

CONCERNED CITIZENS FOR PROPER LAND USE

1328 Washington Drive
Annapolis, MD 21403

DATE: May 31, 2016
TO: Planning Commission
SUBJECT: Memorandum of Opposition to Forest Conservation Ordinance, O-22-16

Thank you for your consideration of Ordinance O-22-16, the latest City Ordinance proffered to meet the state Forest Conservation Act (FCA) requirements. Alderman Littmann and three other Council members have introduced this new Ordinance to respond to the legal insufficiencies and lack of clarity with the City's current FCA compliance. These problems have arisen because the City failed to adopt its own FCA ordinance and procedures as required by state law and instead adopted the state FCA by reference in 1992. O-22-16 is now before you for review and comment.

You will recall that Alderman Littman also sponsored O-32-14, another version of a City Forest Conservation Ordinance, which the Planning Commission carefully evaluated after taking public comment. After your review, the Commission developed significant amendments which greatly improved the Ordinance. They not only clarified the provisions in the ordinance but improved protection for the City's remaining forest. Alderman Littmann accepted your recommendations and offered them in an amended O-32-14 before the Council. However, this amended Ordinance was vigorously opposed by the development community and never received a vote.

We and others in the conservation community, including the Annapolis Environmental Commission, worked at great length with Alderman Littmann and others including a co-sponsor, Alderman Arnett, to suggest changes and to fine-tune his original Ordinance (O-32-14). These written suggested changes were also given to the Planning Commission.

We were disappointed to see the City Council fail to adopt the amended O-32-14 with the Planning Commission amendments. Then, we in the conservation community were disappointed again when the current O-22-16 was developed and introduced without any input or review from any of us before introduction. We were not allowed to see the drafts of this emasculated ordinance nor did we have an opportunity for input.

Most all of the progressive changes you and we sought and those that were already in the original Littmann ordinance (O-21-14) have been removed. The ordinance now is a skeletal, de minimis approach to forest conservation falling well short of what is needed to honor the City's commitment in its Comprehensive Plan to attain a 50% tree canopy by 2036. In fact, the current proposed measure may not meet even meet state law and criteria.

Therefore, we must strongly oppose enactment of O-22-16 unless the substantial changes you suggested are adopted as well as several others mentioned below. These suggested amendments include the ones you had written into the Ordinance and that were accepted by Alderman Littmann last year.

Beyond these changes, the proposed new FCA ordinance, O-22-16, needs to be re-written and heavily amended to reflect the Mayor and Council's unanimous vote on May 9, to dissolve the Department of Neighborhood and Environmental Programs (DNEP), and re-organize environmental reviews and approvals, effective as of July 1, 2016. See CA-1-16.

O-22-16 places the responsibility for the administration of the FCA in DNEP. CA-1-16 shifts DNEP's functions to several City agencies. While much of DNEP's authority over the FCA is shifted under the re-organization to the Department of Planning and Zoning, such matters as stormwater management, sediment control, and the issuance of grading permits are transferred to the Department of Public Works. CA-1-16 also creates an Office of Environmental Policy, which would handle DNEP's responsibilities for grants, urban forestry and policy initiatives.

Requirements for public input, hearings, and appeals vary within these agencies making the re-writing of O-22-16 even more intricate to clearly detail these important provisions. Since all of these changes obviously will require a major re-writing of O-22-16, we suggest that this rewrite also include the changes that follow.

The following requirements to better protect the City's forest were recommended by the Planning Commission in 2015 and included in O-32-14 by amendment by Alderman Littmann. All of these important measures have been eliminated in O-22-16. We suggest these be included in any ordinance approved by the Planning Commission and adopted by the Council:

1. Requirement for a no net loss of forest/trees.
2. Requirement that tree replacement, reforestation, and afforestation to achieve no net loss of trees occur, in priority order, on site, or within the watershed of the city of Annapolis, or in Anne Arundel County as close to the site as practical.
3. Requirement that all significant trees removed, shall be replaced with similar species at a minimum of 2.5-inch caliper tree replacement:
 - 12"-18" diameter at breast height, 3 to 1.
 - greater than 18"to 23" diameter at breast height, 4 to 1.
 - Specimen tree (24" or greater) or champion tree, 8 to 1.

NOTE: The three items above are critical to the City maintaining its tree canopy and remaining forest. Without these requirements it is nearly impossible for the City to attain the Comprehensive Plan canopy goal of 50% by 2036. The Commission should be aware of such approved projects as Rocky Gorge where eight acres of forest have been cleared and Parkside Preserve where 12 acres of forest have been approved for clearing. The pending Crystal Spring project would destroy another 40 acres of forest under current plans.

Despite misguided and illegal resistance from the Maryland Department of Natural Resources to these requirements, the City clearly has such authority under the state FCA. This is documented in the formal Opinion of the Attorney General on this matter dated October 21, 2015. See 100 Opinions of the Attorney General 120 (attached).

