
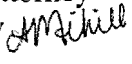


Committee members may be asked to retain this packet for future reference.

MEMORANDUM

TO: Transportation, Infrastructure, Energy & Environment Committee

FROM:  Michael Faden, Senior Legislative Attorney
Amanda Mihill, Legislative Attorney 

SUBJECT: **Worksession 2:** Bill 35-12, Trees – Tree Canopy Conservation

Bill 35-12, Trees – Tree Canopy Conservation, sponsored by the Council President at the request of the County Executive, was introduced on November 27, 2012. A public hearing was held on January 17, 2013, along with Bill 41-12 (see selected testimony, ©29-54). The first Transportation, Infrastructure, Energy and Environment Committee worksession was held on January 28.

Bill 35-12 would:

- establish procedures, standards, and requirements to minimize the loss and disturbance of tree canopy as a result of development;
- provide for mitigation when tree canopy is lost or disturbed;
- establish a fund for tree canopy conservation projects, including plantings of individual trees, groups of trees, or forests, on private and public property; and
- generally revise County law regarding tree canopy conservation.

At the first worksession Executive branch staff presented an overview of Bill 35-12 and the issues it raises, and answered Committee members' questions. (See Executive staff presentation, ©63-96.) The Committee did not take any further action on this Bill at that worksession.

At this worksession Executive branch staff expect to brief the Committee further on discussions they have had with representatives of the Planning Board and various stakeholders regarding the following issues:

- 1) To what extent should the Parks Department be excluded from the requirements of this Bill? How should it apply to the Planning Board's own property?
- 2) How much (if any) credit should be allowed for onsite tree protection activities? How much (if any) credit should be allowed for onsite tree planting?
- 3) What should the amount of the fee be? Council staff asked Executive branch staff to provide specific examples of the fee that would apply in typical situations.

When this packet went to print, Council staff had not received any further information from Executive branch staff on these issues or the progress of negotiations with stakeholders. We did receive an opinion from the County Attorney (see ©97-101) concluding that, with certain clarifying amendments, the proposed fee need not be treated or enacted as an excise tax.

This packet contains:	<u>Circle #</u>
Bill 35-12	1
Legislative Request Report	19
Memo from County Executive	20
Fiscal and Economic Impact Statement	22
Selected testimony and correspondence	29
Executive staff presentation	63
County Attorney opinion	97

F:\LAW\BILLS\1235 Tree Canopy Conservation Program\T&E Memo 2.Doc

Bill No. 35-12
Concerning: Trees - Tree Canopy
Conservation
Revised: 10/25/2012 Draft No. 1
Introduced: November 27, 2012
Expires: May 27, 2014
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

By: Council President at the Request of the County Executive

AN ACT to:

- (1) save, maintain, and establish tree canopy for the benefit of County residents and future generations;
- (2) maximize tree canopy retention and establishment;
- (3) establish procedures, standards, and requirements to minimize the loss and disturbance of tree canopy as a result of development;
- (4) provide for mitigation when tree canopy is lost or disturbed;
- (5) establish a fund for tree canopy conservation projects, including plantings of individual trees, groups of trees, or forests, on private and public property; and
- (6) generally revise County law regarding tree canopy conservation.

By adding

Montgomery County Code

Chapter 55, Tree Canopy Conservation

Sections 55-1, 55-2, 55-3, 55-4, 55-5, 55-6, 55-7, 55-8, 55-9, 55-10, 55-11, 55-12, 55-13 and 55-14.

Boldface

Underlining

[Single boldface brackets]

Double underlining

[[Double boldface brackets]]

* * *

Heading or defined term.

Added to existing law by original bill.

Deleted from existing law by original bill.

Added by amendment.

Deleted from existing law or the bill by amendment.

Existing law unaffected by bill.

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec. 1. Chapter 55 is added as follows:**

2 **Article 1. Purpose and General Provisions.**

3 **55-1. Short title.**

4 This Chapter may be cited as the Montgomery County Tree Canopy
5 Conservation Law.

6 **55-2. Findings and purpose.**

7 (a) Findings. The County Council finds that trees and tree canopy
8 constitute important natural resources. Trees filter groundwater,
9 reduce surface runoff, help alleviate flooding, and supply necessary
10 habitat for wildlife. They cleanse the air, offset the heat island effects
11 of urban development, and reduce energy needs. They improve the
12 quality of life in communities by providing for recreation,
13 compatibility between different land uses, and aesthetic appeal. The
14 Council finds that tree and tree canopy loss as a result of development
15 and other land disturbing activities is a serious problem in the County.

16 (b) Purpose. The purposes of this Chapter are to:

- 17 (1) save, maintain, and establish tree canopy for the benefit of
18 County residents and future generations;
19 (2) maximize tree canopy retention and establishment;
20 (3) establish procedures, standards, and requirements to minimize
21 the loss and disturbance of tree canopy as a result of
22 development;
23 (4) provide for mitigation when tree canopy is lost or disturbed;
24 and

- (5) establish a fund for tree canopy conservation projects, including plantings of individual trees, groups of trees, or forests, on private and public property.

55-3. Definitions.

In this Chapter, the following terms have the meanings indicated:

Critical Root Zone means the minimum area beneath a tree. The critical root zone is typically represented by a concentric circle centering on the tree trunk with a radius equal in feet to 1.5 times the number of inches of the trunk diameter.

Development plan means a plan or an amendment to a plan approved under Division 59-D-1 of Chapter 59.

Director of Environmental Protection means the Director of the Department of Environmental Protection or the Director's designee.

Director of Permitting Services means the Director of the Department of Permitting Services or the Director's designee.

Forest conservation plan means a plan approved under Chapter 22A.

Forest stand delineation means the collection and presentation of data on the existing vegetation on a site proposed for development or land disturbing activities.

Land disturbing activity means any earth movement or land change which may result in soil erosion from water or wind or the movement of sediment into County waters or onto County lands, including tilling, clearing, grading, excavating, stripping, stockpiling, filling, and related activities, and covering land with an impermeable material.

Limits of disturbance means a clearly designated area in which land disturbance is planned to occur.

Limits of tree canopy disturbance means all areas within the limits of disturbance where tree canopy or forest exists.

Lot means a tract of land, the boundaries of which have been established by subdivision of a larger parcel, and which will not be the subject of further subdivision, as defined by Section 50-1, without an approved forest stand delineation and forest conservation plan.

Mandatory referral means the required review by the Planning Board of projects or activities to be undertaken by government agencies or private and public utilities under Section 20-302 of the Land Use Article of the Maryland Code.

Natural resources inventory means a collection and presentation of data on the existing natural and environmental information on a site and the surrounding area proposed for development and land disturbing activities.

Person means:

- (a) To the extent allowed by law, any agency or instrument of the federal government, the state, any county, municipality, or other political subdivision of the state, or any of their units;
- (b) An individual, receiver, trustee, guardian, executor, administrator, fiduciary, or representative of any kind;
- (c) Any partnership, firm, common ownership community or other homeowners' association, public or private corporation, or any of their affiliates or subsidiaries; or
- (d) Any other entity.

Planning Board means the Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission, or the Planning Board's designee.

Planning Director means the Director of the Montgomery County Planning Department or the Director's designee.

Preliminary plan of subdivision means a plan for a proposed subdivision or resubdivision prepared and submitted for approval by the Planning Board under Chapter 50 before preparation of a subdivision plat.

Project plan means a plan or an amendment to a plan approved under Division 59-D-2 of Chapter 59.

Public utility means any water company, sewage disposal company, electric company, gas company, telephone company, or cable service provider.

Qualified professional means a licensed forester, licensed landscape architect, or other qualified professional who meets all of the requirements under Section 08.19.06.01A of the Code of Maryland Regulations or any successor regulation.

Retention means the deliberate holding and protecting of existing trees and forests on the site.

Sediment control permit means a permit required to be obtained for certain land disturbing activities under Chapter 19.

Site means any tract, lot, or parcel of land, or combination of tracts, lots, or parcels of land, under a single ownership, or contiguous and under diverse ownership, where development is performed as part of a unit, subdivision, or project.

Site plan means a plan or an amendment to a plan approved under Division 59-D-3 of Chapter 59.

Special exception means a use approved under Article 59-G of Chapter 59.

Subwatershed means the total drainage area contributing runoff to a single point, and generally refers to the 8-digit hydrologic unit codes.

Technical Manual means a detailed guidance document adopted under Section 55-13 and used to administer this Chapter.

Tree means a large, woody plant having one or several self-supporting stems or trunks and numerous branches that can grow to a height of at least 20 feet at maturity. **Tree** includes the critical root zone.

Tree canopy means the area of one or many crowns of the trees on a site including trees in forested areas.

Tree Canopy Conservation Fund means a special fund maintained by the County to be used as specified in Section 55-14.

Tree canopy cover means the combined area of the crowns of all trees on the site, including trees in forested areas.

Tree canopy cover layer means the Geographic Information System (GIS) layer, or shape file, that contains polygons outlining the aerial extent of tree canopy in the County or any portion of the County.

55-4. Applicability.

Except as otherwise provided under Section 55-5, this Chapter applies to any person required by law to obtain a sediment control permit.

55-5. Exemptions.

This Chapter does not apply to:

- (a) any tree nursery activity performed with an approved Soil Conservation and Water Quality Plan as defined in Section 19-48;
- (b) any commercial logging or timber harvesting operation with an approved exemption from the requirements under Article II of Chapter 22A;
- (c) cutting or clearing trees in a public utility right-of-way for the construction or modification of electric generation facilities approved under the Maryland Code Public Utilities Article if:

(1) the person cutting or clearing the trees has obtained a certificate of public convenience and necessity required under Sections 7-207 and 7-208 of the Public Utilities Article; and

(2) the cutting or clearing of forest or tree canopy is conducted so as to minimize the loss of both;

(d) routine maintenance or emergency repairs of any facility located in public utility rights-of-way;

(e) routine or emergency maintenance of an existing stormwater management facility, including an existing access road, if the person performing the maintenance has obtained all required permits;

(f) any stream restoration project if the person performing the work has obtained all necessary permits;

(g) the cutting or clearing any tree by an existing airport currently operating with all applicable permits to comply with applicable provisions of any federal law or regulation governing the obstruction of navigable airspace if the Federal Aviation Administration has determined that the trees create a hazard to aviation;

(h) cutting or clearing any tree to comply with applicable provisions of any federal, state, or local law governing the safety of dams; or

(i) any non-coal surface mining conducted in accordance with applicable state law.

Article 2. Tree Canopy Conservation Requirements, Procedures, and Approvals.

55-6. Tree Canopy – General.

(a) Submissions. A person that is subject to this Chapter must submit to either the Director of Permitting Services or the Planning Director the following information on the amount of disturbance of tree canopy.

(1) Any person required by law to obtain a sediment control permit for land disturbing activity that is not subject to Chapter 22A must submit a limits of tree canopy disturbance concurrently with the sediment control permit application to the Director of Permitting Services under Section 55-7.

(2) Any person engaging in activity that is subject to Chapter 22A must submit a limits of tree canopy disturbance concurrently with any other plan required under Chapter 22A to the Planning Director under Section 55-8.

(b) Timing of submissions. The person must submit the limits of tree canopy disturbance for review in conjunction with the review process for a sediment control permit, forest conservation plan, development plan, project plan, preliminary plan of subdivision, site plan, special exception, or mandatory referral. If a natural resources inventory/forest stand delineation is required, the person must include the aerial extent of the tree canopy with the natural resources inventory/forest stand delineation as specified in Section 22A-10.

(c) Incomplete submissions. The Director of Permitting Services or the Planning Director must not approve an incomplete submission.

(d) Review of submissions. Each submission required under this Chapter must be reviewed concurrently with the review of any submission required under Article I of Chapter 19 or Chapter 22A.

(e) Coordination of review. The Director of Permitting Services and the Planning Director may coordinate the review of any information submitted under subsection (a) with other agencies as appropriate. The reviews may be performed concurrently, and in accordance with, any review coordination required under Chapter 19 or Chapter 22A.

(f) Time frame of validity. An approved limits of tree canopy disturbance submission remains valid for:

(1) not more than 2 years unless the Planning Director has approved either a final forest conservation plan or preliminary forest conservation plan that includes the limits of tree canopy disturbance;

(2) not more than 2 years unless a sediment control permit has been issued by the Director of Permitting Services and remains valid;
or

(3) 5 years if the accuracy of the limits of tree canopy disturbance has been verified by a qualified professional.

(g) Issuance of sediment control permit. The Director of Permitting Services must not issue a sediment control permit to a person that is required to comply with this Article until:

(1) the Planning Board or Planning Director, as appropriate, or the Director of Permitting Services has approved an applicant's limits of disturbance; and

(2) the applicant pays any fee required under this Article.

55-7. Tree Canopy – Submissions to the Director of Permitting Services.

(a) General. The limits of tree canopy disturbance information submitted to the Director of Permitting Services must document the extent of the existing area of tree canopy and the total area of tree canopy to be disturbed by the proposed activity.

(b) Incorporation of limits of tree canopy disturbance. The limits of tree canopy disturbance information for the subject property must be incorporated in a sediment control permit or the site plan submitted for a building permit.

(c) The limits of tree canopy disturbance. The limits of tree canopy disturbance information for the subject site must include:

(1) a map delineating:

(A) the property boundaries;

(B) the proposed limits of disturbance including any off-site areas;

(C) the aerial extent of existing tree canopy cover on the subject site, up to 45 feet beyond the proposed limits of disturbance;

(D) the intersection of aerial extent of existing tree canopy cover and the limits of disturbance; and

(E) any additional information specified by regulation; and

(2) a table summarizing the square footage of:

(A) the property;

(B) the limits of disturbance of the proposed activity;

(C) the aerial extent of existing tree canopy cover;

(D) the limits of tree canopy disturbance; and

(E) any additional information specified by regulation.

(d) Modification to limits of tree canopy disturbance. The Director of Permitting Services may approve a modification to an approved limits of tree canopy disturbance if:

(1) the modification is consistent with this Chapter, field inspections or other evaluations reveal minor inadequacies of the plan, and modifying the plan to remedy the inadequacies will not increase the amount of tree canopy removed as shown on the final approved plan; or

(2) the action is otherwise required in an emergency.

(e) Qualification of preparer. If a tree canopy cover layer developed by the County is available and is used without alteration, a professional engineer, land surveyor, architect, or other person qualified to prepare erosion and sediment control plans under Chapter 19 is also qualified to prepare the limits of tree canopy disturbance information under this Section. Otherwise, the limits of tree canopy disturbance information must be prepared by a qualified professional as defined in Section 08.19.06.01 of the Code of Maryland Regulations or any successor regulation.

55-8. Tree Canopy – Submission to the Planning Director.

(a) General. The limits of tree canopy disturbance information submitted to the Planning Director must document the extent of existing tree canopy and the total area of tree canopy to be disturbed by the proposed activity. The Planning Director may use the information to identify the most suitable and practical areas for tree conservation and mitigation.

(b) Limits of tree canopy disturbance. A person that is subject to this Section must submit the same limits of tree canopy disturbance information as required under Section 55-7.

(c) Incorporation of the limits of tree canopy, the natural resources inventory/forest stand delineation, and forest conservation plan. If an applicant is required to submit a natural resources inventory/forest stand delineation, the extent of tree canopy must be incorporated into that submission for the same area included in the natural resources inventory/forest stand delineation. If an applicant is required to submit a forest conservation plan, both the extent of tree canopy and the limits of tree canopy disturbance must be incorporated into that submission for the same area included in the forest conservation plan.

(d) Modification to limits of tree canopy disturbance. The Planning Director may approve a modification to an approved limits of tree canopy disturbance that is consistent with this Chapter if:

(1) field inspection or other evaluation reveals minor inadequacies of the plan, and modifying the plan to remedy those inadequacies will not increase the amount of tree canopy removed as shown on the final approved plan; or

(2) the action is required because of an emergency.

(e) Submission for special exception. If a special exception application is subject to this Chapter, the applicant must submit to the Planning Board any information necessary to satisfy the requirements of this Chapter before the Board of Appeals considers the application for the special exception.

55-9. Tree Canopy – Fee to Mitigate Disturbance.

(a) Objectives. The primary objective of this Section is the retention of existing trees. Every reasonable effort should be made to minimize the cutting or clearing of trees and other woody plants during the development of a subdivision plan, grading and sediment control activities, and implementation of the forest conservation plan.

(b) Fees paid for mitigation. Mitigation required to compensate for the loss of, or disturbance to, tree canopy must take the form of fees set by regulation under Method 3, which the applicant pays to the Tree Canopy Conservation Fund. Mitigation fees are based on the square footage of tree canopy disturbed and, therefore, increase as the amount of tree canopy disturbance increases. To provide credit for on-site landscaping, mitigation fees must not be applied to the first 5 percent of the area of tree canopy disturbed. Canopy identified as part of any

forest delineated in an approved natural resources inventory/forest stand delineation and subject to a forest conservation plan is not subject to mitigation fees under this Chapter.

Article 3. Enforcement and Appeals.

55-10. Inspections and notification.

(a) Permission to gain access. The Director of Permitting Services or the Planning Director may enter any property subject to this Chapter to inspect, review, and enforce.

(b) Plan to be on site; field markings. A copy of the approved limits of tree canopy disturbance must be available on the site for inspection by the Director of Permitting Services or the Planning Director. Field markings must exist on site before and during installation of all tree protection measures, sediment and erosion control measures, construction, or other land disturbing activities.

(c) Inspections.

(1) The Director of Permitting Services must conduct field inspections concurrently with inspections required for a sediment control permit under Article I of Chapter 19 for any activity subject to Section 55-7.

(2) The Planning Director must conduct field inspections concurrently with inspections required for a forest conservation plan for any activity subject to Section 55-8.

(3) The Director of Permitting Services or the Planning Director may authorize additional inspections or meetings as necessary to administer this Chapter.

(d) Timing of inspections. The inspections required under this Section must occur:

(1) after the limits of disturbance have been staked and flagged, but before any clearing or grading begins;

(2) after necessary stress reduction measures for trees and roots have been completed and the protection measures have been installed, but before any clearing or grading begins; and

(3) after all construction activities are completed, to determine the level of compliance with the limits of tree canopy disturbance.

(e) Scheduling requirements. A person must request an inspection by:

(1) the Director of Permitting Services within the time required to schedule an inspection under Section 19-12; or

(2) the Planning Director within the time required to schedule an inspection under Section 22A-15.

(f) Coordination. The Department of Permitting Services and the Planning Department must coordinate their inspections to avoid inconsistent activities relating to the limits of tree canopy disturbance.

55-11. Penalties and enforcement.

(a) Enforcement authority. The Department of Permitting Services has enforcement authority for any activity approved under Section 55-7 and the Planning Board has enforcement authority for any activity approved under Section 55-8.

(b) Enforcement action. The Director of Permitting Services or the Planning Director may issue a notice of violation, corrective order, stop-work order, or civil citation to any person that causes or allows a violation of this Chapter.

(c) Civil penalty. The maximum civil penalty for any violation of this Chapter or any regulation adopted under this Chapter is \$1,000. Each day that a violation continues is a separate offense.

(d) Other remedy. In addition to any other penalty under this Section, the Planning Board may seek any appropriate relief authorized under Section 22A-16.

55-12. Administrative enforcement.

