David A. Plymyer
Attorney at Law
397 Gambel Oak Court
Millersville, Maryland 21108
410-979-2505

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Michael G. Leahy, City Attorney
Annapolis City Hall
160 Duke of Gloucester Street
Annapolis, Maryland 21401

RE: Report of Review of Local Forest Conservation Program, City of Annapolis

Dear Mr. Leahy:

You have engaged my services on behalf of the City of Annapolis to conduct a review of the local forest conservation program of the City of Annapolis in order to determine if it complies with the requirements of State law. Specifically, you asked me to answer questions raised by Mr. Rob Savidge in a document dated February 3, 2015, captioned "City/development violations of the Forest Conservation Act," and supplemented in a document prepared by Alderman Jared Littmann and sent to me on February 24, 2015.

Introduction

To date my review has been limited in scope to those matters described by Mr. Savidge as "programmatic violations," or generally-applied practices of the City that violate the requirements of State law. The purpose of a report at this point is to provide my opinion on whether City agencies misunderstand the requirements of State law and therefore are likely to be systematically violating the requirements of State law on an ongoing basis. As the foundation for my opinion I reviewed the stated practices of the City to determine if they violate the requirements imposed by State law on a local forest conservation program.

I use the term "stated" practices to mean those practices described by City officials as representing the practices currently employed in administering its local forest conservation program. Stated practices may differ from *actual* practices. Ideally, stated practices, actual practices, and the requirements of State law coincide. At this point I have not undertaken to determine whether the City's actual practices are consistent with its stated practices. For the stated practices of the City I relied upon information provided by Maria Broadbent, Director of the Department of Neighborhood & Environmental Programs (DNEP), Frank Biba, Chief of Environmental Programs for DNEP, Jan van Sutphen, an Environmentalist with DNEP, and Tom Smith, Chief of Current Planning for the Department of Planning and Zoning.

I had to rely upon the stated practices of the City rather than on the contents of the City Code because the City Code itself provides no useful information on the procedures and substantive requirements that make up the City's local forest conservation program (hereafter referred to as the "City's program. In doing my research and analysis, I quickly came to the same basic conclusion that the City's Forest Conservation Act Working Group reached in 2013: Until the City enacts some form of the State's "Model Ordinance" for local forest conservation programs (and that ordinance is approved by the Maryland Department of Natural Resources) there is going to be confusion over what the City's program requires, and uncertainty as to whether the program complies with State law. Much of what constitutes the City's program is left to interpretation, and with so much interpretation required there inevitably will be debate as to whose interpretation is correct.

Moreover, there historically has been some confusion as to whether certain State regulations apply to the City's program. That statement set forth in § 17.09.025B of the City Code that the Maryland Forest Conservation Act "shall apply" to projects in the City apparently was construed in the past to mean only the Maryland Forest Conservation Act (FCA) as enacted by the General Assembly, not the implementing regulations adopted by the Maryland Department of Natural Resources (DNR).

Before I reviewed the stated practices of the City I researched and analyzed the requirements of State law applicable to a local forest conservation program. Although my descriptions of the stated practices of the City are based on the representations of the City officials and employees listed above, my descriptions of the requirements of State law are based entirely on my own legal judgment. I applied my analysis of the requirements of State law to the stated practices of the City and came to the Findings and Conclusions that follow.

Findings and Conclusions

1. The stated practices of the City comply with the requirements of State law. I edited the issues raised by Mr. Savidge and Alderman Littman into eight separate questions set forth and answered in the report beginning on page 8. Applying the Standard of Review described below I found no stated practices that do not comply with the requirements of State law. The "programmatic violations" alleged by Mr. Savidge reflect, in my opinion, misunderstandings of the requirements of State law.

2. The absence of a reasonably comprehensive ordinance in the City Code setting forth the procedures and substantive requirements that make up the City's local forest conservation program is a substantial problem: It is a source of confusion and is unfair to applicants, to the City officials and employees who administer the program, and most of all to the citizens of the City interested in the nature of the program and the manner in which it is administered. Until this problem is resolved controversy over decisions by DNEP applying the Maryland Forest Conservation Act is inevitable.

3. **I found that one of the most significant allegations against DNEP is not procedural in nature; rather, it goes to the substance of the manner in which DNEP exercises the considerable discretion vested in it to make the key decision under the Maryland Forest Conservation Act. Mr. Savidge and others allege that DNEP takes a too-limited view of its power to disapprove a FCP based on the failure of an applicant to make "reasonable efforts" to protect priority forests and other sensitive areas. My conclusion is that this is a policy debate best addressed by the City Council in the context of considering whether or not *criteria* should be added to the law for DNEP to consider when deciding whether a FCP "reasonably protects" priority forests and other sensitive areas.**

DNEP is required to exercise sound professional judgment in applying an imprecise standard: "Reasonable efforts." In my opinion, there is a lot of room between what DNEP *may* do and what it *must* do under the law in terms of requiring an applicant to relocate proposed improvements in order to avoid disturbance of priority forests and other sensitive areas. That broad area of discretion appears to be at the heart of the debate over the FCP for the Crystal Spring project.

Although at this point I have not made a detailed review of the actual practices of DNEP as applied to specific development projects, I reported this finding now for the following reason: I believe that this finding is relevant to what should be done next. As noted above, I believe that the most direct approach to resolving the debate over the approach to be taken by DNEP is to address it by legislation. Also, I see little to be gained by second-guessing past decisions by DNEP in applying a standard that in another context the Maryland Court of Appeals described as "amorphous" when not accompanied by criteria to guide decisions under the standard. Amorphous standards lend themselves to widely-divergent decisions. I expand on this recommendation beginning on page 18.

Governing Law

This section sets forth my best legal judgment as to what the City should be doing in the course of administering its local forest conservation program as a matter of State law. It begins with a Summary, followed by the Background and Analysis that supports the Summary.

