

**Montgomery County Department of Environmental Protection (DEP) Response
to Notes Compiled by Caren Madsen
Chair, Conservation Montgomery Board of Directors
From the July 26, 2011 Meeting Regarding Amending the Forest Conservation Law (FCL)**

Note: Text in black is from summary compiled by Caren Madsen. Text in red is DEP's response.

DEP draft bill should be revised to reflect the following:

- To replace and compensate for canopy lost, need a requirement for numbers of trees saved or replanted on lots at an acceptable rate. Builders need to get credit toward the requirement for trees that are retained on a site. A fee in lieu fund should be included in the legislation to provide flexibility (another tool in the toolbox) when tree requirements cannot be met on a site. As an option, builders should be allowed to plant in the right of way in the same community or watershed and be allowed credit on their tree plan for trees planted in the right of way. (As discussed, the formula for tree canopy mitigation fees and requirements for numbers of trees on lot sizes needs to be resolved. This is where we need analysis from the Planning Department and DEP to come up with the best formula for the county.)

DEP Response: On the issue of requiring a specific number of trees to be saved or replanted to give builders credit for trees retained on site, DEP's proposal is intended to provide a strong incentive to retain trees because the builders do not pay a fee for areas where the trees are not removed. DEP's proposal requires compensation whenever tree or forest canopy is lost but the less forest or fewer trees removed, the lower the fee to the builder. Builders are better off financially when they reduce the number of trees disturbed.

It is unclear to us as to how requiring a minimum number of trees no matter how many are removed provides greater protections than DEP's proposal except in a few limited instances. Additionally, although we support being as protective as practicable, it would seem that site visits to make sure the right number, size and types of trees are replanted would be costly for the County to administer and regulate. At the July 26 meeting, however, mention was made of other jurisdictions who might have adopted a program similar to this one. If more specifics are provided, DEP will provide an opinion on whether we believe the programs in these other jurisdictions would be possible here given current fiscal conditions.

On the issue of allowing builders the option to plant rather than pay a fee, DEP believes that this option can be considered if the planting meets the current mandates of the FCL, which includes easements, long-term maintenance, bonds, etc. As we understand it, the obligation of the builder under the proposed planting requirement would end once the trees are put in the ground, and there would be no follow-up to ensure the long-term growth of these trees. As a result, we do not see how this proposal, especially on small lots, would benefit the resource. DEP is proposing the payment of a fee for forests/trees disturbed as a result of development because we believe better results can be achieved through a comprehensive county-wide planting program, including long term maintenance, by an entity dedicated to this effort

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On the issue of determining the best formula for coming up with the exact number, size and type of trees on lots of different sizes, again we believe that the best place to look for such a formula would be in the jurisdictions that have adopted this type of program. If and when this formula can be agreed upon, however, the administration and enforcement cost to the County of ensuring that the required number, size and type of trees are actually planted and maintained must be analyzed and addressed.

In an effort to provide credit and recognition to the many builders that do plant and or save trees, DEP is open to discussing exempting the first X number of square feet or X percentage of canopy from being subject to a fee. This would also address the very legitimate issue raised by the builders that many trees are lost as a result of regulations (including stormwater requirements) and there is no way for builders to avoid or reduce the number their tree losses in all cases.

- County should have a coordinated and comprehensive urban forestry program. Agencies should coordinate activities and public outreach and develop a tree action plan for the county to address urban forest and urban trees. (BIA said they go along with it as long as it does not affect private property. However, private property owners are in control of a considerable amount of the county tree canopy.)

DEP Response: DEP supports this suggestion in concept, but we note that this is an administrative issue that should not be addressed in this legislation. In fact, legislation already exists (Section 22A-30(c) of the Code) for a comprehensive urban forestry program. The recommendation will be discussed with the County Executive during this year's budget process.

- Certified Arborist/Urban Forester and staff to administer or advise on a tree bill at DPS and street tree program and staff transferred to DPS. (Green side wants this so that DPS will have the human and financial resources needed for additional duties AND so that street trees are treated as an important part of the urban canopy. BIA says this can be accomplished via Executive Order and does not need to be in the urban tree legislation.)

DEP Response: This is an administrative issue and does not need to be included in this legislation. It will be discussed with the County Executive during this year's budget process.

- Legislation should be specific and clear with clearly defined and separated roles between agencies where FCL (forestry) is covered and where tree legislation is covered. The current DEP draft is too vague in terms of Planning Department role and DPS. There should be clear delineation between Planning Department's role in FCL administration and in the new sections of the law dealing with individual trees on land area under 40,000 square feet to be administered by DPS.