(a) Administrative order. In addition to any other remedy allowed by law, the Planning Director may at any time, including during the pendency of an enforcement action under Section 55-11, issue an administrative order requiring the violator to take one or more of the following actions within the time specified by the Planning Director:

- (1) stop the violation;
- (2) stabilize the site to comply with a forest conservation plan;
- (3) stop all work at the site;
- (4) restore or reforest unlawfully cleared areas;
- (5) submit a limits of tree canopy disturbance, forest conservation plan, or tree save plan for the net tract area;
- (6) place forested land, reforested land, or land with individual significant trees under long-term protection by a conservation easement, deed restriction, covenant, or other appropriate legal instrument; or
- (7) submit a written report or plan concerning the violation.

(b) Effectiveness of order. An order issued under this Section is effective when it is served on the violator.

Article 4. Administration

55-13. General.

(a) Regulations. The County Executive must adopt regulations, including technical manuals, to administer this Chapter, under Method 2. The

372 regulations must include procedures to amend a limits of tree canopy
 373 disturbance.

374 (b) Technical manual. The technical manual must include guidance and
 375 methodologies for:

376 (1) preparing and evaluating maps of the aerial extent of the tree
 377 canopy and the limits of tree canopy disturbance;

378 (2) providing protective measures during and after clearing or
 379 construction, including root pruning techniques and guidance
 380 on removing trees that are or may become hazardous;

381 (3) monitoring and enforcing the limits of disturbance and the
 382 limits of tree canopy disturbance; and

383 (4) other appropriate guidance for program requirements consistent
 384 with this Chapter and applicable regulations.

385 (c) Administrative fee. The Planning Board and the County Executive
 386 may each, by Method 3 regulation, establish a schedule of fees to
 387 administer this Chapter.

388 (d) Reports. On or before March 1 of each year, the Department of
 389 Permitting Services, the Planning Board, and the Department of
 390 Environmental Protection each must submit an annual report on the
 391 County tree conservation program to the County Council and County
 392 Executive.

393 (e) Comprehensive plan for mitigation. The Department of
 394 Environmental Protection must develop and maintain a
 395 comprehensive County-wide plan to mitigate disturbance to tree
 396 canopy. The Department of Environmental Protection should develop
 397 the plan in consultation with the Planning Department, the
 398 Department of Transportation, the Department of General Services,

the Department of Economic Development, the Soil Conservation District, and other agencies as appropriate.

(f) Sediment control permit application. To prevent circumvention of this Chapter, the Planning Director and the Director of Permitting Services may require a person to submit an application for a sediment control permit enforceable under this Chapter if that person:

(1) limits the removal of tree canopy or limits land disturbing or construction activities to below requirements for a sediment control permit; and

(2) later disturbs additional tree canopy or land on the same property, or by any other means, such that in total, a sediment control permit would be required.

55-14. Tree Canopy Conservation Fund.

(a) General. There is a County Tree Canopy Conservation Fund. The Fund must be used in accordance with the adopted County budget and as provided in this Section.

(b) Mitigation fees paid into the Tree Canopy Conservation Fund. Money deposited in the Tree Canopy Conservation Fund to fulfill mitigation requirements must be spent on establishing and enhancing tree canopy, including costs directly related to site identification, acquisition, preparation, and other activities that increase tree canopy, and must not revert to the General Fund. The Fund may also be spent on permanent conservation of priority forests, including identification and acquisition of a site within the same subwatershed where the disturbance occurs.

(c) Fines paid into the Tree Canopy Conservation Fund. Any fines collected for noncompliance with a limits of tree canopy disturbance

or forest conservation plan related to tree canopy disturbance must be deposited in a separate account in the Tree Canopy Conservation Fund. The Fund may be used to administer this Chapter.

(d) Use of the Tree Canopy Conservation Fund.

(1) Any fees collected for mitigation must be used to:

(A) establish tree canopy;

(B) enhance existing tree canopy through non-native invasive and native invasive species management control, supplemental planting, or a combination of both;

(C) establish forest; and

(D) acquire protective easements for existing forests or areas with existing tree canopy that are not currently protected, including forest mitigation banks approved under Section 22A-13.

(2) The canopy established under paragraph (1)(A) should shade impervious surfaces, manage stormwater runoff, and generally increase tree canopy coverage. Trees native to the Piedmont area of the County should be used, if feasible, to meet the mitigation requirements of this Chapter.

(3) The establishment of tree canopy to satisfy the mitigation requirements of a project must occur in the subwatershed where the project is located. Otherwise the tree canopy may be established anywhere in the County.

LEGISLATIVE REQUEST REPORT

Bill ~~35~~12

Tree Canopy Conservation

DESCRIPTION:	This bill introduces requirements for fees when tree canopy is disturbed. Generally, it applies when a sediment control permit is required under Chapter 19 of the Montgomery County Code and the trees are not subject to Article II of Chapter 22A. The bill requires the fees to be used to plant new trees to mitigate for the loss of benefits provided by the tree canopy. The new trees will be located using a comprehensive approach to enhancing tree canopy across the County.
PROBLEM:	Currently, the Forest Conservation Law (FCL) does not apply to most disturbances to individual trees outside of forests during development. Also, it does not apply to development activity on lots less than approximately one acre. In recent years, a significant increase in development activity on small lots that are not subject to the FCL has raised awareness of the value of trees to all residents, as well as the need to provide communities some compensation for the loss of trees when development occurs.
GOALS AND OBJECTIVES:	This bill is designed to provide mitigation for the loss or disturbance to tree canopy not currently regulated by the FCL, as well as specifying that the fees will be used to plant trees across the county using a comprehensive approach that will enhance the existing canopy.
COORDINATION:	Department of Permitting Services, Maryland-National Capital Park & Planning Commission, Department of Environmental Protection
FISCAL IMPACT:	See Fiscal and Economic Impact Statement
ECONOMIC IMPACT:	See Fiscal and Economic Impact Statement
EVALUATION:	
EXPERIENCE ELSEWHERE:	The Forest Conservation Law, Chapter 22A of the Montgomery County Code, requires mitigation when forest land and/or champion trees, as well as certain other vegetation, are disturbed.
SOURCE OF INFORMATION:	Stan Edwards, Division Chief, Division of Environmental Policy and Compliance, Department of Environmental Protection (7-7748)
APPLICATION WITHIN MUNICIPALITIES:	This bill applies to all municipalities if the land disturbing activity requires a sediment control permit under Chapter 19 of the Montgomery County Code that is approved and enforced by the Department of Permitting Services.
PENALTIES:	Class A




OFFICE OF THE COUNTY EXECUTIVE
ROCKVILLE, MARYLAND 20850

Isiah Leggett
County Executive

MEMORANDUM

October 25, 2012

TO: Roger Berliner, President
County Council

FROM: Isiah Leggett 
County Executive

SUBJECT: Proposed Legislation: Tree Canopy Conservation Program

I am transmitting for Council introduction a bill that creates a Tree Canopy Conservation Program which is intended to protect and enhance the County's valuable tree canopy. I am also transmitting a Legislative Request Report, Fiscal Impact Statement, and Economic Impact Statement.

This bill introduces requirements for fees when tree canopy is disturbed as a result of development activity. Generally, the bill applies when a sediment control permit is required under Chapter 19 of the Montgomery County Code and the trees are not subject to the County's Forest Conservation Law (FCL). The bill requires the fees to be used to plant new trees to mitigate the loss of benefits that were provided by the disturbed tree canopy.

When the FCL was adopted, the majority of development in the County was occurring on large, previously undeveloped parcels, much of which was forested. The FCL was intended to provide compensation for the loss of forested land through the long-term protection of undisturbed forest or the planting of new forests. As the amount of undeveloped land in the County has diminished, the majority of development is now occurring on smaller, previously undeveloped "in-fill" properties or as the result of redevelopment of previously built-out sites. While these parcels contain few forests, they often contain significant tree canopy due to the presence of individual trees or clusters of trees not meeting the definition of a forest. These trees provide significant benefits to communities, including helping to reduce ambient temperatures, clean the air, manage stormwater, and generally increasing the economic value of the property. However, the majority of these trees are not covered under the FCL and, as a result, there is no mechanism requiring compensation for the loss of these trees.

The Tree Canopy Conservation Program would be implemented by the Department of Permitting Services or the Montgomery County Planning Department, depending on the nature of the development activity. The process has been designed to be as streamlined as possible by incorporating tree canopy review into the existing sediment control permitting process or the existing FCL review process. The bill outlines the process for determining the extent of disturbed tree canopy subject to regulation, but the specific fee structure would be set by regulation.

20

Roger Berliner
October 25, 2012
Page 2

If you have any questions about this bill, please contact Bob Hoyt, Director of the Department of Environmental Protection, at 240-777-7730 or bob.hoyt@montgomerycountymd.gov.

Attachments (4)

- c. Bob Hoyt, Director Department of Environmental Protection
- Joe Beach, Director, Finance Department
- Kathleen Boucher, Assistant Chief Administrative Officer
- Marc Hansen, County Attorney
- Diane Jones, Director, Department of Permitting Services
- Jennifer Hughes, Director, Office of Management and Budget



ROCKVILLE, MARYLAND

MEMORANDUM

September 25, 2012

TO: Timothy L. Firestine, Chief Administrative Officer

FROM: Jennifer A. Hughes, Director, Office of Management and Budget
Joseph F. Beach, Director, Department of Finance

SUBJECT: Bill XX-12 – Tree Canopy Conservation

Please find attached the fiscal and economic impact statement for the above-referenced legislation.

JAH:ms

Attachment

c: Kathleen Boucher, Assistant Chief Administrative Officer
Lisa Austin, Offices of the County Executive
Joy Nurmi, Special Assistant to the County Executive
Patrick Lacefield, Director, Public Information Office
Michael Coveyou, Department of Finance
David Platt, Department of Finance
Stan Edwards, Department of Environmental Protection
Barbara Comfort, Department of Permitting Services
Reginald Jetter, Department of Permitting Services
Alex Espinosa, Office of Management and Budget
Amy Wilson, Office of Management and Budget
Matt Schaeffer, Office of Management and Budget
Naeem Mia, Office of Management and Budget

Fiscal Impact Statement
Bill XX-12 – Tree Canopy Conservation

1. Legislative Summary

The proposed bill revises County law regarding tree canopy conservation in an effort to save, maintain, and establish tree canopy for the benefits of County residents and future generations. The bill would maximize tree canopy retention and establishment by establishing fees to be assessed when disturbance to the tree canopy occurs; these fees would then fund mitigation activities to restore the disturbed tree canopy.

The Department of Permitting Services (DPS) and the Maryland National Capital Park and Planning Commission (M-NCPPC) will administer the law; the Department of Environmental Protection (DEP) will have oversight of tree canopy restoration activities.

2. An estimate of changes in County revenues and expenditures regardless of whether the revenues or expenditures are assumed in the recommended or approved budget. Includes source of information, assumptions, and methodologies used.

DEP has indicated that new work created as a result of this legislation (tree canopy restoration activities) will have costs that will correlate to the amount of received fees. While the cost of future work is not known, DEP has asserted that any future costs related to tree canopy restoration activities will not exceed collected fees.

A. M-NCPPC has estimated a cost of \$12,480 annually and a one-time first-year expenditure of \$3,600 related to planning the tree canopy restoration policies outlined in the bill. Some of the specific planning activities related to tree canopy restoration conducted by MNCPPC¹ include:

- Development of a planting plan (One-time investment of 20 work hours)
- Annual Report development (20 work hours)
- Development of a Fee Schedule (One-time investment of 40 work hours)
- Annual adjustment of fee schedules (8 work hours)
- Plan Review Time (60 forest conservation plans per year @ 3 hours per plan)

B. DPS has indicated fiscal impacts relating to the inspection and fine assessments of tree canopy disturbance of approximately \$67,118 annually in the following work areas:

500 additional inspection and assessment projects (\$25,752/annually)

- **Permit Technicians (250 work hours): \$8,878**
(.5 Hrs each project @ Grade 19 midpoint salary of \$56,828 plus benefits² or \$35.51/hr)
- **Permit Services Specialists/Plan Reviewers (125 work hours): \$6,166**
(.25 Hrs each project @ Grade 26 midpoint salary of \$78,929 plus benefits or \$49.33/hr)
- **Inspectors (250 work hours): \$10,708**
(.5 Hrs each project @ Grade 23 midpoint salary of \$68,531 plus benefits or \$42.83/hr)

200 additional complaints relating to tree loss (\$41,366/annually)

- **Permit Technicians (200 work hours): \$7,102**
(1 Hr each project @ Grade 19 midpoint salary of \$56,828 plus benefits or \$35.51/hr)

¹ Cost estimates are based on a rate of \$60 per hour.

² Benefit calculation is 30 percent of base pay.

- **Inspectors (800 work hours): \$34,264**
(4 Hrs each project @ Grade 23 midpoint salary of \$68,531 plus benefits or \$42.83/hr)

Revenues resulting from this legislation will depend on the determination of a rate model for tree canopy disturbance fees. The rate model will be established via method 2 regulation.

- 3. Revenue and expenditure estimates covering at least the next 6 fiscal years.**
DEP has indicated that new work created as a result of this legislation (tree canopy restoration activities) will have costs that will correlate to the amount of received fees. While the cost of future work is not known, DEP has asserted that any future costs related to tree canopy restoration activities will not exceed collected fees.

DPS reports future expenditures of approximately \$62,118 annually (as explained above). The total six-year expenditures for DPS are approximately \$402,708.

M-NCPPC reports annual expenditures of \$12,480 with a one-time startup charge of \$3,600 to implement the planning and implementation plan for the bill (as explained above). Total six-year expenditures for M-NCPPC are approximately \$78,480.

Revenues resulting from this legislation will depend on the determination of a rate model for tree canopy disturbance fees. The rate model will be established via method 2 regulation.

- 4. An actuarial analysis through the entire amortization period for each bill that would affect retiree pension or group insurance costs.**

Not applicable. This bill does not affect retiree pension or group insurance costs.

- 5. Later actions that may affect future revenue and expenditures if the bill authorizes future spending.**

The bill authorizes the creation of a Tree Canopy Conservation Fund that would fund tree canopy restoration activities in the future.

- 6. An estimate of the staff time needed to implement the bill.**

While DEP does not expect the need for additional staff time to implement the bill, future staff needs could change depending on the extent of tree canopy restoration activities resulting from the bill.

DPS reports the need for an additional 1,625 work hours annually in different job classes to implement the bill.

MNCPPC reports the need for an additional 208 hours annually and 60 hours to start up the program in the first year of implementation.

- 7. An explanation of how the addition of new staff responsibilities would affect other duties.**

(24)

While DEP does not expect the need for additional staff time to implement the bill, the actual impact on staff will depend on the extent of tree canopy restoration activities as a result of implementing the bill.

DPS reports that the bill would impact both the workload of permitting staff and permit reviewing staff. Estimates for costs of additional work are provided above.

M-NCPPC reports that the bill would impact the workload of forest conservation planners. Estimates for costs of addition work are provided above.

- 8. An estimate of costs when an additional appropriation is needed.**
Not applicable.

- 9. A description of any variable that could affect revenue and cost estimates.**
DEP has indicated that costs and revenues relating to tree canopy restoration will be dependent on the amount of fees received. The rate model for fees will be established by method 2 regulation.

Article IV, Section 55-13(c) allows for the establishment of a fee for administering the program; this fee would be adopted under method 3. An administrative fee has not been established but could impact revenue and cost estimates.

Article III, Section 55-11(c) establishes a maximum \$1,000 civil penalty for violation of the proposed legislation. Fines would be deposited into the Tree Canopy Conservation Fund and could be used to implement any part of the bill. Estimates of revenue from these fines are difficult to predict without knowing the extent of the violations.

- 10. Ranges of revenue or expenditures that are uncertain or difficult to project.**
DEP has indicated that costs and revenues relating to tree canopy restoration will be dependent on the amount of fees received. The rate model for fees will be established by method 2 regulation.

Article IV, Section 55-13(c) allows for the establishment of a fee for administering the program; this fee would be adopted under method 3. An administrative fee has not been established but could impact revenue and cost estimates.

Article III, Section 55-11(c) establishes a maximum \$1,000 civil penalty for violation of the proposed legislation. Fines would be deposited into the Tree Canopy Conservation Fund and could be used to implement any part of the bill. Estimates of revenue from these fines are difficult to predict without knowing the extent of the violations.

- 11. If a bill is likely to have no fiscal impact, why that is the case.**
Not applicable.

12. Other fiscal impacts or comments.

This bill creates a Tree Canopy Conservation Fund as the account for fees collected as a result of tree canopy disturbance and the source of funds for tree canopy restoration projects. DEP would manage this fund.

13. The following contributed to and concurred with this analysis:

Stan Edwards, Department of Environmental Protection

Barbara Comfort, Department of Permitting Services

Reginald Jetter, Department of Permitting Services

Rose Krasnow, MNCPPC

Amy Wilson, Office of Management and Budget

Matt Schaeffer, Office of Management and Budget

Naeem Mia, Office of Management and Budget



Jennifer A. Hughes, Director
Office of Management and Budget

9/21/12

Date

(26)

Economic Impact Statement
Council Bill XX-12, Tree Canopy Conservation

Background:

The purpose of this legislation is to: 1) save, maintain, and establish tree canopy for the benefit of County residents and future generations; 2) maximize tree canopy retention and establishment; 3) establish procedures, standards, and requirements to minimize the loss and disturbance of tree canopy as a result of development; 4) provide for mitigation when tree canopy is lost or disturbed; and 5) establish a fund for tree canopy conservation projects, including plantings of individual trees, groups of trees, or forests, on private and public property. The proposed legislation generally revises County law regarding tree canopy conservation.

The requirements of this bill are applicable when a sediment control permit is required under Chapter 19 of the Montgomery County Code and the trees are not subject to Article II of Chapter 22A. The bill supplements the Forest Conservation Law (FCL). The FCL does not apply to most disturbances to individual trees outside of forests during development, and it does not apply to development activity on lots less than approximately one acre.

1. The sources of information, assumptions, and methodologies used.

Not applicable

2. A description of any variable that could affect the economic impact estimates.

The economic impact of the bill will vary based on a number of factors including the amount of acreage that is the subject of the sediment control permit, the area of tree canopy on land covered by such a permit, the amount of the fee imposed per square foot of tree canopy disturbed as a result of the development activity subject to the permit, and the market conditions at the time of development. The cost of development for each property will be affected by the amount of tree canopy disturbed times the fee.

3. The Bill's positive or negative effect, if any on employment, spending, saving, investment, incomes, and property values in the County.

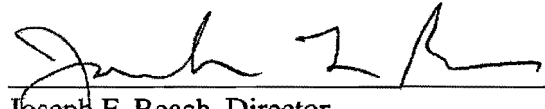
The bill may increase the cost for developing some properties, and those costs may affect the gross profit margin to the developers or the price of the property. However, some studies indicate that property with trees can have a higher value than property that is cleared of trees. To the extent that the proposed legislation encourages developers to retain trees, they may realize a higher return than if they clear the site. However, this analysis would vary by property and market conditions and would need to factor in the cost of removing trees as well as the impact of the cost of the fee. With a specific fee structure it will be possible to estimate these potential costs.

Economic Impact Statement
Council Bill XX-12, Tree Canopy Conservation

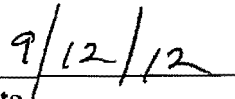
4. If a Bill is likely to have no economic impact, why is that the case?

Not applicable; see item 3.