Summary

The City is required by the Maryland Forest Conservation Act to have and administer a "local forest conservation program" unless the City "assigns its obligations" under the Act to Anne Arundel County with the concurrence of the County and DNR. The City's program is subject not only to the requirements of the Act but also to the requirements of the regulations adopted by DNR to implement the Act, including COMAR 08.19.02 and COMAR 08.19.03.

As required by the Act, DNR promulgated a Model Forest Conservation Ordinance for local forest conservation programs that met the requirements of the Act, and this Model Ordinance is set forth in COMAR 08.19.03. Although a local government has the latitude under

the Act to amend existing ordinances to conform to the requirements of the Act rather than enact the Model Ordinance, COMAR 08.19.02.02 requires that a local forest conservation program include "the elements of each Article of the Model Forest Conservation Ordinance provided in COMAR 08.19.03 enacted in substantively similar form as . . . [l]ocal law, regulation, or ordinance . . . or [a]mendments to existing local laws, regulations, or ordinances."

In other words, the General Assembly delegated to DNR the authority to establish the criteria that local forest conservation programs must satisfy, and DNR did so by crafting a Model Ordinance. The City, however, did no more than pass an ordinance in 1992 stating that the Maryland Forest Conservation Act "shall apply" to projects in the City, whatever that means.[1]

It is my opinion that what the ordinance means is that the City's program must be construed to incorporate "the substantive provisions of each article [of the Model Ordinance]" as required by COMAR 08.19.03.01. Also, the City is required to have a "technical manual" although it may choose to adopt the State Forest Conservation Technical Manual in lieu of drafting its own technical manual.

The City has not formally adopted the State Technical Manual as the City's technical manual. DNEP, however, has done so informally. Although there is some ambiguity in State law as which provisions of the State Technical Manual are mandatory "standards or minimum requirements" and which are merely advisory, the provisions of the State Technical Manual that govern the "submittal requirements" for (required contents of) a forest stand delineation (FSD) and the required information and standards for the approval of a forest conservation plan (FCP) clearly *are* mandatory and binding upon applicants and the City.

Background and Analysis

The General Assembly enacted the Maryland Forest Conservation Act by Chapter 255 of the 1991 Laws of Maryland. The statute established the State Forest Conservation Program, and also required that each local government with planning and zoning authority establish a local forest conservation program consistent with the intent, requirements, and standards of the Maryland Forest Conservation Act.

State law provides that, in the event a local government fails to implement a local forest conservation program approved by DNR, DNR will assume responsibility for the review of all forest conservation plans in that jurisdiction by applying the State Forest Conservation Program. The fact that DNR will step in if a city or county fails to act does not mean that a local

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[1] Taken at face value, the statement in § 17.09.025B of the City Code that the Maryland Forest Conservation Act shall apply to projects in the City is superfluous; there was no need for the City to "accept" the application of State law. State law applies whether the City likes or acknowledges it or not. Section 17.09.025 apparently was intended to mean that the City will administer a local forest conservation program in conformance with the Act, and that is how I have construed the ordinance.

government may decide to defer to the State's implementation of a forest conservation program in that jurisdiction and allow DNR to take over. A local government with planning and zoning authority is required to enact its *own* local program. 77 *Op. Atty Gen. Md.* 127 (1992).

The City of Annapolis enacted its local program by language codified at § 17.09.025B of the City Code. § 17.09.025B simply states the Maryland Forest Conservation Act "shall apply" to projects in the City. The language of § 17.09.025B was adopted by Ordinance No. O-11-92, and the preamble describes the purpose of the ordinance as "complying with the State of Maryland Forest Conservation Act."

The "bare bones" approach taken by the City Council to the mandate of State law creates a significant problem identified by the City's Forest Conservation Act Working Group in 2013. The problem is that there is no single law or regulation to which reference may be made in order to determine precisely what is required under the City's program. And, if it is difficult to determine what is required under the City's program, then it also is difficult to determine whether the City's program complies with State law.

Stating merely that the Maryland Forest Conservation Act shall apply to projects in the City offers little guidance on the content of the City's program. The Maryland Forest Conservation Act does more than one thing. It establishes the State Forest Conservation Program applicable to certain projects, including those undertaken by the State; requires local governments with planning and zoning authority to establish local forest conservation programs for local projects; and requires DNR to do a number of things, including establishing the criteria that local forest conservation programs must satisfy in order to be approved.

So what exactly does it mean for the City Code to state that the Maryland Forest Conservation Act "shall apply" to projects in the City? Here is what I believe that it must be construed to mean: The local forest conservation program of the City of Annapolis consists of the requirements and standards for forest conservation imposed by State law on a local forest conservation program.

Mr. Savidge states that there is a "myth" within City government that the City is not bound by the provisions of COMAR because the City Code refers only to the Maryland Forest Conservation Act itself, not to the implementing regulations adopted by DNR. Whether or not there is such a myth, I will say this: **The content of a local forest conservation program, including the City's, is dictated by State law, and that State law includes not only statues enacted by the General Assembly but also regulations adopted by a State agency pursuant to a delegation to that agency by the General Assembly of legislative rulemaking authority.**

In the case of the Maryland Forest Conservation Act, § 5-1609(a)(1) of the Natural Resources Article empowers and requires DNR to adopt regulations setting "requirements and standards which establish . . . criteria for local forest conservation programs." The City's program must satisfy those criteria, and it matters not that there is no reference to COMAR in § 17.09.025B of the City Code.

The City's "adoption" of the Forest Conservation Act included the adoption of § 5-1609(a)(1) of the Natural Resources Article delegating the authority to DNR to set the requirements and standards establishing criteria for local forest conservation programs. In light of the preemption of the regulation of forest conservation programs by State law the City lacked the power to adopt parts of the Act but not others, or to adopt the Act but disregard the regulations implementing the Act. Therefore it must be presumed that the City acted consistently with State law and did not intend to disregard the implementing regulations required by the Act.