4. Requirement that a statement of how a development *will further* the city's tree canopy coverage goal of 50% by 2036; instead, a clause is substituted only requiring a statement of how the project will *impact* the goal.
5. Requirement that to clear any priority forest, including contiguous forest, a variance must be obtained.

6. Requirements that to obtain a variance, the applicant must demonstrate that the purpose of the variance is not based exclusively upon the desire to increase financial gain. Instead, the state FCA's unwarranted hardship requirement is put in the new ordinance without defining unwarranted hardship. The proposed ordinance is not consistent with the interpretations of "unwarranted hardship" under state law and appellate court decisions under the Critical Area Law.

O-22-16 worsens this situation by requiring that only one of the following be met, not **all** as should be the case:

The applicant has demonstrated that (1) that the land in question cannot yield a return if the requirement from which the special variance is requested is imposed and will deprive the applicant of all beneficial use of the applicant's property; (2) that the plight of the applicant is due to unique circumstances and not the general conditions in the neighborhood; **or** (3) that the special variance requested will not alter the essential character of the neighborhood. The "**or**" should be an "and". In addition, Maryland case law should be examined to properly define unwarranted hardship. We can provide such language to clarify this.

7. Deleted are requirements that a variance can be approved by the Planning Commission upon a determination of a majority of its members hearing the application that the applicant has proven **each** of the factors set forth in O-32-14, including the unwarranted hardship language in item 6. above.

8. Requirements that stream buffers of 100' and significant trees of 24" dbh and greater be given special protection are eliminated and left to the whim of a determination by DNEP.

Other substantial concerns:

1. O-22-16 would allow major loopholes to forest conservation and keep the City from achieving the 50% canopy goal. These glaring deficiencies have not worked well in other jurisdictions to protect remaining forests.

Under these proposed changes, the City must establish a Forest Conservation Fund that could be used in lieu of reforestation or afforestation by the developer. This would be a bureaucratic nightmare as the City is unprepared to establish such a Fund and oversee replanting in the City. Nor is their sufficient acreage in the City to be reforested. This presents an easy out for developers who simply pay a few thousand dollars per acre of forest destroyed into the Fund and are thus absolved of any reforestation requirements.

Another loophole is allowing a developer who destroys forest to purchase credits from a forest mitigation bank. Both of these alternatives to requiring reforestation by developers should be eliminated.

2. There are no provisions in O-22-16 for public input into the final FCP or for variances **before** they are granted by City officials and before they ultimately reach the Planning Commission as part of a planned development. There are no procedures for public notice of variances, no public comment period provided, and no hearings required. Variances can be granted from any provision of the FCA and are serious matters where formal procedures with public input should be provided but are not.

Surely protection for forests are at least as important—if not more important—as those for the height of fences or size of signs. Yet, with the passage of this ordinance as is, variances from tree and forest protections would involve no notice, public comment, or hearings, while under Chapter 21.18, adjustments to fence or sign restrictions could only be granted after such notice, public comment, and hearings. Public notices, opportunities for comment, and hearings assure that decisions on variances and adjustments to the code requirements reflect all pertinent information and views, not just those of the applicant and City staff, and should be part of any variance process under a forest conservation ordinance.

3. There is an absence of a clear, consistent appeals process for approvals of Forest Conservation Plans and the subsidiary Forest Stand Delineations as well as for variances. This has been a major source of concern and was documented by the Plymyer reports. O-22-16 puts appeals of a FCP under chapter 21.08 of the City Code leaving appeal processes fuzzy and uncertain. This uncertainty is exacerbated by abolishment of DNEP and the splitting of its responsibilities among several City agencies with differing notice, public input, and appeals processes. See CA-1-16.

Developing a detailed and clear process for public notice and comment, hearings, and appeals is critical to the proper functioning of the Forest Conservation Act. Such a process should include a stay of any forest clearing pending a final resolution of any appeals under the City's FCA ordinance. This is not the case now. We can assist with specific language for such appeals and stays.

4. Grandfathering to exempt a project from the new ordinance should be allowed only for a FSD or FCP that has received final approval by all necessary City agencies.

5. The effective date of any city ordinance adopted to implement the FCA should not be based upon approval by DNR. DNR should not be given authority over whether and when a City ordinance takes effect. While DNR does have review and approval authority, there is a major conflict wherein DNR is politically ignoring an Attorney General's opinion allowing for a no net loss requirement and greater replanting/afforestation requirements to achieve it. See 100 Opinions of the Attorney General 120. The City and Planning Commission should be guided by the AG's Opinion and proceed accordingly.

We urge you to not support the current iteration of O-22-16 and to offer amendments to retain your previously well-thought out changes as well as the ones we suggest above. We stand ready to assist in drafting specific language to assure the City adopts a meaningful and sound forest conservation ordinance that assures better protection for the City's remaining forest.

Respectfully Submitted,

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