5. The following contributed to and concurred with this analysis: David Platt and Mike Coveyou, Finance and Stan Edwards, Environmental Protection.



Joseph F. Beach, Director
Department of Finance



Date

1

**Testimony on Behalf of County Executive Isiah Leggett
Regarding Bill 35-12, Trees – Tree Canopy Conservation**

**Robert G. Hoyt, Director
Department of Environmental Protection**

January 17, 2013

Good evening. My name is Bob Hoyt. I am the Director of the Department of Environmental Protection. Thank you for the opportunity to testify on behalf of the County Executive in support of Bill 35-12. This bill is intended to protect and enhance the County's valuable tree canopy. It introduces requirements for fees when tree canopy is disturbed or removed as a result of development activity. Generally, it applies when a sediment control permit is required under County Law and the trees are not subject to mitigation under the County's Forest Conservation Law. The bill requires that fee revenues be used to establish new trees to mitigate for the loss of the benefits provided by the disturbed tree canopy.

An increased proportion of development is now occurring as smaller "in-fill" development or as redevelopment of previously built-out sites. Most of these parcels are not subject to mitigation under the Forest Conservation Law because they are too small. Yet they often support canopy from individual trees or clusters of trees. Additionally, significant amounts of canopy outside of forests are not regulated on lots even where the Forest Conservation Law does apply. The trees associated with this canopy provide numerous benefits to our community, including helping to reduce ambient temperatures, clean the air and water, manage stormwater, increase the economic value of the property, and generally increase our sense of well-being. Bill 35-12 creates a regulatory structure to encourage preservation of these trees and require mitigation when they are disturbed.

Under the bill, the application and review procedures are streamlined and designed to be implemented by both the applicant and the agencies without requiring any significant expenditures of additional resources. They are incorporated into the existing sediment control permitting process or the existing Forest Conservation Law review process.

The bill would be implemented by the Department of Permitting Services (DPS) or the Montgomery County Planning Department, depending on whether the lot is subject to the Forest Conservation Law. If a lot is subject to the Forest Conservation Law, the Planning Department will implement the bill. For other properties, DPS will implement the bill. The bill outlines the method for calculating the amount of tree canopy disturbed and establishes that the amount of the fee will be based on the amount of disturbance and increase as disturbance increases. The specific fees would be set by regulation.

Specific fees are not included in the bill itself because the County Executive felt that the discussion should focus on the merits of the “fee in lieu” mitigation approach outlined in the bill. The bill requires that the fees be established by Method 3 regulations which do not require formal approval of Council. However, this part of the bill reflects an inadvertent drafting error. The County Executive’s intent is that the fees established under the Tree Canopy Conservation Program be established by Method 2 regulations which require affirmative approval by the Council.

This bill is the product of many years of discussions with a variety of stakeholders. Given the range of views on the extent to which trees should be afforded regulatory protection – with some believing no additional regulation is needed and others believing this bill does not go far enough – you will hear from a variety of speakers tonight that will offer a number of criticisms or suggested changes to the bill. We look forward to exploring each of these issues and seeing if better approaches can be agreed upon. Trees contribute significantly to the quality of life in our County, particularly in our residential neighborhoods. It is critical that we establish a regulatory framework to protect and enhance this valuable resource for future generations. I urge you to support Bill 35-12.

I would be happy to address any questions the Council may have.



MONTGOMERY COUNTY PLANNING BOARD
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

OFFICE OF THE CHAIR

January 17, 2013

The Honorable Nancy Navarro
Montgomery County Council
100 Maryland Avenue
Rockville, Maryland 20850

Dear Ms. Navarro:

The Montgomery County Planning Board reviewed and discussed Montgomery County Council Bill 35-12 - Tree Canopy Conservation on January 10, 2013. On January 17, 2013, the Planning Board held a second discussion on the proposed legislation. The Planning Board supports the goal of this bill to preserve tree canopy or provide for the replacement of canopy removed by development. However, the Board considers the bill as written seriously flawed. We hope to have the opportunity to work with Council, its staff, and Executive Branch agencies to improve the ability of this bill to achieve its objectives. Enclosed is a copy of the staff report prepared by Planning staff, which the Council may find useful for background information.

Members of the Planning Board are particularly concerned that Section 55-5 does not exempt the Parks Department from the provisions of this bill, which would impose a fee on development projects based on the amount of tree canopy within the area of land to be disturbed, regardless of whether any trees are actually removed or damaged. The bill as drafted would impact all park projects that require sediment and erosion control permits, thus adding another layer of cost and regulatory complexity to a wide variety of work on M-NCPPC parkland including park capital improvement projects, historic resource restoration/rehabilitation projects, and environmental restoration/habitat improvement projects. By the very nature of parkland, it is typical for park capital projects to involve extensive work under tree canopy, during which significant effort and expense is made to avoid damage to the trees. The Department of Parks currently undertakes a wide variety of efforts to avoid, minimize, and mitigate the negative effects of park projects on native tree canopy, with great success. The proposed bill offers no offset credit for tree protection efforts, removal of non-native and invasive trees, or historic resource restoration. The Planning Board requests that all Parks Department projects be exempt from the provisions of this bill.

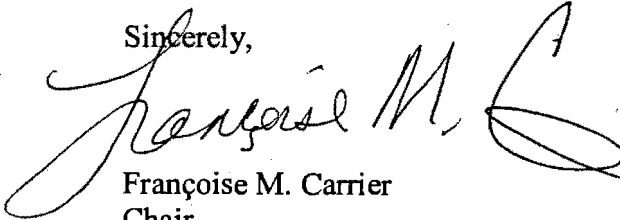
In the Planning Board's view, the proposed bill overreaches in charging for all canopy with the limits of disturbance on a site. The Board believes that regulated entities should be given credit against their canopy fee for protecting individual trees and their critical root zones. This would strengthen the incentive to protect trees rather than impacting them, in situations where options exist to save trees. The Planning Board further recommends that the bill be amended to allow regulated entities some option to reduce mitigation costs by planting trees onsite to mitigate for the loss of canopy on the subject site. The best approach to achieve this will require further discussion among interested parties.

The members of the Planning Board are also concerned that the bill does not articulate the rate at which the mitigation fee will be set. The fee is proposed to be set by Method 2 regulation, however, it is unknown if the unit cost will be the same in all cases or if there will be a sliding scale that increases as more land under the tree canopy is disturbed, or if the cost will be nominal or substantial. The Planning Board recommends that a fee be set before any bill is adopted, so the Council and other interested parties have a full understanding of the ramifications. The Planning Board believes that any mitigation fee should be capped.

Planning staff highlighted the fact that there are two different enforcement mechanisms proposed by the Bill. Certain regulated parties would be subject to Administrative Civil Penalties imposed by the Planning Board of up to \$10.50 per square foot, whereas others, whose plans are not reviewed by the Planning Board would not be subject to the same penalties. The Planning Board does not believe any person that violates the proposed law should be subject to an Administrative Civil Penalty. The enforcement mechanism should be the same for all plans reviewed under the provisions of this bill.

We look forward to working with the County Council and County Executive on this bill.

Sincerely,



Françoise M. Carrier
Chair

Enclosures
FMC/MP/jh



Discussion: Montgomery County Bill 35-12 – Tree Canopy Conservation



Mark Pfefferle, Chief, Mark.Pfefferle@montgomeryplanning.org, 301 495-4730

Completed: 1-3-13

Description

Montgomery County Bill 35-12 was introduced by the County Council on behalf of the County Executive on November 27, 2012. This bill proposes a new requirement on any person that is required to obtain a sediment control permit and that removes tree canopy. Persons that remove tree canopy will be required to pay a fee to mitigate for the removal of canopy. The fees collected are to be deposited into the Tree Canopy Conservation Fund, which would be authorized by the legislation. The funds will be used for the establishment and enhancement of existing tree canopy. The County Council is holding a public hearing on January 17, 2013. The public hearing will also be for Montgomery County Bill 41-12 entitled Street and Roads- Roadside Trees Protection. Bill 41-12 is not the subject of this staff report and this bill does not impact the Planning Department.

Summary

Staff recommends the Planning Board support Bill 35-12 with amendments.

Discussion

If approved by the Council, Bill 35-12 would supplement the County's Forest Conservation law or Chapter 22A of the County code. The County's Forest Conservation Law is modeled after statewide legislation passed in 1991 that required each county and municipality to develop and implement a forest conservation program. The County's Forest Conservation Law is primarily focused on the protection and creation of new forest. The Forest Conservation Law requires any regulated entity to preserve a certain percentage of their property in forest, or to plant new forest if no forest is currently onsite. If a person is unable to protect, or plant, the required percentage of forest onsite there is an offsite planting requirement. Not all projects have forest planting requirements. Recently the State and County Forest Conservation laws were amended to provide additional findings before trees greater than 30 inches diameter could be impacted by development. Montgomery County Bill 35-12 is not a State mandated requirement but was initiated by the County Executive to "minimize the loss and disturbance of tree canopy as a result of development".

Bill 35-12 requires any person that is required to obtain a sediment control permit pay a fee to mitigate canopy loss when land disturbing activities occurs under the tree canopy. The fee will be paid to the County

and deposited into the Tree Canopy Conservation Fund. The fee is to mitigate for the loss of, or disturbance, to tree canopy; however, the mitigation amount is based on the amount of ground disturbance under the tree canopy and not based on the actual removal of the tree canopy. The methodology is simple, however not always accurate for frequently land is disturbed under tree canopy without any portion of the tree above ground-level being impacted.

The methodology used to calculate the mitigation amount does not give credit to persons that utilize tree protection to save trees and thus tree canopy. The methodology does not consider the health of the tree nor the tree species. Certain tree species are more susceptible to construction damage than are others; similarly trees that are in poor health have difficulty withstanding any additional impacts such as the severing of roots. There should be consideration given to the health of a tree, however, the methodology does not require field visits but relies on aerial photography superimposed over the proposed limits of disturbance. There is a tradeoff between the simplicity of the methodology to identify tree canopy loss and the information and data needed to calculate the mitigation. The proposed methodology does not require persons subject to the law to have special qualifications to assess the health of the trees that support the canopy.

The proposed legislation does not indicate the unit fee amount nor does it discuss if the fee will be set at a flat rate or graduated to increase as more land under the tree canopy is disturbed. The legislation does not allow persons subject to the law to meet the mitigation requirements other than through payment into the Tree Canopy Conservation Fund.

If approved the legislation will be administered and enforced by the Planning Department and the Montgomery County Department of Permitting Services. The Planning Department will be required to implement and enforce the provisions of the law for properties that are subject to the forest conservation law. This will include all development applications that require Planning Board approval and all properties where a Forest Conservation plan, or exemption from submitting a forest conservation plan, is approved by the Planning Director. The Department of Permitting Services will administer and enforce the provisions of the law on all persons that are required to get a sediment control permit but do not require any approval from the Planning Department. This will typically apply to owners of recorded single lots less than 40,000 square feet in size. The legislation does not apply to any person that wishes to remove a tree when a sediment control permit is not required. Therefore, homeowners will be able to remove a hazardous tree without being subject to the legislation.

Impact to Planning Department

The additional work for the Planning Department review staff should be minimal for staff already has the aerial extent of tree canopy shown on natural resource inventories/forest stand delineations. All forest conservation plans and all exemptions from submitting a forest conservation plan show the limit of disturbance and the tree canopy therefore the amount of tree canopy impacted, according to the methodology, is simple to calculate.

The inspection staff would continue to ensure approved plans are fully implemented. There should be minimal additional work to the enforcement staff to implement this bill. However, the Bill as written provides the potential for all enforcement actions to be forwarded to the Planning Director for action (lines 349

through 367). This could substantially increase staff's workload. Staff is proposing changes to the Bill that keeps the enforcement of the law separate and distinct and prevents violations under the Department of Permitting Services' authority from being enforced by Planning staff, or penalties assigned by the Planning Board.

Impact to the Regulated Entities, including the Parks Department

The tree canopy legislation is a new cost to all persons subject to the legislation. Anyone that is required to obtain a sediment control permit will also be required to prepare a plan showing the aerial extent of canopy and the proposed limits of disturbance. The intersection between the limits of disturbance and the tree canopy will determine the amount of mitigation necessary. The fee associated with the mitigation will be set at a later date. The proposed legislation indicates that mitigation fees will not be applied to the first 5 percent of the area of tree canopy disturbed (lines 290 and 291). This is seen as a credit for on-site landscaping (line 289). However, the legislation does not provide a credit for meaningful tree protection.

The Parks Department will be subject the legislation each time they are required to obtain a sediment control permit. They will need to provide mitigation equal to the intersection between the tree canopy and the limits of disturbance. The Parks Department has certified arborists that design tree protection to protect the park assets but under the proposed Bill will receive no credit for tree protection. An example of a project that will be heavily impacted by this new legislation is Woodside Park. In October 2011 the Planning Board approved a forest conservation plan for the Park. The Park contains no forest but is almost completely covered by tree canopy. The limit of disturbance that is associated with the forest conservation plan is large and the tree protection to be installed is impressive, however, even though many trees will not be removed the intersection between the limit of disturbance and tree canopy will require a large amount of mitigation for the 5 acre park. The legislation does not grandfather previously approved plans and therefore the Parks Department will need to pay the required fee.

Conclusion and Recommendation

Planning staff recommends the Planning Board support Bill 35-12 requesting the following amendments:

1. Provide an exemption that grandfathers any project that has obtained approval of a forest conservation plan or an exemption from submitting a forest conservation plan prior to the effective date of this legislation. Insert a new section 55-5(j) that grants an exemption to the provisions of this Bill if *"any person that has obtained approval of a preliminary or final forest conservation plan, or an exemption from submitting a forest conservation plan, before the effective date of this legislation."*
2. On line 209 change *"site plan"* to *"building site plan"* for site plan is identified in the "definition" section on lines 98 and 99 as *"a plan or an amendment to a plan approved under Division 59-D-3 or Chapter 59"*. Staff also recommends the term *"building site plan"* be identified in the section 55-2 as *"Building Site Permit means a drawing submitted in support of a building permit application for an individual lot"*.

3. Identify the mitigation rate in Section 55-9. That is, will the unit fee be the same for each unit square foot of tree canopy impacted or will the mitigation unit fee increase as the square footage of disturbance increases.
4. Include a subsection within Section 55-9 that provides mitigation credit to any person that does not remove any tree canopy and protects trees during the construction process.
5. Include a subsection within Section 55-9 that provides mitigation credit to any person that does not remove any tree canopy and impacts less than 30% of the critical root zone of a tree that supports the tree canopy.
6. Provide opportunities for persons that have a tree canopy mitigation requirement to meet their mitigation by planting new or replacement trees onsite instead of requiring an automatic payment into the Tree Canopy Conservation Fund. Base the on-site mitigation on the 20 year canopy of each tree species to be planted.
7. Under the "Penalties and enforcement" section, replace lines 339 to 342 *"Enforcement action. The Director of Permitting Services or the Planning Director may issue a notice of violation, corrective action order, stop-work order, or civil citation to any person that causes or allows a violation of this Chapter"* with *"Civil action: For any activity subject to Chapter 55-7, the County may bring any civil action authorized by law under Sections 1-18, 1-19, and 1-20 to enforce this Chapter or any regulation adopted under it."*
8. Under the "Penalties and enforcement" section, replace lines 346 to 349 *"Other remedy. In addition to any other penalty under this Section the Planning Board may seek any appropriate relief authorized under Section 22A-16"* with *"For any activity subject to Chapter 55-8, the Planning Board may bring any enforcement action authorized under Article III of Chapter 22A to enforce this Chapter or any regulations adopted under it"*. This clarifies that the Planning Board would not be asked to assess an administrative civil penalty to violations under the purview of the Department of Permitting Services.
9. Delete the entire section 55-12 "Administrative Enforcement" (lines 349 to 367) for this is already addressed in the changes mentioned above. Since the Planning Department's reviews associated with the Bill will be incorporated into a forest conservation plan (lines 261 to 264) this section is not necessary.
10. Modify lines 424 to 428 from *"Fines paid into the Tree Canopy Conservation Fund. Any fines collected for noncompliance with a limit of tree canopy disturbance or forest conservation plan related to tree canopy disturbance must be deposited in a separate account in the Tree Canopy Conservation Fund"* to *"Fines collected under the enforcement of Chapter 55-7 to be deposited in a separate account in the Tree Canopy Fund. Fines collected under the enforcement of Chapter 55-8 to be deposited in the County Forest Conservation Fund."*

Attachment

1. Montgomery County Bill 35-12: Trees- Tree Canopy Conservation

Amended staff recommendations presented to the Planning Board on January 10, 2013.

Replace staff recommendations 7 and 8 of the staff report with new recommendation #7 below

55-11. Penalties and enforcement.

- (a) **Enforcement authority.** The Department of Permitting Services has enforcement authority for any activity approved under Section 55-7 and the Planning Board has enforcement authority for any activity approved under Section 55-8.
- (b) **Civil Enforcement actions.** For any activity subject to Chapter 55-7 or 55-8 tThe Director of Permitting Services or the Planning Director may bring any civil action authorized by law under Sections 1-18, 1-19, and I-20 to enforce this Chapter or any regulation adopted under it except that the maximum civil fine permitted is as stated in 55-11(c).may issue a notice of violation, corrective order, stop work order, or civil citation to any person that causes or allows a violation of this Chapter.
- (c) **Civil finepenalties.** The maximum civil finepenalty for any violation of this Chapter or any regulations adopted under this Chapter is \$1,000. Each day that a violation continues is a separate offense.
- (d) **Other remedies.** In addition to any other penalty under this Section, the Planning Board may seek any appropriate relief authorized under Section 22A-16.



Testimony
January 17, 2013

Bill 35-12 Canopy Tree Bill
Bill 41-12 Roadside Tree Bill

Let us take a moment to recognize the process that these bills followed to get to where we are today and what that may tell us. Taking the bills one at a time, first, the Roadside Tree Bill:

Some in the environmental community report trees in the right-of-way, owned by the County, may be disturbed, damaged or removed without proper consideration. Council Members Berliner and Elrich sought insight from County staff and invited both the environmental community and the building community in for discussion. The dialogue continues even to this day. In spite of everyone's best effort, however, there remains a disconnect. We cannot agree that a real problem exists. It seems every instance brought to our attention of a roadside tree problem involved a utility or the County and not a builder. Is there a problem with builders? This is like the famous Groucho Marx line "Who are you going to believe, me or your lying eyes?"

Well our "lying eyes" see the following:

1. Builders have to obtain a DNR permit to disturb a tree in the Right-of-way that says, on the permit, that the applicant must get permission from the owner of the right-of-way to disturb the tree, the permit does not grant that right.
2. If we want to remove a tree, we are required to consult with a licensed tree expert and replace trees removed and meet with the State Forester
3. The right-of-way and the trees are owned by the County
4. If we need to disturb the right-of-way we have to get a right-of-way permit from the County and an Erosion and Sediment Control permit.
5. If we want to build a house, we have to get a building permit
6. On the building permit is a check-off that we have complied with the DNR permit.
7. We are required further to include an affidavit that we comply with the DNR permit.
8. If a R-O-W permit is required, we meet with the DPS inspector on-site to before we can proceed
9. DPS inspects the site numerous times to make sure we comply with our permits and before any R-O-W bond can be released

If there are problems of compliance, DPS can identify the problem and seek corrective action before they issue a final inspection.

