

Memorandum

To: City Council and general public
From: Jared Littmann, Alderman, Ward 5, City of Annapolis
Date: September 21, 2016
Re: O-22-16 and related amendments, also known as the Forest Conservation Act

The Forest Conservation Act (O-22-16) is the culmination of months of discussion and debate between an informal workgroup of City Council members Joe Budge, Ross Arnett, Sheila Finlayson, and me with significant assistance from City staff including Maria Broadbent, Gary Elson, Mike Leahy, Frank Biba, and with regular guidance (and sometimes restrictions) from the Maryland Department of Natural Resources (DNR). In addition, the City's Planning Commission, Annapolis Environmental Commission, the Chesapeake Bay Foundation and many members of the public who identify as conservationists or developers commented and testified. All of the input was valuable and considered by the workgroup. The workgroup members introduced the legislation as co-sponsors, and the mayor joined as a co-sponsor.

After Council introduction and a public hearing, this legislation was assigned for consideration by 3 Council committees: Environmental Matters, Rules and City Government, and Economic Matters. When the three committees met to review and vote on this legislation, all seven voting Council members voted unanimously in support of the underlying Ordinance, the Working Group amendments (amendments Alderpersons Arnett, Budge, Finlayson and I crafted to address DNR concerns), and the Joint Committee amendments (crafted to address concerns raised during the public hearing process). Alderman Kirby was present during the discussion, though he was not a voting member of any of the participating committees.

This legislation, O-22-16 as amended, would replace the status quo, or the adopted Maryland Forest Conservation Act, which does not exist in City Code. In 1991, the State passed the Maryland Forest Conservation Act (the State Act). The Act allowed local jurisdictions to establish their own versions of a Forest Conservation Act (FCA), and the State FCA also provided a "Model Act", which essentially spells out what DNR would look for in a local jurisdiction's FCA. In 1992, the City adopted the State Act. The City did not adopt the Model Act. The State Act itself is vague on many issues for local jurisdictions because it left to the local jurisdiction the right to fine-tune for its own needs. This vagueness has led to unpredictability, a waste of time and treasury as uncertain appeals have been filed, and minimum environmental standards enforced.

Significant Improvements Over the Status Quo or Model Act

1. Definition of "Contiguous Forest". The Ordinance provides protections for Contiguous Forests. The Model Act defines Contiguous Forests as 100 or more acres. This Ordinance reduces the minimum to 20 or more acres.
2. Adds Special Exceptions over 40,000 sq. ft. to "Regulated Activity".
3. Reduces from 30" to 24" the tree diameter of trees considered for protection.

4. Adds protection for steep slopes and their buffers up to 100' (instead of 50' and no buffers). Similarly increases to up to 100' rather than 50' the protection for stream buffers.
5. Changes from 30 cents to 10 dollars the noncompliance fee (per square foot).
6. Adds posting and notice requirements on land and online (for public transparency).
7. Adds a limit of 5 years to the validity of a Forest Stand Delineation (FSD) and Forest Conservation Plan (FCP).
8. Creates a disincentive for applicants to submit incomplete or incorrect FSDs. Currently the applicant submits an FSD over and over until correct. Under the new Ordinance, if the applicant submits 2 incomplete or incorrect FSDs, then the department will engage an independent contractor at the applicant's cost (similar to the traffic study model).
9. Clarifies that a final FCP is appealable as part of the appeal of a final administrative decision, Planning Commission Decision, or Board of Appeals Decision.
10. Creates a presumption that Priority Retention Areas shall be retained.
11. Increases from 2 years to 5 years the maintenance agreement term for areas of reforestation.
12. Adds a requirement for the department to hold a public meeting where the applicant presents their plan and the general public participates. This requirement is meant to facilitate a sharing of ideas and concerns, and to generally address issues in a non-litigious, more effective manner.
13. Payment instead of reforestation and forest mitigation bank. These programs are often not successful because they are less expensive than the required performance. Therefore, this Ordinance requires a fee and banking sufficient to account for land acquisition costs, ongoing maintenance costs, and overhead.

Issues Addressed in Proposed Amendments

1. The Ordinance defines "Unwarranted Hardship" and permits variances from the requirements of FCA in a less restrictive way than O-32-14. This was the subject of testimony during the public hearing with the argument that the definition was not restrictive enough. During committee review, the Council committees (made up of all the Alderpersons except Alderman Kirby) unanimously agreed to new language setting the standard to be met by a developer seeking variance approval. The new language is borrowed from existing state law and has the benefit of interpretation from state courts.
2. The Ordinance as written refers to DNEP as the responsible department. Now that the City has reorganized and eliminated that department, an amendment is needed to change the references to the Dept. of Planning and Zoning. This is addressed in one of the proposed amendments.

3. The Forest Conservation Technical Manual is a “how-to” manual that the City is responsible for developing and it must be consistent with the Ordinance. The Planning Commission and others suggests adding some legislative oversight by the Council for revisions of this manual. The joint committees agreed to new language that requires the Planning Commission to be informed of changes to the manual, but not approval authority.

Remaining Issues

1. Rights of appeal. As conservationists have challenged FCA decisions made by City officials, they have sought to identify an additional right of appeal. This right is not codified anywhere, and remains in dispute whether it exists. To be clear, there is no question that FCA decisions can be appealed by aggrieved persons. The question is whether FCA decisions can be challenged in the silo of the FCA process, or as part of the decision-making process of the underlying plan for development. With guidance from DNR, the staff and working group (Alderpersons Budge, Arnett, Finlayson and I) came to the conclusion that the best result is for appeals of FCA decisions to be considered at the same time as the underlying Site Plan or other development application. I think we can continue to work on improving the appeal process for all appeals, not just those to the FCA, as part of separate and additional legislation.

2. No Net Loss. This concept refers to the fact that the FCA will allow some removal of forest acreage, but would require the developer to offset that loss with newly planted acreage. The previous FCA version, O-32-14, added No Net Loss (NNL). DNR, the state agency that reports to Governor Hogan and is responsible for approving an FCA, has made clear that it would not approve an FCA that contained NNL (or the similar theory of increases to conservation thresholds). However, the Attorney General’s Office (headed by Attorney General Frosh) issued an opinion that NNL is permissible in an FCA. I continue to support NNL or increases to conservation thresholds. The working group of 4 council members did not reach a consensus on this point, so Alderman Arnett and I proposed adding NNL via an amendment to the Ordinance. We are concerned, however, that if the City adds NNL language to the proposed City FCA, DNR will reject it and leave the entire ordinance in limbo until DNR and the AG and the City resolve their differences. In order to get an FCA implemented and applicable, we now think the better path is to pass the FCA without NNL, and then we will introduce subsequent legislation with NNL to continue to fight for this important change.

3. The Ordinance adds a requirement for the applicant to include a statement of how the project will impact the City’s tree canopy goals (currently a non-binding goal of 50%). Some people have suggested that this requirement should be a requirement for working towards that goal. I agree with this premise as indicated by my explanation of No Net Loss. However, as described in the same paragraph, DNR is hostile to that goal. Therefore, this is something that may be addressed in the No Net Loss legislation that will follow.