



**Office of the General Counsel**  
**Maryland-National Capital Park and Planning Commission**

*Reply To*

**Adrian R. Gardner**  
**General Counsel**  
**6611 Kenilworth Avenue, Suite 200**  
**Riverdale, Maryland 20737**  
**(301) 454-1670 • (301) 454-1674 fax**

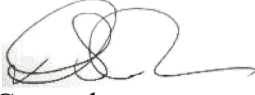
January 5, 2021

**Memorandum**

**TO:** Casey Anderson, Chair  
Montgomery County Planning Board

Elizabeth M. Hewlett, Chair  
Prince George's County Planning Board

**FROM:** Adrian Gardner  
General Counsel

Debra S. Borden   
Deputy General Counsel

**RE:** Legislation to Clarify Mitigation Banking Under the Maryland Forest Conservation Act, Md. Code Ann., Nat. Res. ("NR") § 5-1601 *et seq.*

**Recommendation/Purpose**

This memorandum is to recommend and request authorization for the Planning Board and the Maryland-National Capital Park and Planning Commission ("Commission") to support and/or seek legislation clarifying the definition of "Mitigation Banking" that is made essential to ameliorate the impact of a recent opinion of the Office of the Attorney General ("OAG") interpreting the Maryland Forest Conservation Act (the "Opinion").<sup>1</sup>

**Background and Summary**

As you likely are aware, the local forest conservation laws in both counties subsumed within our agency's jurisdiction give meaningful "credits" to developers who preserve existing forested lands by recording restrictive

---

<sup>1</sup> 105 Md. Op. Att'y Gen. 66 (Oct. 26, 2020). Attachment A.

easements that run in perpetuity. Those laws require those credits in order for various properties to qualify for development – either by creating new forests, preserving existing forests, or a combination of both, undertaken either on- or off-site with respect to each project. Under the OAG Opinion, with very limited exceptions, credits allotted for existing forests under those local laws may no longer be permissible, and the potential for development in Montgomery and Prince George’s counties likely will be impaired substantially. Because these local laws also expressly apply to any development projects undertaken by the Commission, the county, and other governmental entities, the Opinion also carries significant implications for our state and local partners, and for our agency’s capital improvement programs as well.

### Detailed Discussion

In response to request by Anne Arundel County, the OAG Opinion addressed whether the Maryland Forest Conservation Act (“FCA”) allows off-site forest mitigation banks that were established to preserve existing forest.

The FCA defines “forest mitigation banking” as “the intentional restoration or creation of forests undertaken expressly for the purpose of providing credits for afforestation or reforestation requirements with enhanced environmental benefits from future activities.” NR § 5-1601(o) (emphasis added). After analyzing the plain language of that definition, the broader mitigation banking scheme, the legislative history of the FCA, and forest conservation regulations of the Department of Natural Resources (“DNR”), the OAG concluded that the placement of a protective easement on an already-existing forest—as opposed to intentionally-created-or-restored forest—would not qualify as mitigation banking under the FCA. This interpretation of the OAG is significant for several reasons.

First, as indicated above, the mitigation banking program in each county currently allows an applicant to receive credit from a mitigation bank that preserved, rather than restored or created, forest — which would no longer conform under OAG’s interpretation. Under the FCA, the DNR is required to conduct periodic reviews of each local forest conservation program to evaluate the level of compliance with the standards set forth in the FCA. NR § 5-1603(e).

Assuming DNR begins to follow the conclusion established in the OAG Opinion and determines that county laws and programs operated by our planning departments do not comport with the FCA, the DNR could assume direct review and approval of all forest conservation plans in both counties and may

assert other harsh statutory remedies. It is important to note that DNR reviewed and approved the current program operated in both counties prior to issuance of the OAG Opinion.

Second, without viable off-site mitigation available to applicants, development and its economic benefits to both counties may come to a screeching halt during this particularly troubling economic time. As of today, there are hundreds of acres available in forest conservation mitigation banks that preserved existing forest. In response to the OAG's Opinion, the planning departments have suspended the issuance of credits for planted forest. As a result, there has been a rush on the credits from planted forest mitigation credits. As of December 31, 2020, there are no remaining credits available for purchase in Montgomery County. In Prince George's County, based on projections of pending development applications, the credits that will qualify under the OAG's interpretation would likely be depleted within a very short time, perhaps a matter of months.

Finally, two consequences of the OAG's Opinion are that property owners may have less incentive to preserve existing forest and without any other options, developers are now able to meet the fee in lieu payment requirements. With the economic benefit of selling credits in these mitigation banks now vanished, forest mitigation bankers may attempt to vacate their conservation easements in search of a more profitable use of their land and any existing forest that could have been preserved under the counties' programs may instead be sold off for development. In addition, fee in lieu payments were designed to be a last resort. The depletion of mitigation credits has put developers into a position where the only option is to pay instead of protecting forest. Consequently, the counties will have less forest - an outcome that undermines the purposes of the FCA.

### Conclusion

As a result of these concerns, we are requesting formal authority to advocate and develop appropriate legislation that will clarify the FCA's mitigation banking requirements, ensuring that the forest conservation banking programs we currently operate continue to encourage the protection of forest—existing, restored, or created—without harming our local economies.

Attachment

cc: Andree Checkley, Director, Prince George's County Planning  
Mike Riley, Director, Montgomery County Parks

Memo re: Mitigation Banking Legislation

January 5, 2021

Page 4

Bill Tyler, Director, Prince George's County Parks and Recreation

Gwen Wright, Director Montgomery County Planning

John Kroll, Corporate Budget Director