We are told, through hearsay, that the State believes they do not have the manpower to enforce the State law. Our experience tells us otherwise. But if that were true, the County still owns the tree, grants the R-O-W permit, grants the Sediment Control Permit, grants the Building Permit, inspects the site, grants the final inspection, releases any bonds and issues a U&O permit. And of course we are back to the first question, is there really a problem with builders?

We find the argument that the County should have the right to regulate its trees compelling. If the bill only moved the permit from the State to the County; no problem. However, in addition to ADDING a new permit process (since they cannot eliminate the State Permit), this bill adds an application fee, a tree removal fee, a tree replacement fee and protection for tree canopy on private property (though I understand this clause will be removed). Easily many thousands of dollars. Instead of the builder having

responsibility to plant a replacement tree, the County takes over that responsibility. Well we already know what are "lying eyes" can see concerning the maintenance and replacement of County street trees, and it's not good. So we would have to explain to our buyer why their street tree remains unplanted.

This is a law that serves no appreciable purpose.

As to the Canopy Bill, we have been working over two years with Conservation Montgomery and DEP to consider the best way to preserve and replace canopy within the urbanized parts of the County. This bill unfortunately does not reflect any element of agreement with us and I do not think it addressed the objectives of the environmental community. This bill comes down to a tax on disturbing any canopy (not trees, just the ground under the tree canopy) on any lot for any reason with no opportunity to mitigate on-site or off-site. You can avoid the disturbance (by not building) or pay the tax. If you have no trees on your property, there is no tax. If you have trees on your property, well . . . there may be an incentive to change that because you will have to pay a fee to work under the canopy, even, by the way, if the canopy is on your neighbor's property or in the R-O-W.

Unfortunately, for the homeowner and the builder, there is no real opportunity to avoid the tax since most of the disturbance occurs to meet County requirements for 100% storm water storage on-site, setback requirements, utility requirements, etc. Fortunately for the County, builders prefer to save trees to avoid the cost of removing mature trees, unless they are dangerous and should be removed, and homeowners like to plant trees. So even without this bill, the County may be getting more tree canopy over the long run.

If you want to charge a canopy Impact Tax, well let's see if we can agree on an appropriate amount. Otherwise, please reject this bill.

Thank You.

S. Robert Kaufman
Director of Government Affairs
MNCBIA



THE LEAGUE OF WOMEN VOTERS
of Montgomery County, MD, Inc.

4

TESTIMONY TO THE TRANSPORTATION, INFRASTRUCTURE, ENERGY & ENVIRONMENT COMMITTEE,
MONTGOMERY COUNTY COUNCIL:
BILL 35-12, TREE CANOPY CONSERVATION (PROGRAM)
JANUARY 17, 2013

Good evening. I am Linda Silversmith, Action Vice President and Natural Resources Co-Chair of the League of Women Voters of Montgomery County, MD (LWVMC). On behalf of the League, I am speaking in favor of this bill establishing a tree canopy conservation program.

We note the following concerning existing and proposed county environmental programs:

- The county wisely commissioned and received from its Sustainability Working Group a County Climate Protection Plan in 2009 that resulted in 50 to 60 wide-ranging recommendations.
- Chapter 18A of the county code, Energy-Regulations, is commensurate with the climate protection plan but addresses only one area of the plan's recommendations. Many of its other areas need further attention, including trees and forests.
- The approach in the proposed bill is particularly wise in proposing to use the amount of tree canopy – rather than the number of trees – as a measure for protection and enhancement of tree coverage in urban areas.
- The proposed bill fills a gap as the county's Forest Conservation Act does not cover groups of trees that do not constitute a forest.

Below are some specifics concerning relevant LWVMC positions:

- Nationwide the League of Women Voters speaks up to promote an environment beneficial to life through the protection and wise management of natural resources in the public interest.
- We support special attention to maintaining and improving the environmental quality of urban communities.
- We recognize the special responsibility by each level of government for those lands and resources entrusted to them.
- We join the county administrator in recognizing the multiple value of trees for cleaning air and water, managing storm water, and ameliorating ambient temperatures.

- Indeed, with the climate change crisis that is now confronting the earth, every positive step we can take towards moderating temperatures is important. Fighting climate change is one of the highest national priorities of the League.

Indeed, climate change is probably the most urgent issue facing humankind. Actions taken at any level of government can help.

Thank you for your attention.



Conservation Montgomery

TESTIMONY

Regarding Montgomery County Council Bill 35-12, Montgomery County Urban Canopy Bill

Delivered to
Montgomery County Council
by Caren Madsen, Chair
on behalf of Conservation Montgomery
January 17, 2013

Thank you for the opportunity to testify on behalf of Conservation Montgomery on this very important legislation.

We support passage Bill 35-12. However, our support is conditional. We urge the Council to incorporate amendments that you will receive from Conservation Montgomery and our partners before the Jan. 28th Transportation & Environment Committee work session. A starting point for our list is at the bottom of my testimony. We also ask that you use Planning Board recommendations that will strengthen 35-12 and clarify language. My understanding is that the County Executive is willing to accept amendments that will improve this bill. That's good news.

Bill 35-12 is intended to slow the loss of existing canopy and discourage scraping lots down to moonscapes on smaller tracts of land that are not covered under the existing Forest Conservation Law (FCL). For the past 20 years, we've seen many trees that fall below the 40,000-square foot threshold of the FCL disappear. Over the past 20 years, we have also seen changes in development patterns. Development has shifted more toward urbanized areas of the county closer to transit centers. It's time for our tree laws to be updated to reflect trends in development.

Opponents of 35-12 will tell you that the cost of implementation is too high and that new tree legislation will add "more red tape and bureaucracy" to the development review process. Attached to my testimony, please find a 1991 letter from members of the building industry. They were protesting the FCL, and complained to then-Council President Leggett of costs associated with implementation of the FCL, more red tape and bureaucracy. Yet today, builders are protesting 35-12 and its companion Bill 41-12 and telling us that the FCL works and that we don't need more protection for trees that fall outside of the jurisdiction of that law.

Opponents of 35-12 will say we have enough trees and they'll point to our almost 50% countywide canopy cover – which includes forested land covered by the FCL that our friends in the building industry opposed in the early 1990s. But the fact is there are sections of the county at 8% canopy (Montgomery Hills), or 11% (Bethesda central business district), or 13% (Long Branch community). We believe that all residents of this county deserve to live within an acceptable level of tree canopy.

Even where there are areas of the county with abundant canopy, it's important to remember that **tree canopy is never static**. It is always changing due to tree loss from many causes. Tree canopy percentages are a moving target. We need better laws to manage this valuable resource effectively and conserve trees that fall outside of the definition of forests as stated in the FCL.

This long-awaited tree bill presents Montgomery County with an opportunity to replicate the modest success of the existing FCL; we can slow tree loss in the Down County just as the FCL has slowed loss of forest land in the Up County. We can no longer afford the cumulative impact of losing canopy in urbanized sections of the county a few trees at a time.

Respectfully, we submit the following revisions to 35-12 and encourage the Council to include Planning Board amendments in the final version of Bill 35-12:

1. In general, additional mitigation options must be identified in Bill 35-12. We need incentives to save healthy mature trees on-site instead of using a fund to cut and pay as the only option. A good starting point is that builders should get mitigation credit and not be required to pay into a fund when they do not disturb tree canopy and whenever they take measures to preserve existing trees on a site. This will provide more incentive for saving healthy mature trees than offering a cut and pay scenario as the only option in an urban canopy law.
2. Parks need to be exempt from Bill 35-12 in the same way that DEP has exempted their own stewardship projects.
3. The mitigation rate in Bill 35-12 is unknown. This needs to be included or discussed prior to passage. The regulated community has a right to know what the fee amounts will be. And we ask that a significant fee amount be placed on demolition of mature or desirable trees. The fees collected must be significant to deter unnecessary removal of healthy trees, and high enough for this new policy to be effective -- and taken seriously.
4. Set a countywide canopy goal of a 50% minimum in **all areas** of the county. This will ensure that areas where the canopy is now as low as 8% (Montgomery Hills) or 13% (Long Branch) have a measurable goal for increasing canopy in the future.
5. Bill 35-12 proposes to delegate DPS with a new role in implementation of tree canopy regulations, yet DPS is being assigned a role for which they presently have no experience or expertise. There must be an ISA-certified arborist within DPS who has the technical knowledge to determine what trees can be saved on a plan or should be saved, or what species and size should be replanted to replace canopy that is destroyed. Only an ISA-certified arborist and staff can fully implement the legislation and regulations in an accompanying technical manual for both tree bills. If an ISA-certified arborist is assigned with duties under the provisions in Bill 41-12, perhaps the same professional can also administer provisions of the urban canopy legislation.
6. The maximum civil penalty of \$1,000 per day is far too low. In order for provisions of Bill 35-12 to be enforced effectively, the penalties should be increased along with setting a substantial cost for demolition of mature tree canopy.



Associated Builders and Contractors

of Metropolitan Washington

October 23, 1991

President
Patrick J. Caulfield
Caulfield & Williams Construction Co., Inc.

First Vice President
William I. Magruder
CUMMINS Construction, Inc.

Second Vice President
Loyal E. Gassman
The Gassman Corporation

Treasurer
Monte E. Newman
Opportunity Concrete Corporation

Secretary
A. S. McLaughlin
A. S. McLaughlin

Past President
Gary E. Hess
Hess Mechanical Corp.

BOARD OF DIRECTORS

Peter A. Conio
Edward W. Conio Co., Inc.

Steven J. Donohoe
Donohoe Construction Company

Brice Hill
George Hill Construction Company

William J. Lamir
Lamir Construction Co., Inc.

John Magnolia
John Magnolia, Inc.

Vincent "Cap" Mons
The Mons Group

J. Bernard Nebel
Nebel Construction Co., Inc.

Nicholas G. Paleologos
Paleologos & Sons Co., Inc.

Benny J. Pasquariello
SAGAL Construction Corp.

Carl Ressa
A. S. Johnson Co., Inc.

Edward S. Scheideman
Custom Ware & Windows, Inc.

Sherry M. Turner
Turner Construction Co., Inc.

Beverly Vigue
Vigue Development, Inc.

Thomas B. Woodall
The Woodall Corporation

Ty E. Gable
Executive Director

The Honorable Isiah Leggett
Members of the County Council
Montgomery County Council
100 Maryland Avenue
Rockville, Maryland 20849

006737

Re: Forest Preservation Legislation

Dear President Leggett and Members of the Council:

Associated Builders & Contractors of Metropolitan Washington would like to comment on proposed legislation to protect Montgomery County's trees and forests (Bills 48-91, 49-91, 50-91, Subdivision Regulation 91-3 and Zoning Text Amendment 91015).

Our concerns revolve around two issues -- the costs associated with implementing this legislation and the additional red tape and bureaucracy required. The estimated price tag including the proposed arborist is in excess of \$700,000. The bill should be specific that the duties of an arborist will be incorporated into existing staff functions.

Having the fee in lieu of afforestation or reforestation at 30 cents per square foot and the maximum administrative civil penalty at \$1.20 per square foot instead of 10 cents and 30 cents respectively is needlessly burdensome given the current depressed state of construction in Montgomery County. The fees and penalties outlined in the state bill should be implemented and these can be reviewed in the future if they are not sufficient.

ABC believes that the requirements under Maryland's Forest Conservation Act of 1991 are sufficient to protect Montgomery County's trees and forested areas and that the Council should proceed on this premise.

While recognizing the need to preserve our trees and forests, we believe such protection must be balanced against economic and budgetary realities.

Sincerely yours,

Edward G. Marks
Director of Government
and Public Affairs

1.17.13 Testimony Presented By:
Larry Cafritz
7520 Hampden Lane, Bethesda

Tree Canopy Bill 35-12

I have been a resident of Montgomery County my entire life and I have a small business that has been renovating and building homes in existing mature neighborhoods here for over 20 years.

There is no doubt that a well located tree is an amenity and I think we all know the well documented benefits that trees serve to the environment. I would go so far as to say that any and all trees are good for the environment...even a dead tree is good for the environment, providing habitat and nutrition to the earth's creatures. But when mixing trees, homes, human activity and our infrastructure, you have to step back and understand the complexities of stress and risk on trees in our neighborhoods, no matter how good they might be for the general environment. One could argue that it is more the beauty of trees in our neighborhoods that we humans enjoy, as long as we don't have to deal with the expense and the risk of hazards. This Bill seems to ignore the latter and assumes all private canopy can be and should be saved, and that any homeowner messing with their own trees should be severely punished.

I would venture to guess that almost your entire constituency in Montgomery County expects and appreciates having control over their own private trees at their own risk and expense, while at the same time, may be upset when a neighbor's attractive tree comes down in a storm or in preparation for a major improvement. This would be anyone's normal reaction, but this Bill is the not the way to address it, if you think it needs to be addressed at all.

I am curious.... what is the problem that this Canopy Bill is trying to solve? I am a tree lover and a builder, but when these old "at risk" trees no longer can survive the stress we as homeowners put them through, with our roads, sidewalks, driveways, fences, homes, water and sewer lines, gas lines, power lines, storm water trenches and pits, pesticides, etc., they end up dying and becoming life threatening hazards. **(See Photos C9 and C10).**

The complexity is enormous and the risk can be high when a poorly located tree has to compete with making major improvements. There is no good reason why a homeowner should be penalized for disturbing ground under tree canopy over their own private property. Wouldn't it make more sense to renew our aging and "at risk" tree population that may have to come down when making major improvements, by replacing them with trees for the future? Why charge a deterrent tax on the homeowner's tree canopy and discourage making improvements, rather than encourage more tree planting on site, after the improvements. Safety around our homes is paramount. How many more dangerous trees have to fall before the few supporters of this bill understand this?

The mechanics of this Canopy Bill are severely flawed and make no sense at all.

Flaw#1: It charges a canopy tax to a homeowner for actually complying with a perplexing storm water management law requiring 100% removal of storm water runoff, existing and new, from hitting the streets and storm drains, when doing major improvements (A creation of the State to protect the Bay from new home subdivisions, but enforced by the County on major improvements on spot lots in existing mature neighborhoods). This forces you to ravage a property under any existing tree canopy in order to trench pipes all over your site and excavate large holes to install drywells, raintanks, infiltration planting beds and rain gardens from every downspout on your home and from your driveway. **(See**

photos C1 through C8). How ironic that one environmental law has the unintended consequence of killing even more homeowner trees than necessary, when making improvements.

Flaw#2: Whatever canopy tax is received will not even be used for replanting new trees on site, nor is there any appreciable credit for a homeowner to do so at their own expense. The County says it will use the money to plant trees in some other location within the same watershed, if it can. How does this help our neighborhoods under improvement?

Flaw #3: It charges a tax on disturbed area under canopy, whether you remove a tree or not.

Flaw#4: It does not even disclose the tax rate, which is essential to know, in order to even discuss this Bill.

Flaw#5: There is no grandfather provision or an effective date for permit applications. How is anyone supposed to continue to plan improvements with this hanging over their heads.

Those people who support this bill may love everyone else's trees as much as I do, especially since we get to enjoy them at no expense, risk or consequence, but that does not give them, or anyone, the right to force an excessive and punitive tax on a homeowner's private tree loss. There are people that will argue that there are ways to work around every tree in existence, however impractical, ignoring safety and consequences.

I encourage you to reject this Bill and, if you really think we need to legislate private trees, write something that, instead, encourages planting to renew this natural resource for our future.

Did you know that a White Oak will grow a canopy of up to 80 feet wide at maturity? That is over 5,000 square feet of canopy.

WEST MONTGOMERY COUNTY CITIZENS ASSOCIATION

P.O. Box 59335 • Potomac, Maryland 20854

Founded 1947

January 17, 2013 - Testimony - County Council Public Hearing on Bill 35-12 Trees - Tree Canopy Conservation and Bill 41-12 Streets and Roads, Roadside Tree Protection

Both of these pieces of legislation are overdue. We've known for a long time that trees are not just another pretty face in the landscape. Trees are invaluable to air and water quality. They stabilize temperatures, reduce energy costs, contribute to physical and mental health, increase property values, and act as an economic stimulus to recreation and tourism. We save and replant forest through the FCL but we've not done the same for individual trees or stands of trees. It is time to elevate the value we place on trees by giving them and the canopy they provide some well earned status. Protective legislation says we care and expect our citizens and institutions to do the same.

Bill 41-12 brings roadside tree protection closer to home. The State has made clear they cannot and do not enforce the Md. Roadside Tree Law. An MOU with them would remove duplication, a 2 week turnaround on the permit eliminates excessive waiting and folding this requirement into the existing permit to work in the ROW should eliminate concerns about another layer of bureaucracy. We need this law so the County can protect our own assets ourselves.

Bill 35-12 is not as easy to support. Despite assertions by Executive staff that stakeholders have been an integral part of crafting this bill, many of us feel our concerns have not been heard. This Bill needs work and this hearing is part of the process by which we do it. I've attended both Planning Board agenda items on Bill 35-12 and I'm very encouraged by the discussion Executive staff had with the Commissioners this morning indicating their willingness to entertain some critically needed amendments. Particularly important is the exemption of Parks projects as well as allowing additional mitigation options such as credit for protecting trees and credit for replanting shade or significant trees onsite. After all, our goal is to replace canopy when and where we are losing it as well as in already depleted neighborhoods such as the 8% left in Montgomery Hills. WMCCA support tonight is both preliminary and conditional on amendments arrived at during future discussions. We would welcome being a participant in that process and we'll be joining many of the groups testifying for this bill in a unified statement and list we'll provide to the Council before the first T&E Committee work session.

In our Forest Conservation Advisory Committee (FCAC) meetings, we've discussed the need to set goals for canopy cover or increasing canopy cover. Montgomery County has already done this with our successful recycling program. Set goals for attainment. Meet them and then set higher goals. I would note that in Md., the City of Cumberland, despite their already robust overall canopy of 49% has set a goal to increase it by 35 to 55% by the year 2020. They even have a Shade Tree Commission. We need goals and a vision for the future.

We still have a number of unanswered questions. Why are we not counting trees as part of our County stormwater management program? Bill 35-12 is designed to take into account our County's altered economic condition. It proposes implementation through a desktop evaluation and by curbing the cost of additional staff. Can we really properly evaluate the health and condition of trees on any given property without a more field focused process and site visits? What about the mitigation rate? Don't property owners have a right to know more about what they might be expected to pay for disturbing canopy?

We do need a tree bill. The time has come. By protecting our tree cover, we can achieve the success we've had with the Forest Conservation Law (FCL). Because of urbanization and redevelopment, we are seeing the loss of canopy in neighborhoods where tree canopy has matured. Because of past development practices, we suffer from vast parking lots with no shade in sight. Replenishing and enhancing our canopy will be an ongoing task. The time is now. The public wants it. The climate desperately needs it and this bill has the potential to be a good seed to start growing more of it.

respectfully submitted,

Ginny Barnes, *Environmental Chair*

ginnybarnes@juno.com

(301) 762-6423

16

Renewing Montgomery Opposes Bill 35-12 Tree Canopy Bill

I represent Renewing Montgomery. Over the years we have met with numerous citizen associations to discuss the issues associated with infill development. These meetings have resulted in a *collaborative* approach to homebuilding, allowing the homeowner, builder, and the community to understand the issues from the other's perspective.

It became clear at the meetings that most residents do not understand the current regulations. We believe it is essential that any new legislation that impacts existing neighborhoods be presented to the individual citizen associations to obtain their input *before* proceeding with implementation.