DNR implemented the duty imposed on it by § 5-1609(a)(1) of the Natural Resources Article through two regulations. COMAR 08.19.02, captioned "State Review and Approval of a Local Program," governs the process of review and approval. COMAR 08.19.02.02 sets forth specific criteria that a local forest conservation program must satisfy, including the requirement that a local forest conservation program must include the "elements" of each Article of the Model Forest Conservation Ordinance provided in COMAR 08.19.03.01 "to be enacted in substantially similar form as . . . local laws, regulations, or ordinances."[2]

COMAR 08.19.03.01 further explains that "a local authority shall demonstrate that the *substantive provisions* of each article [of the Model Ordinance] are incorporated in the local program." (Emphasis added.) Therefore, it is primarily through the Model Ordinance that DNR fulfilled its duty to adopt regulations setting forth "requirements and standards which establish . . . criteria for local forest conservation programs." This is consistent with § 5-1609(a)(1)(ii) of the Natural Resources Article, which requires DNR to provide "a model local government ordinance that meets the requirements of [the Forest Conservation] subtitle."

The City has not enacted the "elements" of the Model Ordinance by "local laws, regulations, or ordinances." **Nevertheless, the only way that I know to answer the questions posed by Mr. Savidge and Alderman Littmann is to conclude that the City adopted the "substantive provisions" of the Model Ordinance by necessary implication from its blanket adoption of the Maryland Forest Conservation Act in § 17.09.025B of the City Code. And, in my opinion, that is the only interpretation under which the City's program can comply with the Maryland Forest Conservation Act.**

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[2] Section 5-1603(c)(2)(i) does not appear to require a local government to adopt the Model Ordinance, indicating that a local government could implement a local forest conservation program through "new and amended local ordinances." A sampling of the laws of other jurisdictions, however, indicates that most jurisdictions have decided to adopt some form of the Model Ordinance. In terms of avoiding confusion and uncertainty there is something to be said for the KISS theory, a theory that suggests that it is better to have the law governing a jurisdiction's forest conservation program be explicit and found in one place.

Standard of Review

In reviewing the stated practices of the City for compliance with State law I did so from the same perspective that a court would apply. In other words, I reviewed the practices to determine only whether they were arbitrary, capricious, or unlawful, not whether they constituted the "best practices" under the governing law.

The actions of an agency of State or local government are entitled to a presumption of correctness. *See State Admin. Bd. of Election Laws v. Billhimer*, 314 Md. 46, 62 (1988). If there is room for interpretation of a requirement of State law, the City's construction of the requirement may be considered improper only if the interpretation is unreasonable. *See Bulluck v. Pelham Wood Apartments*, 283 Md. 505, 513 (1978). The presumption of correctness is not conclusive and will not protect a practice of the City's program that is in violation of an unambiguous requirement or standard imposed by State law.

DNR was required by § 5-1603(a) of the Natural Resources Article to approve the City's program for compliance with State. Theoretically, approval by DNR of the City's program would lend further support to the presumption of correctness enjoyed by the City's program: The contemporaneous interpretation of the requirements of a statute or ordinance by the agency charged with its administration (in this case DNR) generally is accorded substantial deference. *See Fogle v. H & G Restaurant*, 337 Md. 441, 455 (1995). Consequently, DNR's apparent decision that the City's program complied with State law is entitled to substantial deference.[3]

In the situation applicable to the City's program, however, the fact that DNR approved the City's program in 1992 is of limited practical value because the City had placed almost nothing in writing for DNR to review and approve. DNR's approval therefore begs the question of what exactly did DNR approve. It must be presumed that DNR approved the City's program under the *assumption* that the City would properly apply the Maryland Forest Conservation Act *in practice*. Consequently, the fact that DNR "approved" the City's program in 1992 would be irrelevant to the issue of whether a current practice of the City complies with State law. If this sounds circular, it is because it is, and it is a direct consequence of DNR approving a program that was not reduced to writing.

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[3] I am informed that DNR performed the required review and approval of the City's program as enacted by Ordinance No. O-11-92, although I have not seen the documentation. DNR also is required by § 5-1603(e) of the Natural Resources Article of the State to review the City's program at least once every two years for its "level of compliance with the performance standards and required forest conservation." The scope of the biennial review does not appear to be as comprehensive as the initial review, but that is a question that DNR would have to answer.

Specific Questions and Answers

I went through the questions raised by Mr. Savidge and Alderman Littmann, paraphrasing them in some instances. I also edited them to limit them to "programmatic" questions relevant to compliance with State law. I describe the current stated practices of DNEP and, where necessary, offer my opinion as to whether the practices comply with the requirements of State law.[4]

1. Is there a requirement for DNEP to hold a public hearing and comment period on Forest Conservation plan submissions? If not required, is it a good practice?

No. DNEP is not required to hold a public hearing or comment period on FCP submissions. The scheme set forth in State law, as described in the Model Ordinance, is that a preliminary FCP is to be submitted with a preliminary site or subdivision plan, and a final FCP is to be submitted as part of a final site or subdivision plan or, in the absence of a site or subdivision plan, with the application for a grading or sediment control permit. COMAR 08.19.02.02C provides that the review process for a forest stand delineation (FSD) and a FCP are to be *consistent* with the local development review process, not in addition to it, and further provides that the hearing and appeal procedures are to be consistent with the local appellate review process.

The scheme described in the Model Ordinance is compelled by the Maryland Forest Conservation Act itself. Section 5-1608(c) of the Natural Resources Article requires that review of a FCP by a local government be *concurrent* with the review by the local government of the subdivision plan, or the grading or sediment control permit, whichever is submitted first. Nothing in State law expressly compels that a separate hearing of any nature be held prior to approval by a local government of either a preliminary or final FCP.

Mr. Savidge alleges that the City is violating the "State Forest Conservation Technical Manual" by omitting the hearings. I do not agree. First of all, the State Forest Conservation Technical Manual in its entirety is not law that can be "violated," a point made clear in the Manual on page 1-5: "This document is the technical manual for the State Forest Conservation Program *and is informational only*. It is not incorporated by reference into the Natural Resources Article of the Annotated Code of Maryland or the Code of Maryland Regulations (COMAR)." (Emphasis added.) For the law, the Manual refers the reader to the State Code and COMAR.

