



Gregory J. Swain, County Attorney

MEMORANDUM

To: Council Members, Anne Arundel County Council

From: Kelly Phillips Kenney, Supervising County Attorney /s/

Date: February 16, 2021

Subject: Bill No. 20-21 – An Ordinance concerning: Floodplain Management, Erosion and Sediment Control, and Stormwater Management - Subdivision and Development - Forest Conservation

Legislative Summary

This summary was prepared by the Anne Arundel County Office of Law at the request of Councilman Lisa Rodvien for use by members of the Anne Arundel County Council during consideration of Bill No. 20-21. The summary is intended to explain the purposes and legal effects of the bill.

Purpose. The primary purpose of this Bill is to require property owners to obtain approval from the County for clearing more than three trees or more than 1,000 square feet in a forest, if the forest also includes an area considered a priority retention area.¹ The Bill also establishes fines

¹ “Forest” has the definition set forth in § 5-1601(k) of the Natural Resources Article of the Maryland Annotated Code, which “means a biological community dominated by trees and other woody plants covering a land area of 10,000 square feet or greater.”

(2) “Forest” includes:

- (i) Areas that have at least 100 trees per acre with at least 50% of those trees having a 2 inch or greater diameter at 4.5 feet above the ground; and
- (ii) Forest areas that have been cut but not cleared.

(3) “Forest” does not include orchards.

Five of the priority retention areas listed in § 17-6-303 (b) are included in this Bill::

- (1) trees, shrubs, and plants located in sensitive areas, including the 100-year floodplain, intermittent and perennial streams and their buffers, steep slopes, non-tidal wetlands, and all associated buffers; and critical habitat areas, as defined in § 5-1601 of the Natural Resources Article of the State Code; . . .

for any such clearing conducted without the required approvals and elaborates on existing provisions regarding violations of Article 16 and the Forest Conservation provisions of the Code.

Background. Under current law, approval is required for more than 5,000 square feet of clearing or grading² outside the critical area buffer.³ Currently, clearing or grading of more than 5,000 square feet without approval outside of the critical area is a Class C civil violation, which carries a fine of \$500 for the first violation and \$1,000 for the second or any subsequent violation, (*See* § 16-5-105(d); § 9-2-101 (f)(3)).

After the passage of the new Forest Conservation provisions in Bill 68-19, there was a misconception that clearing of any trees in a forest or from a priority retention area could be considered “clearing in violation of forest conservation law” and subject to a fee of \$4.50 per square foot cleared.

However, this is not the case. Article 17 applies to development activities. The types of plants that are required to be placed in priority retention areas in a forest conservation plan are not listed in the Code in such a way to make the removal of those items outside of the development context a “violation.” That section only comes into play if a property owner is going through the development process.⁴ Therefore, if the tree removal or clearing does not need a grading permit

(3) trees, shrubs, or plants determined to be rare, threatened, or endangered under the Federal Endangered Species Act of 1973 set forth in 16 U.S.C. §§ 1531 - 1544 and in 50 CFR Part 17; the Maryland Nongame and Endangered Species Conservation Act set forth in the Natural Resources Article, §§ 10-2A-01 et seq., of the State Code; and COMAR, Title 08;

(4) trees that are champion trees, part of a historic site, or associated with a historic structure;

(5) a tree that has a diameter measured at 4.5 feet above the ground of 30 inches or more or that is 75% or more of the diameter of the current State champion tree of that species; . . .

(7) habitats or potential habitats for forest interior dwelling birds and other wildlife species that consist of:

(i) a minimum of 75 acres of contiguous forest with 10 or more acres of contiguous forest located more than 300 feet from the nearest forest edge; or

(ii) a minimum of 75 acres of contiguous riparian forests along a perennial stream with an average width of at least 300 feet.

Two were excluded as they describe forest in general, rather than the specific priority retention areas this Bill seeks to protect.

² All clearing falls within the broader category of grading. Therefore, when the term grading is used, it also encompasses clearing. Clearing is defined as “a form of development that means the process of cutting or removing trees, woody vegetation, ground cover, stumps, or roots, and does not include gardening or maintenance of an existing grass lawn or removal of hazardous trees as defined in COMAR, Title 27.” § 17-1-101 (15).

Grading means “to cause the disturbance of the earth, and the term includes clearing, excavating, filling, including hydraulic fill, stockpiling of earth materials, grubbing, rootmat or top soil disturbance, or a combination of any of these operations, including logging and timber removal operations.” § 16-1-101 (50).

³ Approval is required for any amount of clearing in the critical area buffer, expanded buffer, or buffer modification area.

⁴ The scope of the forest conservation subtitle applies to “any public or private preliminary plan, site development plan, subdivision plan or application for a grading or sediment control permit by any person, including a unit of State

(i.e., less than 5,000 square feet of disturbance), there is currently no violation of the County Code. If the clearing is more than 5,000 square feet, the violation would be cited as grading without a permit, and would be a \$500 violation.