In our meetings the residents have generally agreed that infill development is a positive change for older neighborhoods and the goal should be to minimize the disruption to the community when possible by making all regulations efficient, consistent, and clear. The sooner the home improvements are completed, the better it is for all concerned.

The following are reasons why Renewing Montgomery opposes Bill 35-12.

1. The County has always allowed the removal of trees on private property without any permit or fee requirement. This is a basic property right. This Bill will impose significant fees on property owners seeking to improve their homes, and will discourage home improvements due to the excessive costs.
2. Current common law allows all property owners to remove any overhanging limb or root that extends onto their property. This bill takes away this basic property right and imposes an unnecessary and expensive fee; it is an unnecessary and illegal infringement of private property rights.
3. In older neighborhoods the complaint is more often there are too many trees – especially during storms. The clearing of trees to allow for home improvements helps remove dangerous trees that have outgrown the allowable space. This bill will add a significant fee to the cost of removing a tree.
4. This bill will *discourage* home improvements and devalue properties with existing trees.
5. This bill will *discourage* homeowners from planting trees to avoid the canopy fee.
6. The trees on private property were planted by the homeowners at no cost to the County. Some are weed trees that are undesirable. There is no distinction between a dying poplar and a healthy oak tree; all are considered valuable canopy – but all trees are not equal. Over the years they were maintained by the homeowners. Now the County is imposing a fee to remove them; so in exchange

for providing the canopy, the County is now requiring another fee from property owners to improve their property.

7. The fees collected will not replace the trees being removed. The fees will be used to plant trees somewhere else in the County. This bill does nothing to replace canopy where it is removed.
8. The canopy tax will discourage home improvements that increase energy efficiency and improve storm water management. New homes raise property values, stabilize neighborhoods, meet the needs of today's families, and increase tax revenue. This bill *misses the big picture* as it is focused only on one environmental issue, while ignoring all the other benefits of home improvements.
9. This bill will discourage tree removal to accommodate home improvements. It will likely cause property owners to not remove questionable trees creating an unsafe situation that can cause severe property damage or even death. In addition it costs twice as much to remove a tree after home improvements are completed.
10. This bill assumes the entire canopy within the limit of disturbance will be removed, which is a false assumption not based on any evidence.
11. This bill does not give a reasonable credit for trees that are saved or replanted. It does nothing to encourage the planting of new trees – in fact it *discourages tree replacement* to avoid the canopy tax.
12. If the County is truly concerned about tree canopy this should apply to all property owners regardless if they have a sediment control permit. If tree canopy is a benefit to all residents, than all the residents should share in the cost to either pay a canopy fee or replace the trees that are removed.
13. This bill has not been properly vetted by the numerous individual citizen associations who will be *severely impacted* by these new regulations. We suspect that the impetus of this bill is from a small vocal minority and that if the Council took the time to obtain input from the citizen associations the majority would oppose it. Renewing Montgomery would be happy to help coordinate and attend these meetings so that a thorough evaluation of the impacts could be considered by those it will impact.

Any fee required to remove a tree on private property is a tax that will not achieve the goal of replacing canopy, discourages home improvements, is contrary to the law, reduces property values, reduces tax revenue, and does nothing to revitalize older neighborhoods.

For these reasons Renewing Montgomery opposes this Bill and supports the current law which allows the removal of trees on private property without any permit or fee requirement.

Susan Silber
Linda S. Perlman
Kenneth T. Sigman
Metody A. Tilev*



**SILBER, PERLMAN,
SIGMAN & TILEV, P.A.**

ATTORNEYS AT LAW

*Practicing in Maryland and
the District of Columbia*

* Also admitted in Virginia

7000 Carroll Avenue, Suite 200 ■ Takoma Park, Maryland 20912-4437 ■ Tel: (301) 891-2200 ■ Fax: (301) 891-2206 ■ Web: www.SP-Law.com

MEMORANDUM

To: Transportation, Infrastructure, Energy & Environment Committee of the Montgomery County Council

Cc: Takoma Park Mayor and City Council; Daryl Braithwaite, Public Works Director, Todd Bolton, City Arborist

From: Susan Silber, City Attorney; Kenneth Sigman, Asst. City Attorney

Subject: Request for amendments to and statement of support for Bill 35-12.

Date: January 22, 2013

We are writing on behalf of the City of Takoma Park to express the City's support for the policy of promoting tree canopy embodied in Bill 35-12 and to request an amendment to the Bill that would exempt from the requirements of the proposed Montgomery County Tree Canopy Conservation Law activity that is already regulated by municipal tree preservation legislation that is at least as stringent as the County Law.

The City of Takoma Park has long recognized the environmental, economic, and aesthetic benefits that trees provide and has enacted comprehensive legislation that protects existing trees and requires the replacement of lost trees. Therefore, the City supports the additional protections to the County's tree canopy afforded by Bill 35-12. However, the City is concerned that Bill 35-12 would undermine the City's well-developed and thorough tree preservation scheme unless it is amended to recognize municipal authority on this subject and allow for an exemption from the County Tree Canopy Conservation Law for development activity that is already subject to comprehensive municipal regulation.

Takoma Park's Tree Preservation Legislation

The City of Takoma Park has been on the leading edge of legislative efforts to protect tree canopy for many years. Chapter 12.12, Urban Forest, of the *Takoma Park Code* ("Tree Ordinance"), regulates all activity in the City that may have an adverse impact on the viability of any tree that is at least 24" in circumference, was planted with government funding, or was required to be planted or maintained pursuant to government tree preservation regulations.¹ Under Bill 35-12, only development activity requiring a sediment control permit would be subject to the requirements of the Tree Preservation Law. However, the City's Tree Ordinance regulates even small-scale

¹ Takoma Park, like the County, is restricted regarding the regulation of the activity of Verizon and Pepco, although the City has Memoranda of Understanding with both utilities that requires the utilities to notify the City of tree work and gives the City Arborist some influence over the activity.

activity that could have an adverse impact a protected tree.²

Under the City's Tree Ordinance, most construction activity within the critical root zone of a protected tree requires a Takoma Park Tree Protection Plan Permit. The City Arborist aids property owners and their contractors in the development of a tree protection plan, which must be approved by the City before work can commence. Tree protection plans prescribe measures to minimize the impact of the construction activity on existing trees. When proposed activity requires the removal of a tree, a Takoma Park Tree Removal Permit is required.

In developing tree protection plans, the Arborist seeks to minimize the number of trees that must be removed as a result of a project and protect the most valuable trees. For example, if the project involves the construction of a new home on a vacant lot, the tree protection plan may mandate changes to the size, shape, and placement of the house, to facilitate the preservation of existing large, healthy trees. For more minor projects, a tree protection plan may simply require the installation of tree protection fencing to prevent the storage of materials or the parking of heavy equipment within the critical root zone of a tree. Tree protection plans also mandate additional measures to protect remaining trees from the impact of construction. For example, a tree protection plan may require the applicant to tunnel under tree roots to lay cable, rather than digging a trench through the roots, refrain from using heavy equipment in the critical root zone of the tree to prevent soil compaction that may kill the roots, utilize gravel or pervious pavers in lieu of concrete, and provide follow-up watering and treatment against disease for trees that will be stressed by the construction activity. Applicants must replace trees intended to be saved by the tree protection plan that die following the activity by planting new trees or paying into the City's tree replacement fund the cost of planting replacement trees. Replacement trees must be nursery stock trees of specified species, and the number of replacement trees required depends on the size and condition of the tree prior to the activity.

Significant pruning of protected trees also requires a permit, which will not issue for pruning extensive enough to harm the tree unless conditions make it absolutely necessary.

When someone seeks to remove a protected tree in the City of Takoma Park, they must obtain a Tree Removal Permit. The City Arborist weighs the reasons for the removal of the tree against the benefits of retaining the tree in ruling on the permit application. If the permit is granted, the applicant must plant replacement trees on site or pay an amount equal to the cost of the replacement trees into the City's Tree Replacement Fund.

Takoma Park's Request for an Exemption

Takoma Park believes that an exemption from Bill 35-12 for activity in the City would be in the best interest of the City, the County, residents, and contractors. As discussed above, the City already provides extensive protection for existing trees and promotes the establishment of additional tree canopy through its Tree Ordinance. The City has honed its Tree Ordinance over decades, and has established an independent administrative body to review tree permit decisions. The City's tree permit process, which involves site visits and the development of

² Under Takoma Park's regulatory scheme, even very minor activity within the critical root zone of a protected tree requires the property owner or contractor to first have the City Arborist perform a Tree Impact Assessment to determine whether the proposed activity is likely to have an adverse impact on one or more protected trees. For example, building a shed or paving or regrading an area of 25 square feet within the critical root zone of a tree requires a Tree Impact Assessment. If the City Arborist determines that the proposed activity will not harm the tree(s), the property owner may proceed with the project. If the Arborist determines that the activity would have a significant adverse impact on a tree, then he advises the property owner that a Tree Protection Plan Permit or Tree Removal Permit will be required.

individualized tree protection plans by the City Arborist, and a case by case assessment of whether the removal of a tree is necessary, results in much greater protection to the Takoma Park's tree canopy than Bill 35-12 would provide. The Takoma Park Tree Ordinance mandates tree-friendly changes to development plans and recognizes and rewards tree preservation measures and on-site tree replacement (through reductions in tree replacement requirements and the consideration of mitigation measures in the granting of permits). Bill 35-12, on the other hand, simply imposes a fee based on the area of disturbance of a proposed project.

The City of Takoma Park is concerned that subjecting development projects in the City of Takoma Park to the requirements of Bill 35-12 and the City's Tree Ordinance would impose unreasonable substantive and procedural burdens on developers without providing additional protection to the tree canopy. Under the City's Tree Ordinance, developers would be required to apply for City permits, develop a site plan that minimizes canopy removal, develop a tree protection plan to protect the trees remaining on or near the site, and replace or pay the cost of replacing the trees to be removed. Unless exempted from the County's Tree Canopy Conservation Law, the developer would also have to document the existing tree canopy for the site and the proposed area of disturbance, and then pay a County fee calculated based on the area of disturbance, without regard for the tree preservation, protection, and replacement measures already mandated by the City of Takoma Park.

The City is also concerned that the imposition of the Montgomery County Tree Canopy Conservation Law would discourage compliance with the City's carefully tailored Tree Ordinance. First, developers may not realize that both the City and the County regulate tree removal and replacement, and therefore inadvertently proceed with development projects without the necessary Takoma Park permits. Second, the City is concerned that the presence of two canopy preservation schemes, and their concomitant procedural hurdles and mitigation expenses, may cause developers to intentionally disregard the City's Tree Ordinance.

Our proposed amendment to Bill 35-12, a copy of which is attached, would provide for an exemption from the Montgomery County Tree Canopy Conservation Law for any activity in a municipality that has enacted tree canopy conservation legislation that is at least as stringent as the County's Law. The Department of Permitting Services would be responsible for determining whether a municipal tree canopy conservation ordinance warrants an exemption from the County Law. In addition, in recognition of the ongoing monitoring of development projects performed by the Department of Permitting Services and the Planning Department and the County's interest in tree canopy conservation, the proposed amendment gives both County agencies the authority, at their discretion, to enforce municipal tree canopy ordinances applicable to projects under their jurisdiction.

Conclusion

For the foregoing reasons, the City of Takoma Park respectfully requests that Transportation, Infrastructure, Energy & Environment Committee recommend that the County Council enact Bill 35-12 as amended by the attached proposal.

F:\TAKOMA\TREES\Montgomery County Legislation\2013-01-22 TP Comments re Bill 35-12.wpd

**City of Takoma Park's Proposed Amendments to
Bill 35-12, Trees – Tree Canopy Conservation**

55-5. Exemptions.

- (i) any activity in a municipality that has enacted an ordinance for the preservation, maintenance and establishment of tree canopy that the Department has determined is at least as stringent as this Chapter, except that the Department and the Planning Board shall have the authority, concurrent with the municipality's authority, to enforce violations of municipal tree canopy preservation ordinances relating to activities that would be subject to this Chapter if not exempted under this paragraph.

55-11. Penalties and enforcement.

- (b) Enforcement action. The Director of Permitting Services or the Planning Director may issue a notice of violation, corrective order, stop-work order, or civil citation to any person that causes or allows a violation of this Chapter or a municipal tree canopy preservation ordinance.

The City of Takoma Park's requested amendments to the Bill are double underlined.

February 20, 2013

Montgomery County Council
Transportation, Infrastructure, Energy and Environment Committee
Attention: Roger Berliner, Chair
Nancy Floreen
Hans Riemer

RE: Bill 35-12, Tree Canopy Conservation

Dear Mr. Berliner, Committee Members Floreen and Riemer,

You may recall that I testified at the public hearing on this bill and I attended the subsequent work session. I want to make a few points as you continue to deliberate this bill.

We all agree that our trees are an important and valuable resource and should be protected and preserved. However, there has been very little factual justification for the bill, either from the Department of Environmental Protection staff or members of the public at large. We know as of 2009 that 50% of the county is covered by tree canopy, which is 157,219 acres or 245 square miles. However, a few simple but important questions remain **unanswered**:

1. How much tree canopy have we lost since 2009?
2. How much tree canopy have we gained since 2009?
3. What is the Urban Tree Canopy (UTC) goal for the county?
4. What is the fiscal impact (cost-benefit) of this legislation?

It is not appropriate for this legislation to proceed until these basic questions are answered since the answers will either show a justification for the bill or show that the bill is unnecessary.

DEP staff presented a small residential section of West Bethesda that included the redevelopment of 13 different lots. This was intended to demonstrate that redevelopment or infill development is causing a loss of tree canopy throughout the county. However, when the MNCPPC Tree Canopy Explorer tool is applied to this area, it calculates tree canopy coverage of 55.9%, which is well in excess of the county average. The larger area presented by DEP, which includes a substantial portion of the Bethesda CBD, was also intended to demonstrate a section of the county undergoing substantial redevelopment and loss of tree canopy. Using the same tool, the canopy coverage is shown to be 47%, also a substantial amount of tree canopy for one of the more urbanized areas of the county. (See attachments) Based on this information alone, I do not see how this bill can be justified.

I've also included an example of how tree canopy coverage has been added in the county during a time of rapid growth, over the last 30 years. This type of tree canopy growth is playing out all over the county in other communities that have been developed more recently. The North Farm neighborhood on Montrose Road existed in the 1970s' as a land parcel with almost zero tree canopy, yet today this enclave of residential homes and open spaces has a tree canopy of 54%, illustrating how tree canopy is established and preserved without a forest conservation law or tree canopy law. (See attachments)

With respect to Urban Tree Canopy goals, our neighboring county Fairfax, Virginia currently has 41% tree canopy with a goal to reach 45% by 2037. The District of Columbia has 37.2% tree canopy with a goal of 40%. Obviously we are well beyond those levels at this point in time.

In conclusion, it is my hope that you ask the tough questions of staff in order to get all the facts on the table. Simply put, you should not enact legislation with only anecdotal evidence as justification for a bill that will affect a county of 507 square miles and almost a million people.

Sincerely,

A handwritten signature in black ink, appearing to read 'CWG', with a long horizontal flourish extending to the right.

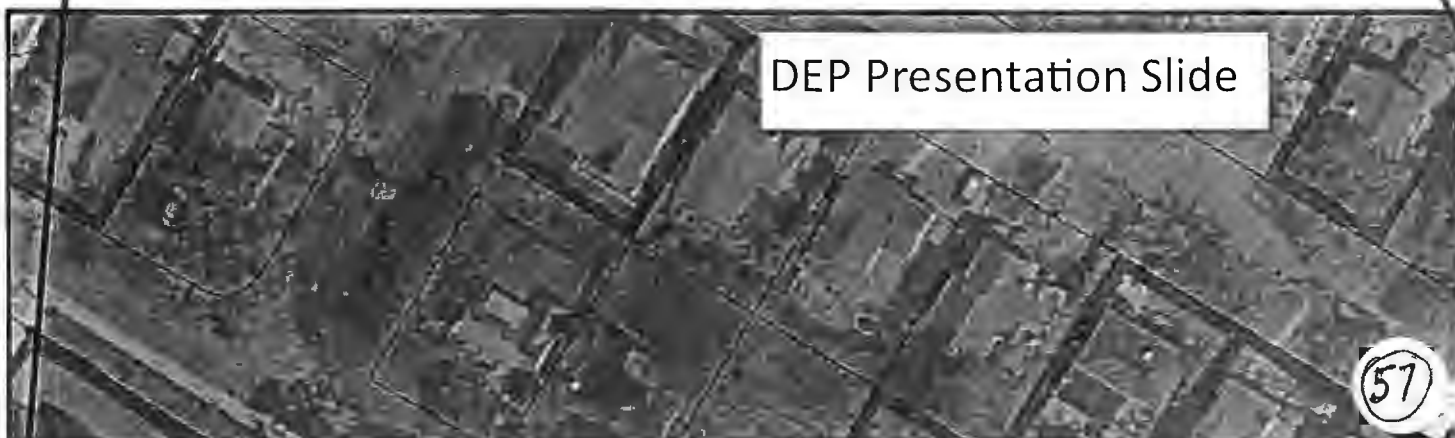
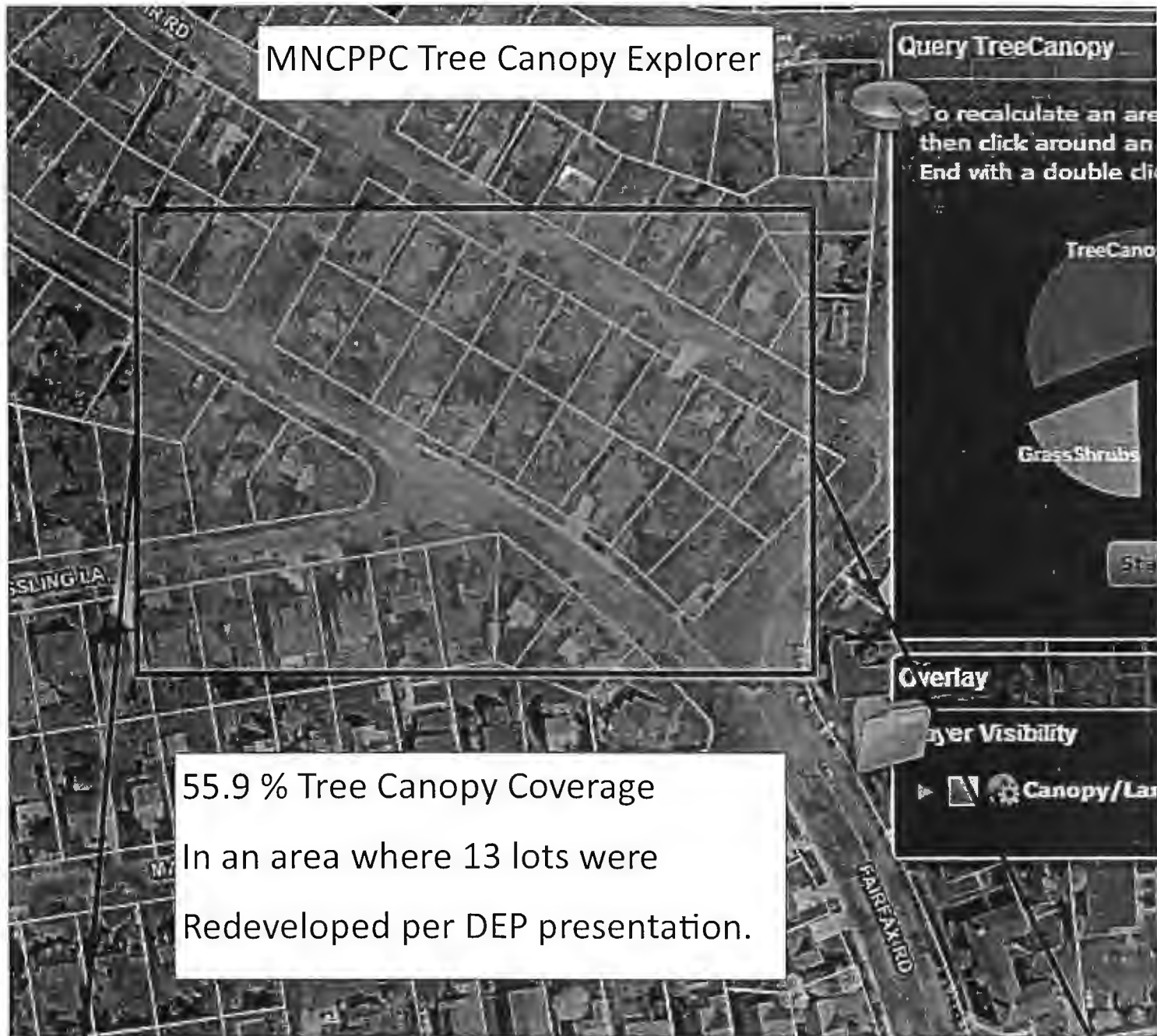
Clark Wagner

48 year County Resident

Vice President of Montgomery County, MNCBIA

Pleasants Development, Inc.