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[4] The stated practices that I evaluated are the current stated practices. No representation is made about past practices, particularly those before 2012. Mr. Biba is the person most familiar with the practices and he stated it was in 2012 that he undertook a more direct role in the review of projects subject to the Maryland Forest Conservation Act, and cannot vouch with certainty for practices before that time.

Secondly, even as an informational document the State Technical Manual makes clear that the hearing requirements for a FCP to which Mr. Savidge refers apply only when the FCP is being approved by DNR. The State Technical Manual provides guidance to the State *and* to local governments on the preparation of FSDs and FCPs. In the chart on page 1-4 in which the Manual describes these processes it inserts language to make clear that the requirement that there be public notice and an opportunity to request a public hearing regarding a preliminary FCP applies only to "projects under *state* review." (Emphasis added.)

The State Forest Conservation Program administered by DNR and a local forest conservation program reviewed and approved by DNR but administered by a local government are not synonymous, nor do they contain identical procedures. The State Forest Conservation Program, which applies only to projects reviewed directly by DNR, is governed by COMAR 08.19.04. For such projects, COMAR 08.19.04.11 and 08.19.04.12 require DNR to open a comment period and, if requested, hold an informational hearing.

COMAR 8.19.02 governs the review and approval by DNR of a local program and COMAR 8.19.03 sets forth the Model Forest Conservation Ordinance for a local program. Nothing in COMAR 8.19.02 or the Model Ordinance imposes a period for comments or an informational hearing requirement on local governments, and the Model Ordinance must be presumed to meet all of the requirements for a local forest conservation program as required by § 5-1609(a)(1)(ii) of the Natural Resources Article.

Although, as described by Mr. Savidge, there is general language in COMAR 08.19.02 that states that a local program must meet the requirements and standards of "this subtitle" (referring apparently to the entirety of COMAR 8.19) that hardly is sufficient to compel a local government to adopt a procedural requirement specifically imposed elsewhere in COMAR only upon the State. As noted above, Mr. Savidge's interpretation is rebutted not only by the contents of the Model Ordinance but also by the language in the State's own Technical Manual, language which must be construed to be interpretative of the intent of State law.

The answer to whether it is a good practice to have a comment period or hold an information hearing even if not required by State law is a matter of policy to be answered by the City Council in the context of the legislation now before the City Council, as I recommend that any such practice be enacted into law. Based on my experience with local government operations, I do have this comment: That decision should be based on considerations specific to the City of Annapolis.

What may be appropriate for a large county still experiencing a high rate of development may not be appropriate for a smaller municipality that is almost fully-developed and has less forest cover to protect. Another consideration is that making a process more complex may make it slower without necessarily improving the quality of the result.

Stated practice: DNEP posts all submissions and correspondence for projects undergoing review pursuant to the Maryland Forest Conservation Act on the City's website, and

accepts comments from anyone who wishes to comment. DNEP has established "formal" comment periods for FCP submissions for the Crystal Springs project.

Does this stated practice comply with the requirements of State law? Yes. It exceeds the requirements of State law. Consistent with my general recommendation that the City make its law explicit, I recommend that the practices regarding comment periods or information hearings be codified into law rather than established on a project-by-project basis.

2. Must DNEP require the submission of a Preliminary Forest Conservation Plan?

Yes, under specified circumstances. A preliminary PCP must be submitted for projects for which a preliminary subdivision plan or a preliminary site design plan is required under City law. Because State law dictates that review and approval of FCPs is to be concurrent with the local development review process, no preliminary FCP is required when City law does not require a preliminary subdivision plan or preliminary site plan.

Although COMAR 08.19.02.02J states that a local government "may" have a preliminary FCP in addition to a final FCP, the Model Ordinance states that a preliminary FCP *shall* be submitted with the preliminary plan of subdivision or proposed project plan. The State Technical Manual does not distinguish between a "preliminary" and a "final" FCP. Although this leaves some significant doubt as whether a preliminary FCP is required by State law even if a preliminary subdivision plan or preliminary site design plan is required, I believe that the best conclusion is that DNEP is bound by this element of the Model Ordinance requiring a preliminary FCP to accompany a preliminary subdivision plan or preliminary site design plan.

Stated practice: DNEP does not consistently require that a "preliminary" FCP *labelled as such* accompany a preliminary subdivision plan or a preliminary site design plan, with the plans accompanying a preliminary subdivision plan or a preliminary site design plan simply labelled "Forest Conservation Plans." DNEP describes all initial FCP submissions as effectively "preliminary" because they all require revisions before they become final FCPs. As with other planning documents, it is more a process of a FCP evolving from preliminary to final rather than consisting of two discrete documents. Since 2012 the review of FCPs no longer is done at the same time as site design plan review; the FCP must be approved and then incorporated into the site plan review. Also, in recent years applicants have been labelling the initial FCPs **as** preliminary FCPs, presumably on the advice of legal counsel in order to insure full compliance with State law.

DNEP and the Department of Planning and Zoning, however, *do* require that a FCP (regardless of whether labelled "preliminary") accompany a preliminary site design plan for a project subject to the Maryland Forest Conservation Act. As explained by Mr. Miller, a landscape architect by training, any site design plan for a project subject to the Maryland Forest Conservation Act is driven to a large extent by the FSD and FCP, and it is not useful to review a site design plan in the absence of a FCP.

Does this stated practice comply with the requirements of State law? Yes. As described above, the letter of the law appears to require the separate submission and review of a preliminary FCP as described in Article VI [Section 6.2] of the Model Ordinance. DNEP and the Department of Planning Zoning require that an initial FCP accompany an initial (preliminary) site design plan without insisting that it be labelled a Preliminary FCP, and the initial FCP evolves after comment and revision into a final FCP that is incorporated into the final site design plan. In large part this is an issue of semantics rather than substance, and in my opinion the practice is adequate to comply with State law.