This Bill makes it a violation to clear more than three trees or between 1,000 and 4,999 square feet⁵ in a forest that also includes a priority retention area listed in the Bill without approval. Clearing or grading over 5,000 square feet anywhere remains a violation. The Bill is not intended to make the clearing of a few trees from most single residential lots a violation. This only applies to trees that are part of a forest and are located in a priority retention area. The Bill creates a new class of fine for all clearing above 1,000 square feet within a forest and priority retention area.

Bill provisions.

The definition of “standard grading plan” is revised in § **16-1-101(86)** to be one that can also authorize clearing or grading of less than 5,000 square feet. Right now, a standard grading plan only applies to grading associated with minor construction, so this expansion will allow a standard grading plan to be used for grading not associated with construction.

Section 16-3-201(a)(4) is new and is the provision discussed above that requires a standard grading plan, grading permit, or approved forest management plan for the clearing of three or more trees or 1,000 square feet of forest, if the clearing also includes any of the features listed in paragraphs **(i) through (v)**. These are five of the priority retention areas listed in § 17-6-303(b) of the Code. Subsection **(b)** is revised to add a reference to (a)(4).

In § **16-3-202**, subsection **(a)(2)** is revised to include a reference to clearing, as that type of activity would now be approved through a standard grading plan. Subsection **16-3-303(d)** is new and requires that, for a standard grading plan approving the clearing trees authorized by new § 16-3-201(a)(4), the applicant shall replant or pay a fee-in-lieu of replanting at a ratio of 1 to 1.

Subsection 16-5-105(d) is new and makes clearing in violation of new § 16-3-201(a)(4) a Class A civil offense. The section further provides that the fine shall be \$4.50 per square foot of trees or area cleared, not to exceed \$10,000 per violation. The maximum fine for a Class A civil offense is \$10,000 (§ 9-2-101(f)(1)).⁶ The \$4.50 per square feet was chosen because that is the amount approved by the Council in Bill 68-19 for clearing in violation of the forest conservation law.

government and the County, on areas 40,000 square feet or greater.” § 17-6-301. The priority retention areas set forth in § 17-6-303(b) to be left undisturbed applies only when there is a development application and is a requirement for what is required to be retained in a forest conservation plan submitted with any of these development applications.

⁵ A removed tree is converted to square footage by using the canopy coverage for the area of disturbance. While field verification for enforcement cases is always needed, a typical mature tree’s canopy is estimated to cover 400 square feet of area.

⁶ In accordance with State law, the maximum fine that can be imposed for each sediment control violation is \$10,000. Md. Code Ann., Envir., § 4-116 (c).

Section 16-5-106 has been completely rewritten. Existing § 16-5-106 is not a model of clarity, as it refers to a “fee-in-lieu” of planting for “clearing in violation”, when those are actually two different fees. The section also appears to have been intended to apply to all violations of Article 16, but only refers to “clearing in violation” of the law.

The section is rewritten to reflect the longstanding practice to require replanting at a ratio of three-to-one for all violations of Article 16, not just “clearing” violations. Paragraph (2) makes it clear that, for any replanting that cannot be achieved in accordance with the Code (either onsite or offsite), a person shall pay a fee-in-lieu of planting as set forth in § 17-11-101. Lastly, paragraph (3) requires that, in addition to any civil fines or the fee-in-lieu, a person shall pay the fee for clearing in violation of the critical area law as set forth in § 17-11-101 (\$1.50 per square foot of mitigation required) for the entire area cleared, graded, or disturbed.

Section 17-6-309 is revised to be consistent with § 16-5-106. The latter section requires planting at a ratio of three-to-one for forest conservation violations, whereas the former states a ratio of two-to-one. As revised, § 17-6-309 is made consistent with § 16-5-106 and also requires replanting at three-to-one for violations of the forest conservation title.⁷ For any replanting that cannot be achieved in accordance with the Code, a fee-in-lieu of replanting shall be paid in accordance with paragraph (2). Lastly, paragraph (3) requires that in addition to any civil fines or the fee-in-lieu, a person shall pay the fee for clearing in violation of the forest conservation law as set forth in § 17-11-101 (\$4.50 per square foot of mitigation required) for the entire area cleared. As the law is currently written, it is not clear that both the planting or fee-in-lieu *and* the clearing in violation fee should be paid.

Section 3 provides that the Ordinance shall take effect 45 days from the date it becomes law.

The Office of Law is available to answer any additional questions regarding this Bill. Thank you very much.

⁷ These types of violations include violation of the terms of a forest conservation easement or covenant, violation of a forest conservation plan or maintenance agreement, or violations of other forest conservation regulations adopted under law. Natural Resources, § 5-1608; COMAR 08.19.03.01.15.1.