CC: Council Members Andrews, Ervin, Elrich, Leventhal, Navarro, and Rice



MNCPPC Tree Canopy Explorer

Query TreeCanopy

to recalculate an area
then click around a
End with a double c



Overlay

Layer Visibility

► ☐ Canopy/L

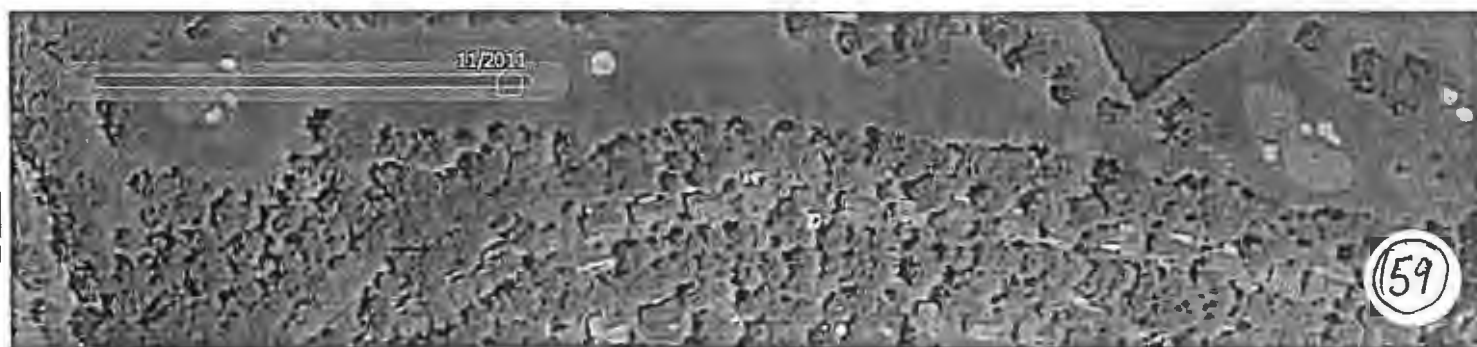
47 % Tree Canopy Coverage

In an area that had substantial
redevelopment per DEP presentation.

DEP Presentation Slide



North Farm, Montrose Road



DONOVAN • FEOLA • BALDERSON & ASSOCIATES, INC.

LANDSCAPE ARCHITECTURE • SITE PLANNING • FOREST CONSERVATION • RECREATION PLANNING

ANDREW H. BALDERSON, RLA, PRESIDENT
TYLER H. BALDERSON, MASTER ARBORIST, VICE-PRESIDENT
ROB COHEN, RLA, SENIOR LANDSCAPE ARCHITECT
TOM TROSKO, RLA, SENIOR LANDSCAPE ARCHITECT
SHANNON SWANSON, BUSINESS MANAGER

February 16, 2013

Ms. Nancy Navarro, President
Montgomery County Council
100 Maryland Avenue
Rockville, Maryland 20850

RE: Montgomery Co. Bill 35-12, Trees – Tree Canopy Conservation

Dear Ms. Navarro:

As a licensed landscape architect practicing in Montgomery County for 41 years, I have designed and directed projects including: tree preservation, land development, tree planting, and reforestation. Additionally, I have testified as an expert witness before the Montgomery County Board of Appeals, the M-NCPPC Planning Board, and the Circuit Court. For thirty years I have owned and managed Three Springs Nursery, growing trees at our farm in Laytonsville, Maryland. I cannot support the above tree Bill as written, because it will cause an undue hardship on small lot property owners, will be extremely difficult for public agencies to administer in a fair and reasonable way, and does little to improve the urban forest.

The name of the Bill, Tree Canopy Conservation, is misleading as this is NOT a Bill of Canopy Tree Conservation, although it is being promoted as such. The definition of a tree as provided within the Bill:

“Tree means a large, woody plant having one or several self-supporting stems or trunks and numerous branches that can grow to a height of at least 20 feet at maturity.”

This is neither an accurate nor working definition, as there are many shrubs, both ornamental and native that would meet this definition. Rather, “trees” should be clearly classified and defined, the largest being the Canopy Trees. A working example of how canopy trees should be defined is that of the ordinance of Athens-Clarke County in Georgia which provides a proper definition of the sizes & character of trees.

Additionally, the required use of aerial photography and GIS for delineating “tree” canopy cover can be extremely misleading, particularly for areas as small as 5,000 square feet. An on-site inspection and description of the tree size, species, and health must be part of this application and review process.

The definition of land disturbing activities provided is vague and needs to be revised, as this is the trigger which requires the submission of Tree Canopy Disturbance Plans. Specifically, “tilling” and “related activities” must be clarified, as well as other “land disturbance” which may or may not impact the health of the “tree”. The amount of the land disturbance area that triggers a review is 5,000 square feet, approximately the size of a regulation basketball court.

4230 DAMASCUS ROAD • LAYTONSVILLE • MARYLAND • 20882
VOICE: 301 • 774 • 1931 FAX: 301 • 570 • 0556 www.dfblandarch.com

The exact same land disturbance activity requiring a Sediment & Erosion Control Permit and "Limits of Tree Canopy Disturbance Plan" must be submitted to one of two different County agencies depending upon the size of the lot involved. Projects on lots less than 40,000 square feet will be submitted to the Director of Permitting Services (DPS). Projects on lots over 40,000 square feet will be submitted to the Director of Planning (M-NCPPC). This is a duplication of services, staffing, and resources which is an egregious waste of tax dollars and will reduce the effectiveness of existing staff.

The mitigation fee will be assessed per square foot of land disturbed under the tree canopy, even if the "tree" is not removed. If this fee is consistent with M-NCPPC current fees for tree mitigation, it will be \$1.05 per square foot. The mitigation requirements will not allow the applicant the option to plant the trees on their own property (only 5% of the fee can be credited for on-site landscaping.) The money deposited in the Tree Canopy Conservation Fund will be used to establish tree canopy on other sites in the County.

Under 55-11(c) Penalties and enforcement – "The maximum civil penalty for any violation of this Chapter or any regulation adopted under this Chapter is \$1,000. Each day that a violation continues is a separate offense."

Projects most impacted by this Bill with land disturbances of 5,000 square feet or more requiring a Sediment Control Permit include:

- a) Residential Landscaping
- b) Additions or Renovations
- c) New Development
- d) Green Space Management for Commercial and Institutional Facilities, including schools and campuses
- e) Recreational Facilities – Parks, Playgrounds, Athletic Facilities, Golf Courses, etc.

Where appropriate, the preservation of existing CANOPY TREES and the planting of new canopy and under story trees should be required on those lots which are less than 40,000 square feet requiring a Sediment Control Permit. I have attached an appendix with some recommendations for your consideration.

Clearly, to write a successful tree conservation bill, it is necessary throughout the entire process to engage licensed professionals who prepare and submit tree conservation plans, as well as those who perform tree preservation and tree planting in the urban environment. It is evident that this was not done, and the existing legislation, as written, is unworkable.

Thank you for your consideration of and attention to this matter.

Sincerely,

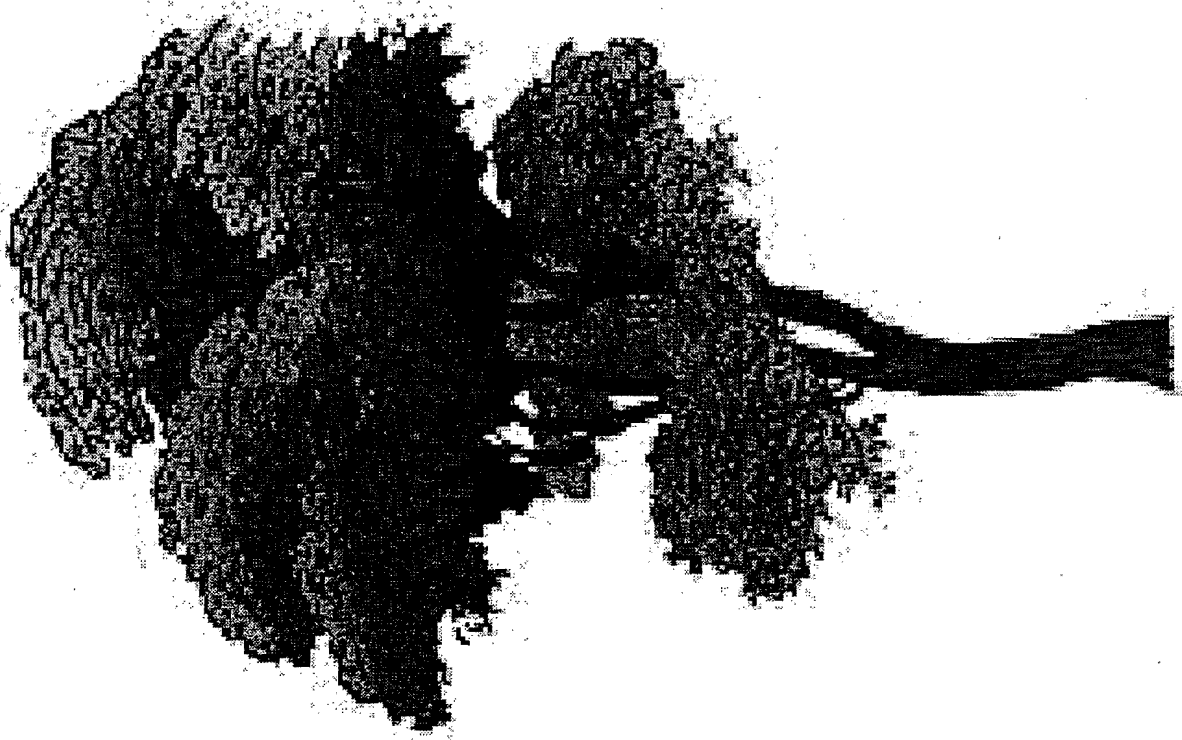
Andrew H. Balderson

Cc: Editor, Gaithersburg Gazette
Mimi Kress, Sandy Spring Builders, LLC
Ken Thompson, President, LCA

Appendix A: Recommendations to amend Bill 35-12, Trees – Tree Canopy Conservation

- I. For lots less than 40,000 square feet
 - a. Incorporate into the Sediment Control Permit the surveyed location, size, species, and condition of all trees 55" circumference (17 ½" DBH) or greater. Submit Tree Preservation Plans. Note: this requirement is similar to District of Columbia code for Special Tree Removal Permit.
 - b. Determine a mitigation ratio for replacement trees based on the total circumference inches for trees removed or fatally impacted.
 - c. For every 5,000 square feet of land disturbance calculated in the Sediment Control Permit, an appropriate number of canopy and under story trees will be planted on-site, unless applicant chooses to allocate to the County Tree Fund.
- II. For lots greater than 40,000 square feet
 - a. Eliminate any requirement for Tree Canopy Conservation, as this is redundant to the existing Forest Conservation Law.

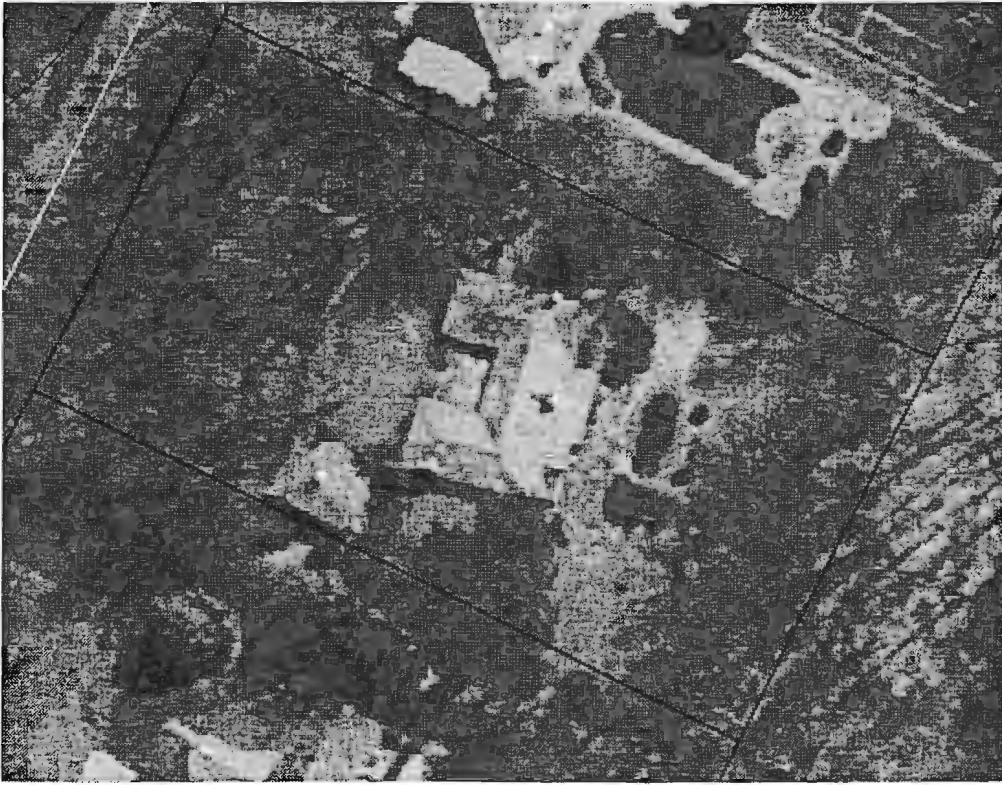
Bill 35-12 Tree Canopy Conservation



Why is a tree canopy bill needed?

- Development patterns have been changing
 - Fewer large parcels are left to subdivide
 - More previously built lots are being redeveloped
- The County is losing canopy during redevelopment, particularly in residential neighborhoods
- Local benefits provided by tree canopy include
 - increased property values
 - increased revenues for businesses
 - cleaner and cooler air and water
 - lower heating and air conditioning bills
 - many social benefits