I add the following as context: Even if the City's practice as stated was held not to be in complete compliance with State law, the approval of projects that were approved without a preliminary PCP as contemplated by State law submitted would not legally compromise the approval of those projects if the "final" FCP met all requirements of State law. Because a preliminary FCP is subsumed by a final FCP, it is my opinion that any failure in the past to require a preliminary FCP would not form the legal basis for overturning the past approval of a FCP or a site plan or subdivision plan of which the FCP was part.

Therefore, even assuming that a court found that State law requires a preliminary FCP (which is questionable), such a failure undoubtedly would be held to be a procedural mistake cured by submission and approval of the final FCP. No administrative due process issues are implicated because, like a FSD, a preliminary FCP simply is a step in the process and is not a final and appealable administrative decision.[5]

There are matters of substance, and then there are matters of form. The substance is that an accurate FSD must be completed and approved as the foundation for a FCP that complies with the requirements of State law. The approved FCP, along with other relevant plans, must then be incorporated into final site design review. The site design plan must be approved before a shovel touches ground, a tree is removed, or an improvement is constructed. Although I do not believe that any non-compliance with the requirement for a preliminary FCP jeopardizes past approvals, I do recommend that in future projects DNEP require a preliminary FCP, labelled as such, to accompany any preliminary subdivision plan or a preliminary site design plan submitted to the Department of Planning and Zoning, at least until the City Council modifies this provision of the Model Ordinance in an ordinance of its own approved by DNR.

3. Must DNEP ensure an inventory of the natural resources (FSD) is completed prior to approving a Forest Conservation Plan? Any exceptions?

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[5] In the absence of a specific requirement for a preliminary FCP in either the statute or in COMAR 08.19.02.02J it is likely that that DNR would approve a future City ordinance that did not require a preliminary FCP. Staging the review process by requiring preliminary plans such as a preliminary FCP generally is done to make the review process more orderly and efficient, and is not intended to have an effect on the substance of the regulatory outcome. In my opinion it should be left up to the judgment of a local government as to what works best within the local development review process.

Yes. The FSD must be completed and approved by DNEP prior to approval of the FCP. I am not sure whether this is what Alderman Littmann meant by "exceptions," but State law does allow the use of a simplified FSD or substitute plan (concept plan, sediment control plan, etc.) under certain circumstances. **Also, as described later, this does not necessary mean that a FSD and a FCP may not be submitted at the same time.**

Stated practice: DNEP concurs, and described a practice that complies with the requirements of State law. Mr. van Sutphen stated that he typically performs a field inspection to verify the accuracy of a FSD, and does not do so only if he is able to confirm the basic information from other sources. No field inspection by a local authority is required by State law in order to verify a FSD prepared by a licensed forester, licensed landscape architect, or a qualified professional who meets the qualifications stated in COMAR 08.19.06.01A, so this particular practice exceeds the minimum requirements of State law.

4. Must DNEP require all FCA jurisdiction developments to submit justifications for clearing priority forests and wetlands?

Yes. Under State law the burden is on the applicant to "show cause" (my phrase) why priority forests and other "sensitive areas" as enumerated in State law cannot be left in undisturbed conditions.

Under § 5-1607(c)(2) of the Natural Resources Article an applicant must leave trees, shrubs, and plants located in sensitive areas including 100-year floodplains, intermittent and perennial streams and their buffers, coastal bays and their buffers, steep slopes, and critical habitats in an undisturbed condition "unless the applicant has demonstrated, to the satisfaction of the . . . local authority, that reasonable efforts have been made to protect them and the [forest conservation] plan cannot reasonably be altered." Section 5-1607(c)(2) imposes the same burden on an applicant for a "contiguous forest that connects the largest undeveloped or most vegetated tracts of land within and adjacent to the site."

The Model Ordinance [Section 6.1] requires an applicant to demonstrate why priority forests cannot be left in an undisturbed condition. Elsewhere [Section 7.2] it clarifies that the "sensitive areas" that are subject to what I describe as a "show cause" requirement include non-tidal wetlands having trees, shrubs, or plants located in them. The burden placed on the applicant under this requirement is one of the key provisions of the Maryland Forest Conservation Act.

I will restate the standard as I believe it must practically be applied: The applicant must demonstrate to the satisfaction of DNEP why it would place an unreasonable burden on the

applicant to protect a priority forest or other sensitive areas from disturbance. The rub is that that State law does not define what an unreasonable burden is.[6]

Although questions as to whether this "show cause" requirement has been properly applied to specific projects is beyond the scope of this report (and my expertise), the following is worth noting: Determining whether an applicant has met its burden of demonstrating that "reasonable efforts" have been made to protect priority forests and other sensitive areas and that a FCP cannot "reasonably be altered" to prevent disturbance is a question informed by expert opinion and involving the exercise of a considerable degree of judgment.

Stated practice: DNEP concurs and described a practice that complies with the requirements of State law. DNEP acknowledged that the "reasonable efforts" standard is somewhat "subjective," and requires the exercise of judgment. A consideration that DNEP mentioned is the health of a priority forest. For example, if a forest is extensively storm or insect-damaged DNEP may not give us much emphasis to preventing disturbance as it would to a healthy forest.

5. Must the City make clear what the application, review, appeals processes are for FCA applications? If so, has it done that? Where? Is it part of the City Code?

Yes. The City must make these processes sufficiently clear so that the public is placed on reasonable notice of how these processes work, and so that it may be objectively determined whether there has been compliance with the processes. Has that been done? In my opinion, the City has satisfied this standard, but only by the smallest of margins and not by language that is part of the City Code. In any event, the clarity of these processes is something that could and should be improved to assure compliance with State law, and the processes should be set forth in the City Code rather than in explanatory documents.

Under § 5-1603(c)(2)(i) of the Natural Resources Article the City's program must include provisions governing "exemptions" and specifying "the review, approval and appeal processes." COMAR 08.19.02.02 indicates that these provisions are to be enacted as "local laws, regulations, or ordinances." COMAR 08.19.02.02C states that the hearing and appeal procedures for FCPs are to be "consistent with the local appellate review procedures."

