



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

Attachment A

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

2 **Sec. 22A-3. Definitions.**

3 ***

4 ***

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

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

13 ***

14 **Sec. 22A-5. Exemptions.**

15 ***

16 (t) a modification to an existing [non-residential developed property if]:

17 (1) non-residential developed property if:

- 18
19 (A) no more than 5,000 square feet of forest is ever cleared at one time or
20 cumulatively after an exemption is issued;
21
22 (B) the modification does not result in the cutting, clearing, or grading of any
23 forest in a stream buffer or forest located on property in a special protection area
24 which must submit a water quality plan;
25
26 (C) the modification does not require approval of a preliminary or administrative
27 subdivision plan; [and]
28
29 (D) the modification does not increase the developed area by more than 50% and
30 the existing development is maintained; and
31
32 (E) the pending development application does not propose any residential uses.
33

34 (2) residential developed property if:

- 35
36 (A) forest is not impacted or cleared;
37
38 (B) the modification is not located in a stream buffer[or located on property in a
39 special protection area which must submit a water quality plan];

40
41 (C) the modification does not require approval of a preliminary or administrative
42 subdivision plan;

43
44 (D) the modification does not increase the developed area by more than 50%;
45 [and]

46
47 (E) the existing structure is not modified; and

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

50

51 ***

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

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

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

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

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

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

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

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

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

66 ***

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

68 ***

69 (d) *Administrative civil penalty*

70 ***

71 (2) In determining the amount of the civil administrative penalty, or the extent of an
72 administrative order issued by the Planning Director under Section 22A-17, the Planning Board
73 or Planning Director must consider:

74 (A) the willfulness of the violations;

75 (B) the damage or injury to tree resources;

76 (C) the cost of corrective action or restoration;

77 (D) any adverse impact on water quality;

78 (E) the extent to which the current violation is part of a recurrent pattern of the
79 same or similar type of violation committed by the violator;

80 (F) any economic benefit accrued to the violator or any other person as a result of
81 the violation; and

82 (G) [the violator's ability to pay; and]

83 [(H)] any other relevant factors.