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DEP Response: We fully support the need to be clear and concise on which agency is doing what so that an applicant knows where to submit the required information. In drafting Section 22A-6 of the DEP proposal we made our best effort to state clearly that an application on a property less than 40,000 sq ft goes to the Department of Permitting Services (for forest and tree disturbance) and an application on a property 40,000 sq ft or above goes to the Department of Planning (for forest and tree disturbance). It is true that the current language is unclear on which agency handles a property of exactly 40,000 sq ft so we will clarify that point. However, we are not sure how to make the section any clearer but are very willing to consider any proposed language changes offered:

- (a) *Submissions.* Except as provided in subsection (i), a person that is subject to this Chapter must submit certain information on the condition of the existing natural resources and the amount of disturbance of forests to either the Director of Permitting Services or the Planning Director as follows:
- (1) If the subject property [does not exceed] is less than 40,000 square feet in size, the person must submit limits of forest disturbance information to the Director of Permitting Services in accordance with Section 22A-7.
 - (2) If the subject property is equal to or greater than 40,000 square feet in size, the person must submit a natural resources inventory/forest stand delineation and forest conservation plan to the Planning Director in accordance with Section 22A-8.

The subsequent sections in the DEP proposal attempt to describe what the applicant must submit, and how that information is to be used by the Planning Department and DPS to determine the mitigation requirement for the builder.

In addition to providing us with any suggested clarifying language, please let us know if you have any specific questions related to agency roles and we will respond

- Urban tree strategy should follow an order of priority for trees as practical: 1) preservation first policy as first option to consider, 2) transplant/relocate trees if retaining a healthy tree or trees on site is not possible, 3) when these options have been exhausted, replant at rate that will sustain the county canopy.

DEP Response: We agree that preservation (retention) should have the highest priority, and attempted to make this clear in the DEP proposal by explicitly stating so in a number of places including the preamble and the sections on retention. The payment of a fee based on the amount of forest/trees disturbed supports this policy, particularly if the fee increases as disturbance increases. Additionally, the fee schedule provides incentives for mitigation on site, particularly for larger properties, reviewed by the Planning Department, where easements are appropriate. We are not aware of convincing evidence that transplanting or relocating trees is a realistic or cost effective option but are willing to review any evidence provided.

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- Regulatory incentives should be provided for builders who exceed requirements on tree plans: Expedited review at DPS (aka green light review).

DEP Response: In the proposed bill, the DPS review is, by design, an expedited review. Any project less than 40,000 sq ft will be considered by DPS along with the stormwater management plan. The proposed bill sends all projects equal to or greater than 40,000 sq ft to the Planning Department and allows them to expedite plans similarly to the DPS review. DEP supports this in concept but implementation would be up to the Planning Department.

Note that the current DEP proposal provides several additional “incentives” for developers. Since developers do not have a planting obligation, the requirements for bonds and long-term maintenance are eliminated. In addition, the application process for small lots is office-based and does not require the submission of information beyond that currently required for the sediment control/stormwater management process, and does not involve modifications to a proposed development activity except where such modifications are already currently required under existing sediment control/stormwater management review or the existing FCL process. Finally, the DEP proposal reduces afforestation rates to the minimum required by the State’s Forest Conservation Act.

- DPS should pursue allowing builders credit for using trees as part of stormwater management plans.

DEP Response: DEP supports this in concept but does not believe that the issue can or should be addressed as a part of this legislation.

- Tree canopy goals must be included in the legislation: Overall goal of 40% countywide. In sections where the canopy percentage is low, set goals and pursue an aggressive and targeted replanting program.

DEP Response: We completely agree that long term tree canopy goals provide good benchmarks for measuring our progress and our existing conditions. However, DEP believes a countywide goal should not be applied to an individual property. When trees are disturbed due to development, the community loses a valuable environmental resource regardless of the amount of trees that remain. DEP’s proposal implements the policy that there should be mitigation for the loss of these resources regardless of the percentage of canopy coverage on the site or in the neighborhood.

The Forest Preservation Strategy Update 2004 and the 2009 Climate Protection Plan both recommend starting with the American Forests tree canopy goals, which recommends an area-wide goal of 40%. Since many areas of the county already meet these goals including the overall goal, our focus must shift towards assuring adequate distribution of canopy and appropriate accounting of concentrations, such as the stream valley parks. The canopy in stream valley parks provides phenomenal benefits. However, it provides little cover or shade for impervious surfaces. Therefore, a second set of calculations should remove the parks

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from the percent canopy covered and determine the coverage and distribution of canopy over the remaining area. This will likely coincide with the proportion of impervious surface and water quality.

DEP agrees that aggressive and targeted planting programs should be implemented and should follow a county-wide comprehensive approach to increase canopy where little canopy exists, as well as maintain canopy where stormwater management is lacking or where future development is threatening the existing canopy. DEP's proposal attempts to accomplish these goals through, among others, the strategic use of the canopy disturbance fee.