As to the application and review processes, I note that the guidance published by DNEP ("Tree Regulation in the City of Annapolis") simply refers applicants to the DNR website for

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[6] It is worth reiterating the general scheme of State law: The minimum amount of forest that must exist on a development site after development is completed is fixed by State law. State law, however, does *not* categorically prohibit the clearing of priority forests, although clearing of existing forests may trigger afforestation or reforestation requirements to compensate for the clearing based on specific thresholds described in the State Technical Manual. State law delegates to local authorities the determination of whether an applicant has made "reasonable efforts" in its proposed development plan to avoid the disturbance of priority forests.

information on the Maryland Forest Conservation Act. The DNR website on the Maryland Forest Conservation Act includes references both the Act itself as well as to the relevant provisions of COMAR. Although the DNEP guidance states that "all required FCA forms need to be submitted" there is no further description of the review process. The DNEP guidance also refers the applicant to the link to the State Technical Manual.

There is a flow chart captioned "Current Forest Conservation Act Review Process" published on DNEP's website that provides an overview of the process. The flow chart is not a local law, regulation, or ordinance, but it does provide guidance to the applicant and to the public that tracks the general provisions of State law.

As to the appellate process, the City's incorporation of the Maryland Forest Conservation Act is located in Chapter 17.09 (Trees in Development Areas) of the City Code. Therefore it is reasonably clear in the law that any appeals from the approval or disapproval of FCP ultimately would go to the Building Board of Appeals under § 17.09.140E of the City Code, a process reflected in the flow chart.[7]

Accepting as accurate the description of the "Current Process for Planned Developments" contained in April 2013 report of the Forest Conservation Act Working Group, the approval or denial of an FCP may be appealed to the Building Board of Appeals at the same time that judicial review is sought on the approval or denial of a planned development by the Planning Commission under § 21.24.130 of the City Code. I concur with the Working Group that such a parallel process is cumbersome but it does not violate State law.[8]

I have a separate concern with how the City handles variances from the requirements and standards of the City's program. COMAR 08.19.02.02H contains specific requirements regarding variances, and Section 14.1 of the Model Ordinance sets forth the strict standards to be applied by a local government if a variance is sought from the provisions of its local forest conservation program. A potential source of confusion is that § 17.09.130 of the City Code purports to govern any request to "waive or modify the minimum requirements set forth in this [the Trees in Development Areas] chapter."

If the City applies the "waiver or modification" provisions under § 17.09.130 of the City Code to process requests for variances from the "minimum requirements" of the City's local forest conservation program, however, then DNEP must be sure to adhere to the

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[7] Although it appears reasonably clear to me it apparently was not clear to everyone. Prior to a City legal opinion in 2012 administrative appeals of a FCP were going directly to the City's Planning Commission. Suffice it to say that complete clarity will be achieved only by explicit language in City law.

[8] As a matter of State law, the City is *not* compelled to provide an appeal process for the approval or denial of a FCP that is separate and distinct from the appeal process attendant to the approval or denial of the plan or permit of which the FCP is a component plan, including a planned development. That is a procedural matter to be determined by local law.

requirements of COMAR 08.19.02.02H and Section 14.1 of the Model Ordinance rather than the less stringent standards set forth in § 17.09.130 of the City Code. The need to read modifications into the plain language of an ordinance because of superseding requirements of State law promotes confusion rather than clarity.

Stated practice: DNEP interprets the language of § 17-09.130B of the City Code as precluding use of the "waiver or modification" provisions for variances from the requirements and standards of the City's program, and applies the standards in State law that require a showing of "unwarranted hardship" by the applicant. Variance requests must be in writing, and the only variance that DNEP will consider is variance for protection of a specimen tree.

Does this stated practice comply with the requirements of State law? Yes.

6. Must the City adopt a forest conservation technical manual? If so, has it done so?

Yes, the City must have a technical manual. In my opinion, the informal adoption by the City of the State Technical Manual is sufficient to meet this requirement.

COMAR 08.19.02.02 requires that a local forest conservation program include a technical manual. You advised me that the City did not promulgate its own technical manual, and has informally adopted the relevant provisions of the "State Forest Conservation Technical Manual" (3rd ed. 1997) as the technical manual for the City. As noted above, guidance by DNEP to applicants gives the link to the State Technical Manual.

COMAR 08.19.02.02B states that the technical manual of a local government may be "modeled" after the State's, and DNR apparently has approved the City's practice of using the State manual since first approving the City's program in 1992. COMAR 08.10.02.03 specifically contemplates that a "local authority" may adopt the State Technical Manual rather than draft its own manual. The informal adoption of the State's manual may be another part of the "bare bones" approach but it does not render the City's program non-compliant. The City is not unique in using the State Technical Manual.

In light of the observation in my first answer that the State Technical Manual identifies itself only as an "informational" document, I will add that I believe that there are specific provisions of the State Technical Manual that must be construed by DNET to be mandatory because of language in § 5-1603(a)(2)(ii) of the Natural Resources Article and COMAR 08.19.02.02B. **Applying that language, the provisions of the State Technical Manual that are mandatory are those that set forth the "submittal requirements for forest stand delineations, required information for the approval of a forest conservation plan, specific forest conservation criteria and protection techniques." Those provisions must be construed to include the Forest Conservation Worksheet that sets forth the formulas for determining how many acres of forest must be present on a site after development of the site has been completed. The intent of State law is very clear that local governments have *not* been left to their own devices as to the requirements and standards for FSDs and FRPs.**

Stated practice: DNEP refers applicants to the State Technical Manual for instruction on how to prepare and submit a FSD and a FCP, and uses the State Technical Manual to review FSDs and FCPs. The primary tools include the Forest Conservation Worksheet in the State Technical Manual, and DNEP has prepared its own worksheet that contains the same information. DNEP also relies on the FSD checklists and the Submission of FCP Elements checklist that appear in the State Technical Manual during its review.

