that constrain the supply from which credits can be purchased increases the market rate based on availability.

**8- Considerations for previously approved projects that require an amendment**

- a. The MBIA recommends MNCPPC clarify how they plan to implement the proposed changes on projects or sites that were previously approved and designed based on the requirements of the current Forest Law if those projects or sites are required to be amended. For example, individual property owners with forest violations could be significantly impacted by the increased costs to provide mitigation to bring their property back into compliance. Amendments are done for a variety of reasons and a lack of grandfathering and/or clarifications to the applicability of how amendments will be treated could result in inconsistent application of the law or unintended consequences and costs associated with the amendment.

MBIA appreciates the opportunity to provide comments on the proposed changes and are available to answer any questions that you may have. We also appreciate the work done by planning and council staff in preparing these proposed changes.

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