2004



1.19 acre lot

2011



Redeveloped in 2006

1998



1.02 acre lot

2011



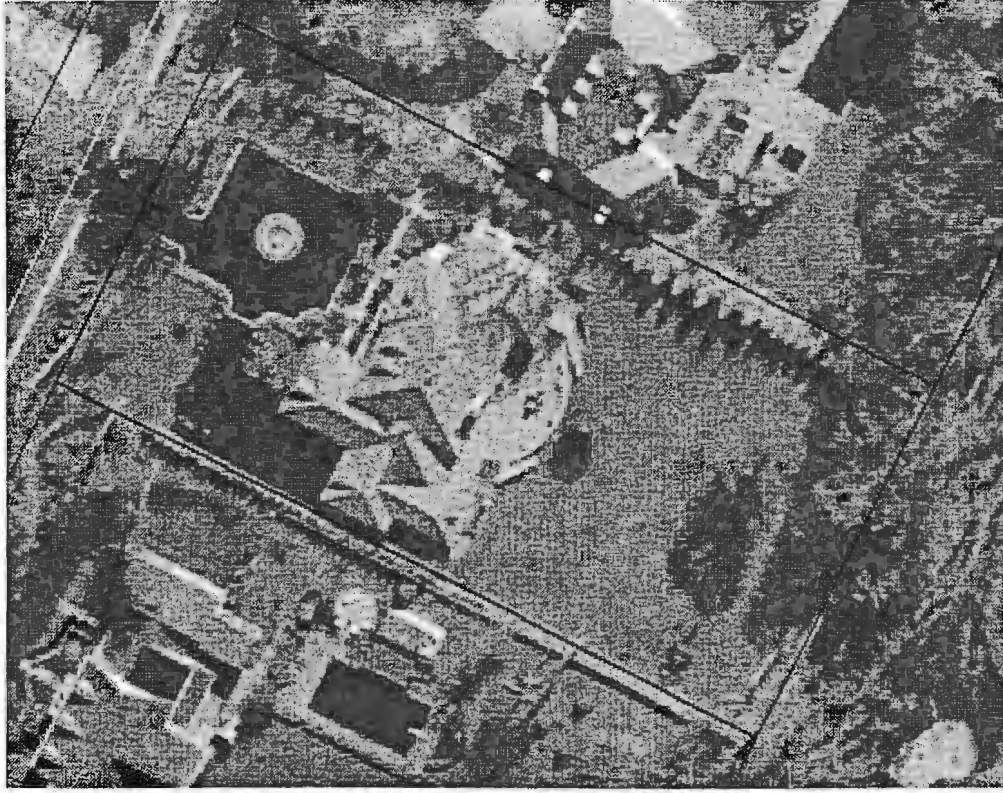
Redeveloped in 2002

2004



1.02 acre lot

2011



Redeveloped in 2009

1998



2011



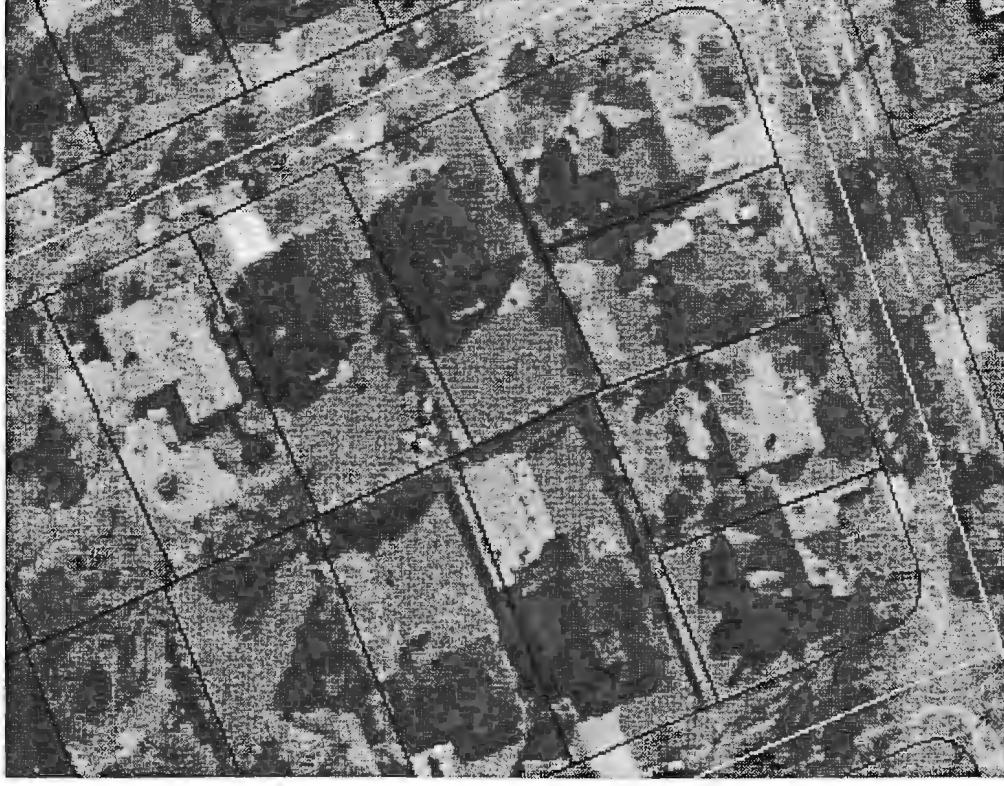
13,000 sq. ft. lots

Redeveloped in 2004-2009

2006



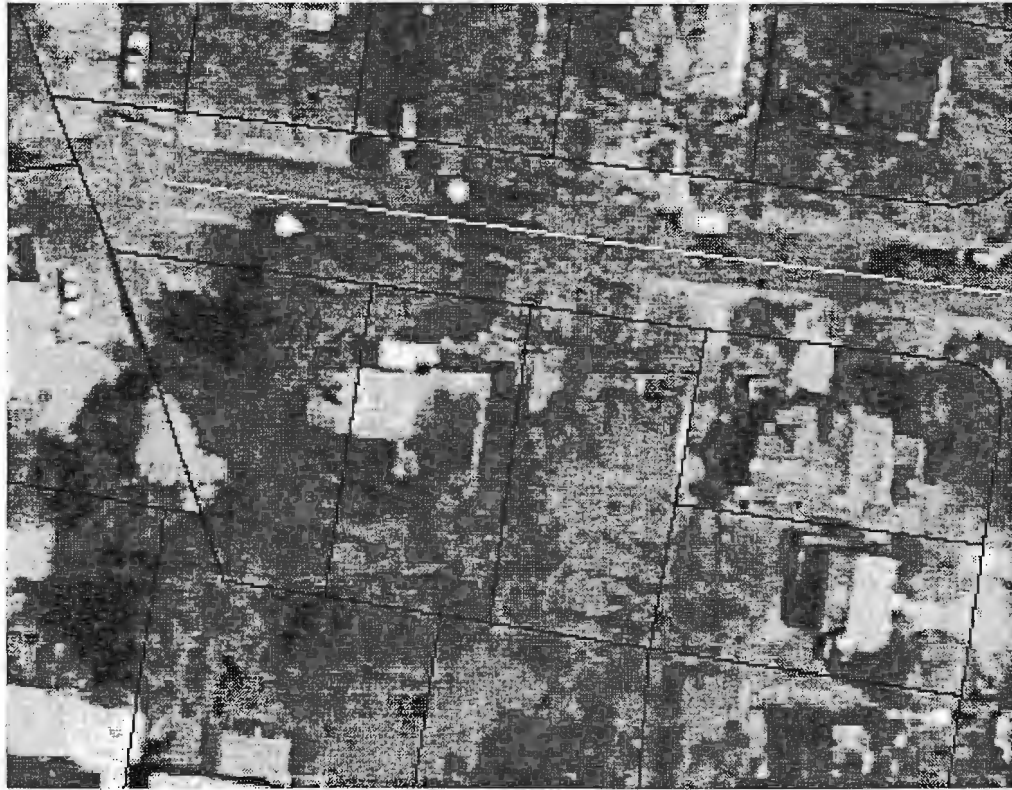
2011



10,800-13,200 sq. ft. lots

Redeveloped in 2004-2011

1998



2011



6,100-7,200 sq. ft. lots

Redeveloped in 2002-2004



Residential neighborhood in 2002; Lots are 5,000 – 10,000 sq. ft.



Residential neighborhood in 2012; Lots are 5,000 – 10,000 sq. ft.



Redeveloped in 2002 – 2011; Lots are 5,000 sq. ft. and greater

The Forest Conservation Law

- The Forest Conservation Law (FCL) was designed to slow the loss of forest at a time when large tracts were subdivided into small lots
- The FCL requires mitigation when forests are lost due to development
- The FCL generally applies to properties over 40,000 square feet when a sediment control permit is required, or when subdivision activity occurs
- The FCL applies to large trees (over 24" dbh) outside of forests and to all Champion trees



Little of this activity is regulated by the Forest Conservation Law.

Tree Canopy Bill – Guiding Principles

As requested by the County Executive, the Tree Canopy Bill was designed to be:

- An approach that could be easily understood by the regulated community
- A streamlined process for the development community
- Something that could be implemented with minimal costs to both the applicants and the County

When does the Tree Canopy Bill apply?

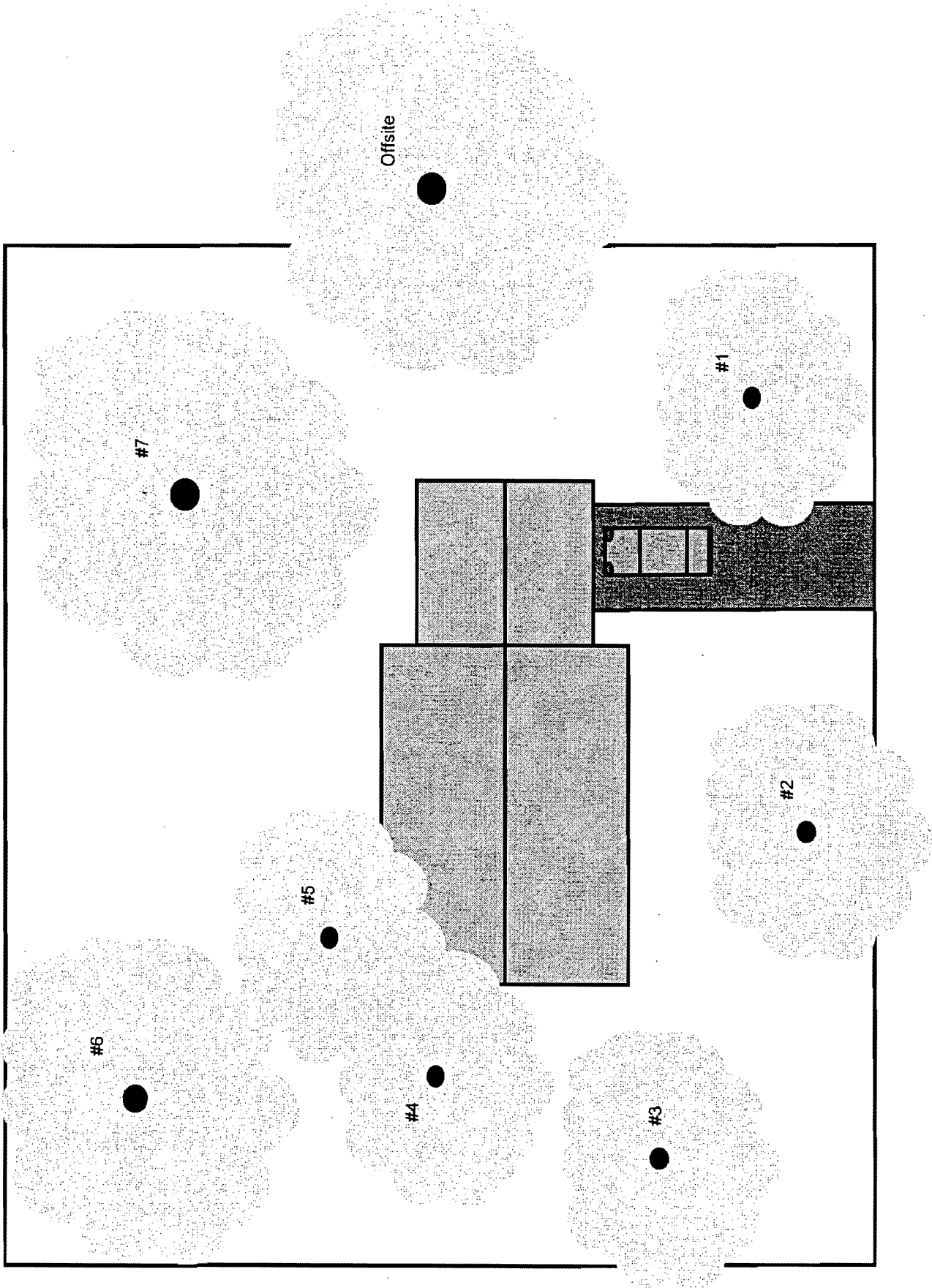
- Applies to any activity requiring a sediment control permit:
 - New residential or commercial building;
 - 5,000 square feet or more of ground disturbance; or
 - 100 cubic yards or more of earth movement.
- The cutting of 5,000 square feet or more of canopy is considered ground disturbance

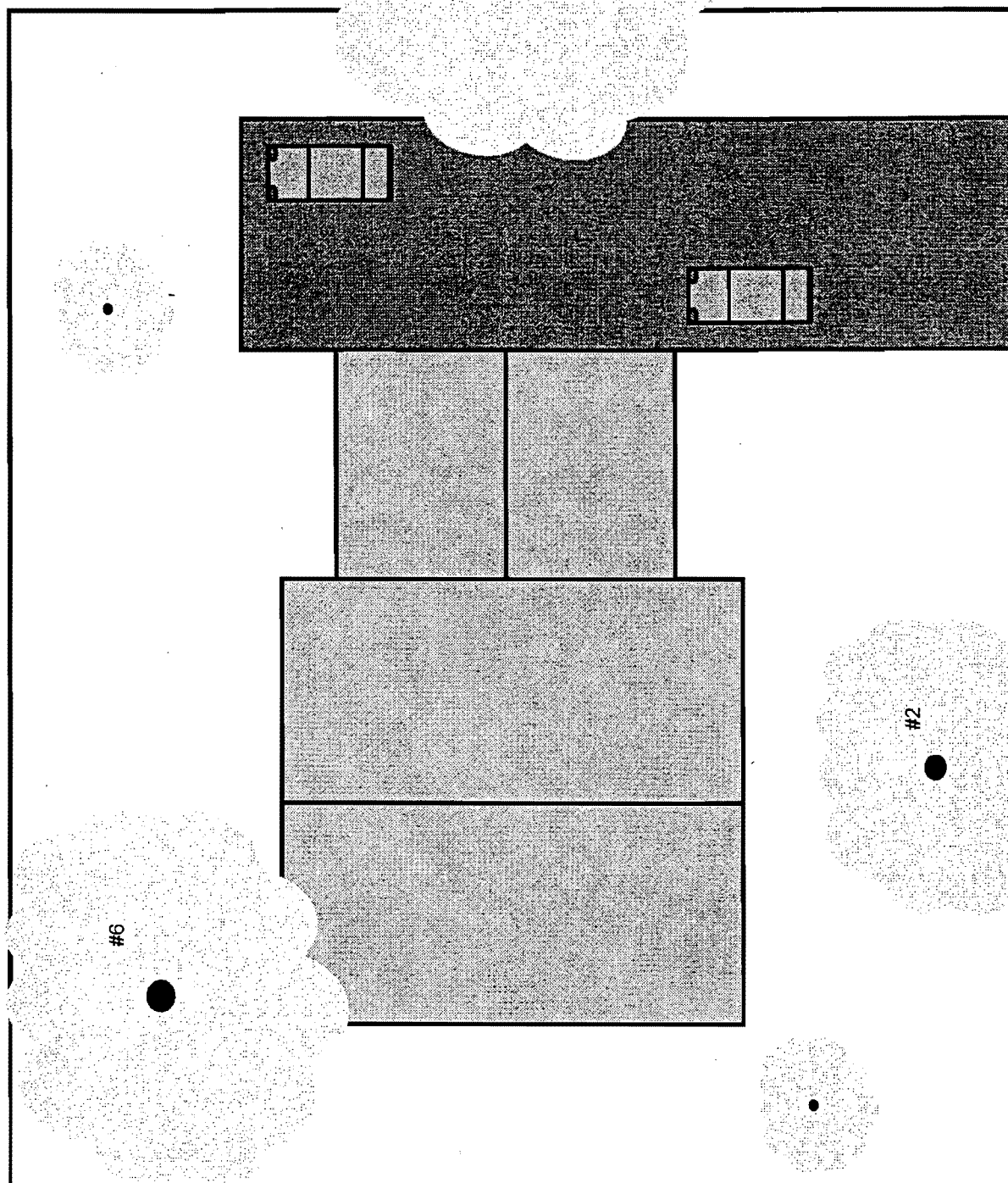
Activities not covered by the Tree Canopy Bill

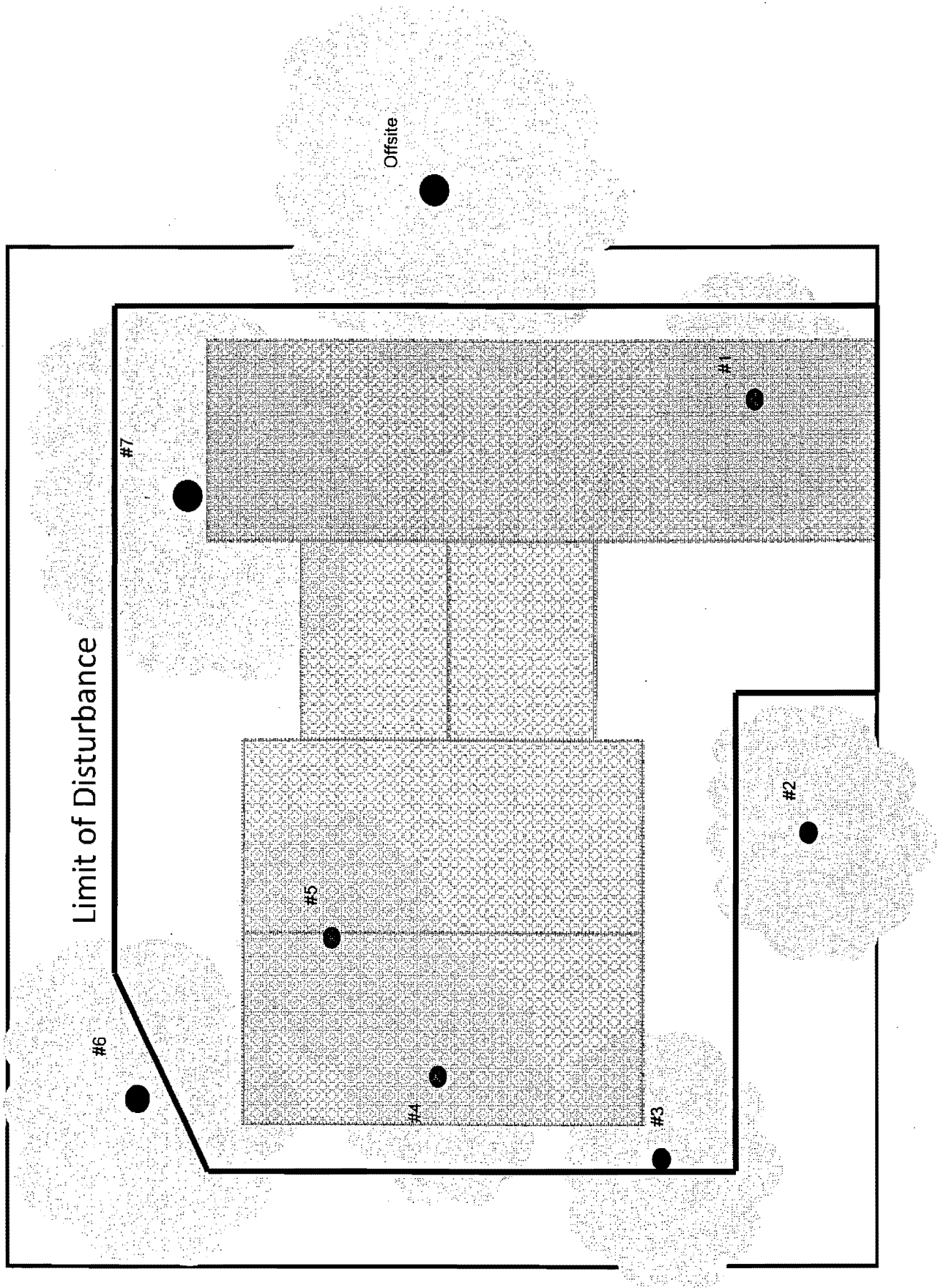
- The removal of an individual tree or group of trees less than 5,000 square feet in canopy area
- Any agricultural activity where a sediment control permit is not required
- Routine tree maintenance activities of electric utilities where a sediment control permit is not required
- Stream restoration and stormwater facility maintenance activities with all appropriate permits

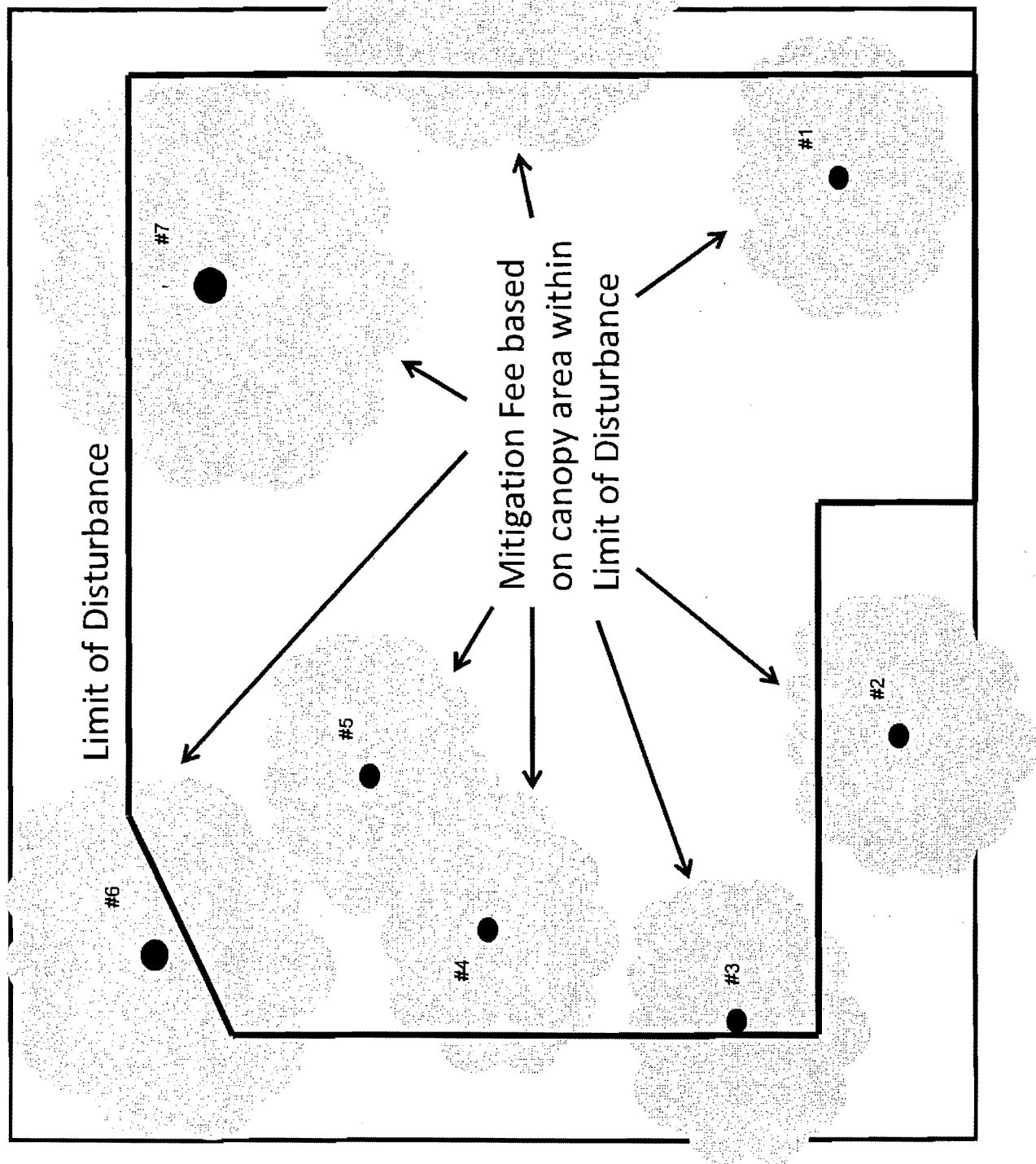
Who implements the Tree Canopy Bill?