Does this stated practice comply with the requirements of State law? Yes. Although the informal adoption of the State Technical Manual as the City's technical manual is less than ideal, and although there has been some historical back and forth as to whether the State Technical Manual "has the force and effect of law," the current stated practice of treating the provisions of the State Technical Manual that govern the submittal requirements for and the standards for approving FSDs and FCPs as mandatory complies with State law.

7. May the DNEP allow an applicant to file a FSD and a FCP in a single submittal?

Yes, under certain circumstances, although this answer is rendered uncertain by the lack of detail in the City's program. COMAR 08.19.02.02K specifically allows a local government to allow an applicant to file a FSD and a FCP in a single submittal if the procedure is limited to "minor development projects" and the procedure fills all of the other procedural and substantive requirements applicable to FSDs and FCPs. A "minor development project" is defined by COMAR 08.19.01.03 as a project that is: On less than five acres of land containing not more than four lots per acre; a minor subdivision as defined in the approved local forest conservation program; or defined as a "minor development project" in the approved local forest conservation program as "substantively similar" to a project consisting of less than five acres of land containing not more than four lots per acre.

Therefore, in the absence of any language in the City's program defining "minor subdivision" or what types of projects are "substantially similar" for purposes of this procedure, it would appear to be a reasonable construction of the requirements of State law for DNEP to allow consolidation of a FSD and a FCP into a single submittal for a project of less than five acres of land containing not more than four lots per acre and even to a "minor subdivision" (my term, not a term used in the City Code) exempted from the requirements of Chapter 20.08 of the City Code under § 20.08.030A of the City Code. In reaching this conclusion, I rely not only on the presumption of correctness to which the City's actions are entitled, but also on the fact that DNR approved the City's program in the context of other City laws governing the development process.

I also reviewed this question in the context described in an earlier answer, which is the principle that the sequencing of reviews does not necessarily go to substance of those reviews. **As applied to the procedure expressly permitted under COMAR 08.19.02.02K it is worth emphasizing that consolidating the submittals does not relieve the applicant from complying with all of the requirements and standards applicable separately to the FSD and the FCP, nor**

does it relieve DNET from approving the FSD *before* it approves the FCP. Allowing the FSD and the FCP to be submitted at the same time is intended to save some time, not to relieve the applicant from any other procedural or substantive requirement applicable to either the FSD or the FCP.

Stated practice: DNEP concurs and described a practice that complies with the requirements of State law, and stated that in only one recent project, Rocky Gorge, was a FSD and FCP submitted at the same time because of circumstances that were unique to that project and not likely to recur.

Does this stated practice comply with the requirements of State law? Yes, with the caveat that I have not reviewed the Rocky Gorge project in order to determine whether submitting the FSD at the same time as the FCP complied with the requirements of State law.

8. Does the alleged failure by DNR to require that the City provide all of the documents set forth in the Forest Conservation Act and the implementing regulations when DNR initially approved the City's program have any legal effect on the current compliance of the City's program with State law?

No. Mr. Savidge alleges that DNR negligently approved the City's program because the City did not include with its application certain documents required by State law, including a policy document, a technical manual, and an explanation of how the local code provisions are consistent with the Maryland Forest Conservation Act, and a certification of compliance with the Maryland Forest Conservation Act signed by the City Attorney. First of all, assuming that Mr. Savidge is correct that these documents no longer are available does not mean that they were not available in 1992 or 1993. The difficulty in recreating events that happened decades ago is the reason that there are statutes of limitation and repose in the law.

In my opinion, DNR should not have approved the City's program in the absence of anything enacted into law by the City other than Ordinance No. O-11-92. Even assuming, however, that DNR committed procedural error when it initially approved the City's program in 1992, it is also my opinion that far too much time has passed for that procedural error to have any legal bearing on project approvals in the present and in the future.

Of the documents mentioned by Mr. Savidge, only two might be described as having a potential bearing on the question of whether the City's program *currently* is in compliance with State law, and as something other than non-substantive explanatory material intended to aid DNR in reviewing the application. The matter of a technical manual has been answered.

The second matter is the "policy document." As noted above, DNR must be presumed to have reviewed and approved the City's program in the context and with knowledge of the City's other laws and the City had a robust program for conserving trees well before the General Assembly enacted the Maryland Forest Conservation Act. The City *does* have a policy document for forest conservation and it is codified at §§ 17.09.010 and 17.09.020 of the City

Code. Given the legal significance (or lack thereof) attached to such general declarations of policy, it is my opinion that §§ 17.09.010 and 17.09.020 are adequate to satisfy the requirement for a policy document under § 5-1603(c)(2) of the Natural Resources Article.

Recommendations for Further Action

1. Regardless of other action undertaken, I believe that the only long-term solution to the questions raised about the City's local forest conservation program is the one recommended in the 2013 report by the City's Forest Conservation Working Group: A reasonably comprehensive ordinance in the City Code setting forth the procedures and substantive requirements that make up the City's local forest conservation program. I am aware that the City Council is considering such an ordinance, Ordinance No. O-32-14.

2. Determining that the stated practices of the City satisfy the requirements of State law does not mean that the actual practices conform to the stated practices or that there are not violations specific to one or more individual development projects as alleged by Mr. Savidge. It is up to the City to decide if investigation into the allegations by Mr. Savidge specific to certain development projects is warranted. Although I believe that Mr. Savidge misinterpreted certain provisions of State law, that conclusion has no bearing on the accuracy of his other allegations.

A limitation on the review of what Mr. Savidge refers to as "development violations" is that only some of them can be confirmed without getting into matters of opinion. For example, he alleges that for the Rocky Gorge project: "Forest cleared. DNEP approved FCP without required justification for clearing priority forests, did not require preliminary FCP, and permitted the FSD and FCP to be submitted at the same time." As noted above, DNEP did not necessarily violate State law by not requiring a preliminary FCP or by allowing the FSD and FCP to be submitted at the same time. DNEP would have violated State law, however, if it approved the FCP without requiring justification for the disturbance of a priority forest. That allegation could be confirmed by reviewing the file.

There are other alleged development violations, however, in which Mr. Savidge challenges DNEP's professional judgment: For example, he alleges that DNEP "did not ensure that the priority areas were *sufficiently* protected" (Reserve at Quiet Waters) and approved a FSD "when it did not *properly* identify the priority areas" (Crystal Spring). (Emphasis added.) It would take a qualified planning professional to review DNEP's judgments in such instances. In other words, while some violations could be confirmed or denied simply by reviewing a file, others would require expert analysis, which is a much more extensive process.

3. One of my recommendations at this point in my review arises from an issue identified by Alderman Littman, and reflected in the allegation by Mr. Savidge regarding the Reserve at Quiet Waters, now known as Parkside Preserve. The key decision for every project that is subject to the Maryland Forest Conservation Act is whether the applicant "has demonstrated that to the satisfaction of the . . . local authority, that reasonable efforts have been made to protect [priority forests and other sensitive areas] and the [FCP] cannot reasonably be altered"

to prevent disturbance. My recommendation is that the City Council should at least consider clarifying the "reasonable efforts" standard.[9]

Mr. Savidge expanded upon his allegation requiring Parkside Preserve in a recent guest column in *The Capital*. The column illustrates the fundamental point: It is a *fact* that not all of the priority forest and other sensitive areas were protected from disturbance, and it is the *law* that not all of the priority forest and other sensitive areas had to be protected from disturbance. It is, however, an *opinion* by Mr. Savidge that the efforts made to prevent further disturbance of the priority forest and other sensitive areas were not "reasonable" as required by the law. I do not minimize Mr. Savidge's concerns with the procedures, but the central controversy appears to be over the *substance* of DNEP's decisions.

These decisions become all the more important, and the focus of intense scrutiny, because the decisions of a local authority approving a FCP under this type of standard rarely will be overturned by a court upon judicial review, despite the fact that even planning professionals may have intense disagreements over what constitutes "reasonable" efforts. The City, acting through DNEP and through the Building Board of Appeals in the event of an administrative appeal, is given broad latitude to determine what constitutes reasonable efforts, and decisions on that issue may be overturned upon judicial review only if arbitrary or unreasonable; in other words, only if the decision by the City on what constitutes reasonable is unreasonable. Long story short, a party dissatisfied with the decision by the City has a high bar to get over in order to have the City's decision overturned on judicial review.

One result of State law and the absence of criteria in City law for determining whether "reasonable efforts" have been made in a development plan to protect priority forests from disturbance is this: **There is a lot of room between what DNEP *may* do and what it *must* do in terms of requiring an applicant to relocate proposed improvements in order to avoid disturbance of priority forests.** That broad area of discretion appears to be at the heart of the debate over the FCP for the Crystal Spring project.

At one end of the spectrum, an applicant's site plan locating the proposed improvements is not sacrosanct; if it were, the power given to local authorities to protect priority forests could be rendered meaningless by an applicant. At the other end of the spectrum, a requirement that an applicant redesign or reduce the proposed improvements on a site might be found by a court to be so draconian that it is unreasonable. Absent any hard and

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[9] One document submitted to me described the "reasonable efforts" standard as a "strict" standard. That is *not* an accurate description. For a discussion by the Maryland Court of Special Appeals of the "reasonable efforts" standard in another context, see *In re Shirley B.*, 191 Md. App. 678, 710-711 (2010). The Court described the standard as "amorphous" and as providing no "bright line rule," meaning that each case had to be decided on its own unique circumstances. In that particular context it was the Court of Appeals, rather than the legislature, that ultimately provided "guideposts" (criteria) to be considered in deciding whether the standard had been satisfied. See *In re Shirley B.*, 419 Md. 1, 25-27 (2011).

fast criteria to guide the decision there is a lot of distance between one end of the spectrum and the other.[10]

Under my Findings and Conclusions I commented that I saw little to be gained by employing qualified planning experts to review past decisions by DNEP on whether FCPs included reasonable efforts to protect priority forests and other sensitive areas. Given the breadth of discretion under the standard, my experience tells me that for the same project the City could find one expert who concluded that DNEP was too aggressive, one who concluded that DNEP was not aggressive enough, and a third who concluded that DNEP got it just right.

Because the City may deviate from the Model Ordinance in order to make its local forest conservation program more stringent than State law requires, the City could choose by ordinance to add criteria to be considered by DNEP when deciding whether "reasonable efforts" have been made to protect priority forests and other sensitive areas, even if this has the effect of making the standard stricter on the applicant. I am not suggesting that the City Council will ever be able to remove all controversy from the key decision under the Maryland Forest Conservation Act, nor am I stating that the City Council "must" clarify the standard: There is nothing inherently wrong with leaving the standard to DNEP for application on a case-by-case basis and, in fact, the City Council properly could decide that is the best and most reasonable approach.

I am stating that, given the history of this issue, it seems inevitable that DNEP will continue to be subject to criticism from one side or the other over its attempts to apply the "reasonable efforts" standard in FCP approvals under current law. It is a standard that lends itself to widely divergent conclusions, both lay and professional. I recommend that the City Council make an affirmative decision to either clarify the reasonable efforts standard by requiring the consideration of specified criteria, or leave the standard as it is and recognize that by doing so it is leaving a considerable amount of discretion in the hands of DNEP.

Thank you and I will make myself available to you and to other City officials to discuss.

Sincerely,

David A. Plymyer

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[10] Although I believe that the discretion conferred on DNEP be State law to demand "reasonable efforts" to avoid disturbance is broad, the outer limits of that discretion will not be known for sure until there is a reported decision by a Maryland appellate court defining the limits. The standard as established by the General Assembly has all of the earmarks of a compromise, with the General Assembly leaving the standard to be fleshed out by local authorities or by the courts.