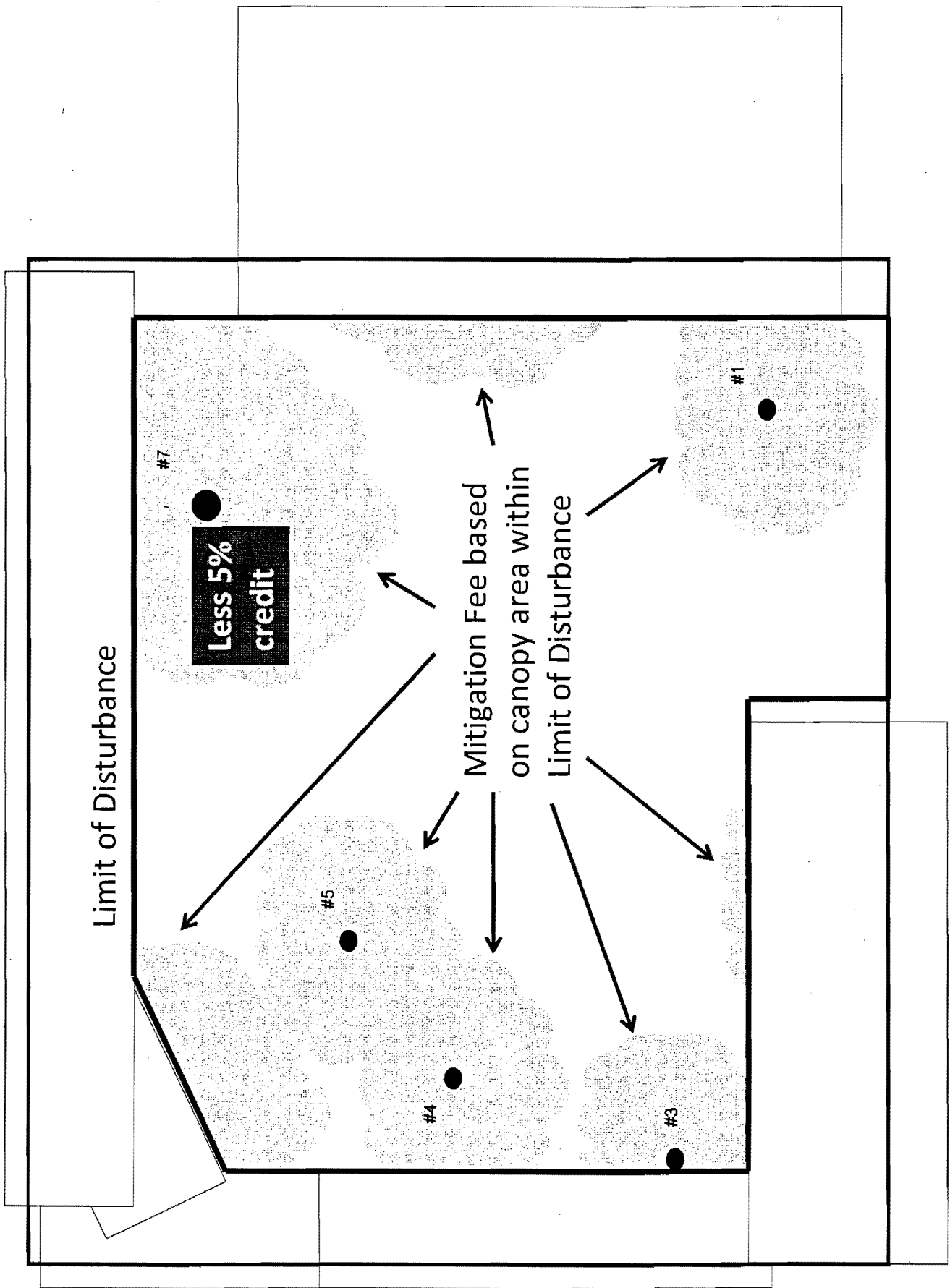
- The requirements of the bill are implemented during existing review processes:
 - The Montgomery County Planning Department implements the bill for all development activities subject to the Forest Conservation Law (FCL)
 - The Department of Permitting Services implements the bill for all other applicable activities during the Sediment Control Permit process

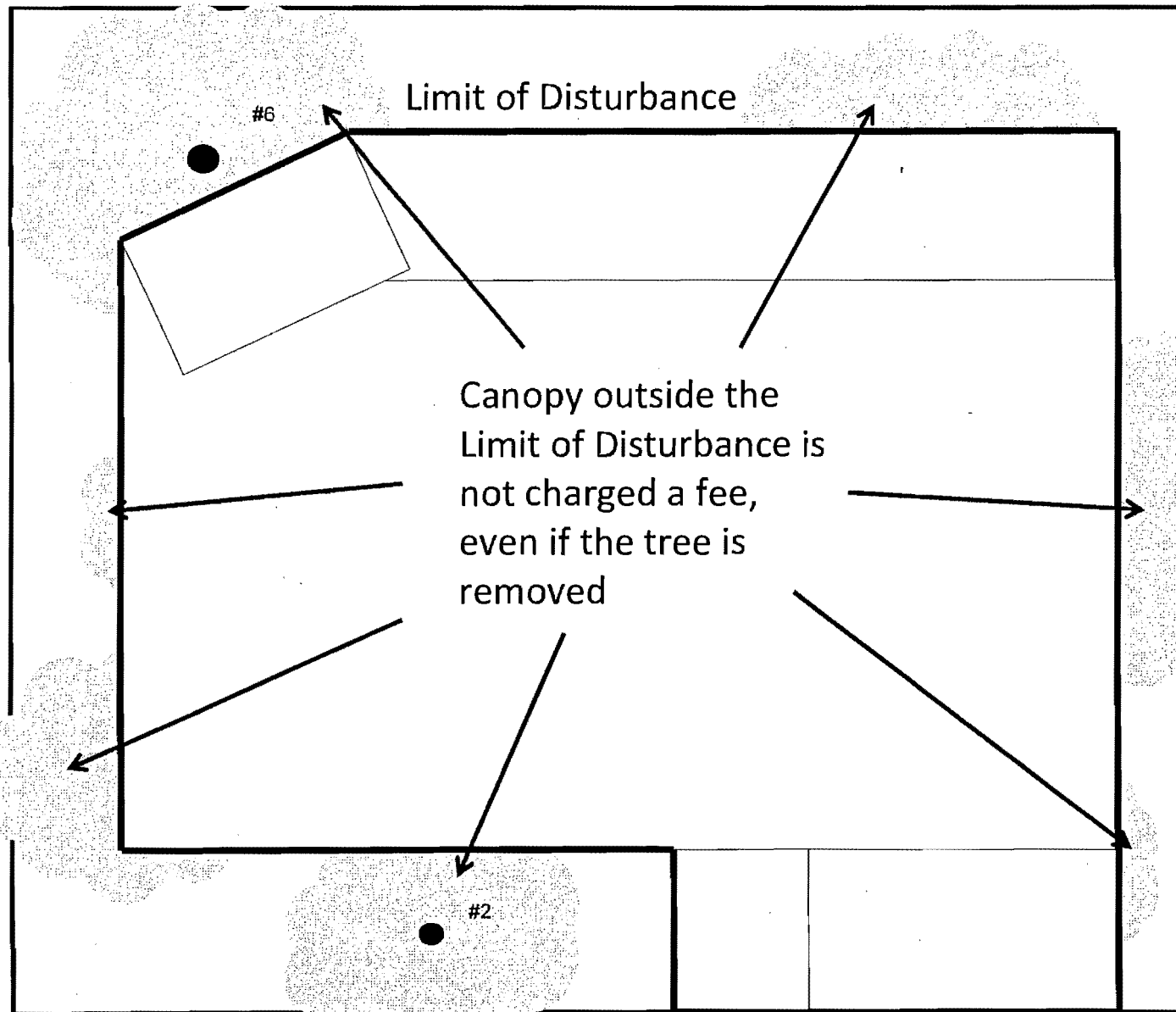


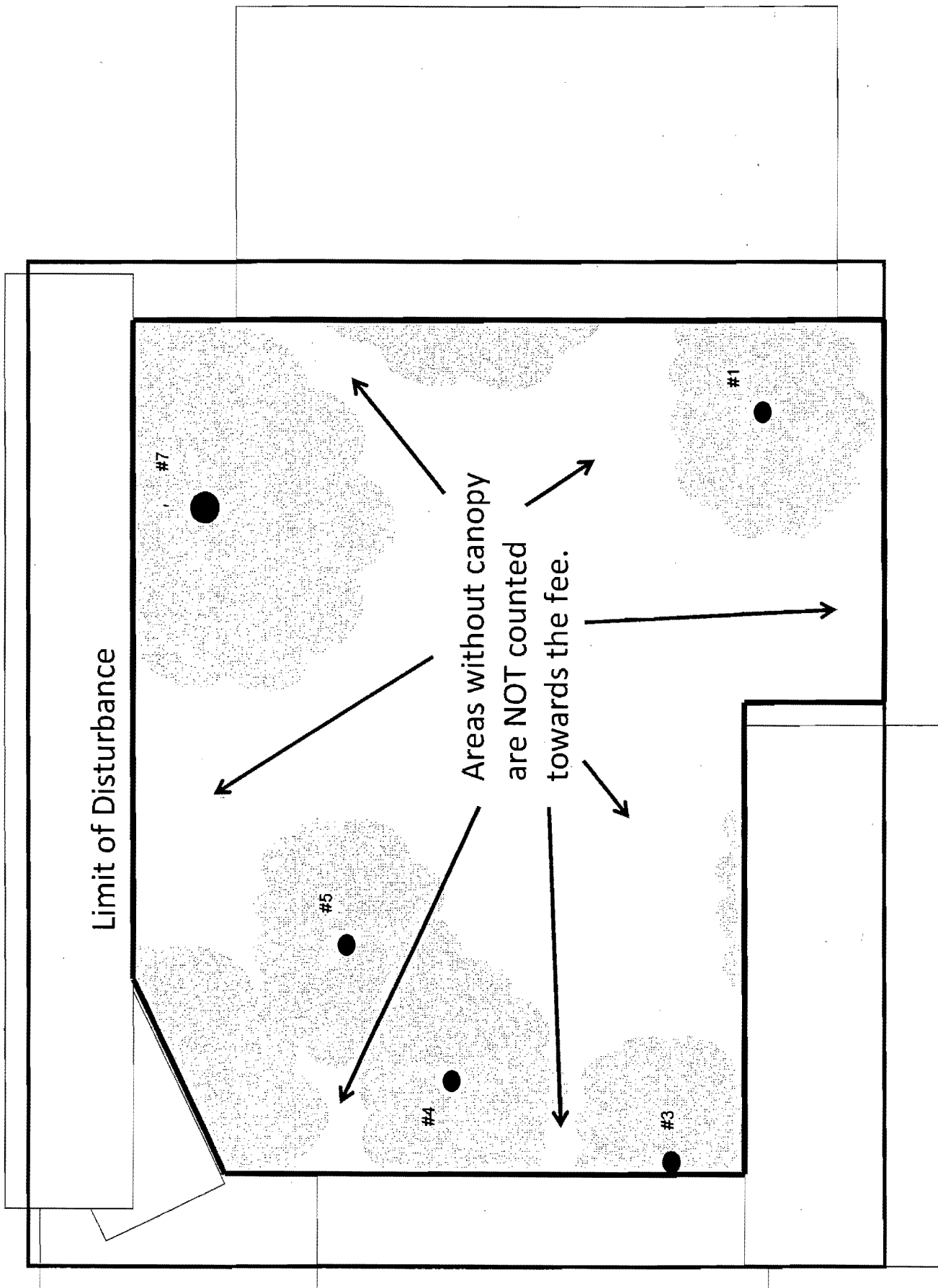












Issue: Mitigation credit for on-site planting

Proposed Approach

- Payment of canopy fee satisfies mitigation requirements
- Fees will be used to establish trees close to the disturbance
- No fee charged for first 5% of canopy within LOD in recognition of on-site planting

Rationale

- Minimizes cost of administering program
- Minimizes delays to development process
- Many sites cannot accommodate canopy trees after development
- Comprehensive planning and economies of scale enable planting that addresses community needs
- Without extended maintenance agreements, performance bonds, and long-term easements, survival rates of trees significantly lower

Issue: Mitigation credit for on-site planting

Alternative Approaches

- Require planting of specified number of trees based on disturbance
- Require planting to the extent the site allows, and payment of fee for balance of mitigation requirement
- Increase percentage of canopy within LOD not charged a fee

Issues to Address

- When is a planting successful? Would maintenance agreements, performance bonds, and long-term easements be required?
- What is correct number of trees to plant? Is it based on disturbance, lot size, available space, etc.?
- What additional County resources would be needed to implement this approach?
- What additional resources would be needed by the applicant?

Issue: Mitigation credit for protected trees

Proposed Approach

- Canopy within LOD assumed to be disturbed and is factored into fee calculation
- Canopy outside of LOD lost due to removal of tree not factored into mitigation fee

Rationale

- Under big tree variance procedures of FCL, any activity within critical root zone of a tree is assumed to be disturbance to the tree
- If tree is truly undisturbed, LOD may be adjusted
- Particularly on small lots, not enough space for adequate tree protection measures
- Minimizes implementation costs for both the County and applicants
- Minimizes delays to development process

Issue: Mitigation credit for protected trees

Alternative Approaches

- Provide mitigation credit for all canopy associated with trees subject to approved protective measures
- Provide mitigation credit only on lots above a certain size or for certain activities (e.g. park restoration activities)

Issues to Address

- What protective measures are acceptable? Who sets the standards?
- What lot sizes and activities are suitable for allowing credit for protective measures?
- What County resources would be needed to implement this approach?
- What additional resources would be needed by the applicant?

Issue: Mitigation credit for meeting on-site stormwater management requirements

Proposed Approach

- Canopy within LOD disturbed as a result of installing stormwater management features treated the same as any other canopy disturbed

Rationale

- Provision of stormwater management part of the development process
- Under the FCL, forest lost due to installation of stormwater management features treated like all other forest
- Not rational to allow the disturbance of one environmental resource in order to address the requirements associated with another environmental resource

Issue: Mitigation credit for meeting on-site stormwater management requirements

Alternative Approaches

- Provide mitigation credit for all canopy associated with trees disturbed as a result of the installation of stormwater management measures
- Provide stormwater credit for trees left undisturbed

Issues to Address

- What additional County resources would be needed to implement this approach?
- What additional resources would be needed by the applicant?
- State law currently does not allow stormwater credit for trees left undisturbed; County cannot provide this credit without state approval

Issue: Fees for Mitigating Loss of Canopy

Proposed Approach

- The fees must increase as disturbance increases
- Fees are not charged to the first 5% of canopy within the LOD
- Fees will not revert to the general fund
- Uses are specified and limited in the bill to establishing and enhancing tree canopy
- Specific fees are not in the bill (will be set by Method 2 Regulations)

Rationale

- Focus on the approach to determining mitigation

Use of Mitigation Fees

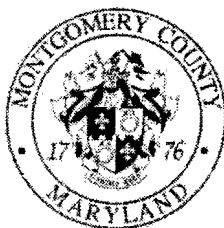
- The fees “must be spent on establishing and enhancing tree canopy”
- Potential opportunities include:
 - Street trees
 - “Paper” streets
 - Backyard programs
 - Parking lots
 - Community buildings (e.g., places of worship)
 - County facilities (e.g., community centers, libraries)
 - Businesses

Issue: Can the proposed law be circumvented?

- The bill includes language to limit circumvention to the degree possible (See proposed Chapter 55-13(f))
- This is a concern for the existing Forest Conservation Law
- The cost of removing trees prior to redevelopment to avoid the bill is likely to be more expensive than the fees imposed by the bill

Issue: Does the bill create hazardous trees?

- Retention of hazardous trees along property lines is currently a problem on small lots, as well as those covered by the FCL
- The bill will increase opportunities to review and address these trees during field inspections
- Guidelines for when to remove trees will be developed in the regulations and will likely follow the guidelines currently used by the Planning Department
- There is no financial incentive to remove or leave trees.



Isiah Leggett
County Executive


Marc P. Hansen
County Attorney


OFFICE OF THE COUNTY ATTORNEY

MEMORANDUM

February 19, 2013

TO: Michael Faden
Montgomery County Council

FROM: Walter E. Wilson 
Associate County Attorney

VIA: Marc P. Hansen 
County Attorney

RE: Tree Canopy Disturbance Mitigation Fees

QUESTION

You have requested an opinion from this office concerning the fee that any person subject to the legislation proposed as Bill 35-12 would be required to pay into a Tree Canopy Conservation Fund to compensate for the loss of, or disturbance to, tree canopy caused by that person's land disturbing activities. Specifically, you ask whether this required payment, which the legislation refers to as a mitigation fee, is actually an excise tax or whether it is in fact a regulatory fee.

SHORT ANSWER

The tree canopy disturbance mitigation fee that would be imposed under Bill 35-12 is in the nature of a regulatory fee because its primary purpose is to minimize the tree canopy disturbance and loss attributable to construction activity. The fee/charge is part of the overall regulatory scheme to minimize tree canopy loss, and is intended to defray the costs that the County would incur to replace the trees canopy lost through development and other land disturbing activities. We acknowledge that this conclusion might not be beyond question. Therefore, we suggest that the Bill's regulatory intent be strengthened by an amendment that would require (to the extent practical) on-site mitigation in the form of protective measures for the remaining trees; the payer would in turn be credited based on the degree to which those mitigation measures attenuate the on-site tree canopy disturbance.

BACKGROUND

Bill 35-12 is designed to maximize the retention of tree canopy on small lots that are not otherwise subject to County Code Chapter 22A (Forest Conservation—Trees) when land disturbing activities occur on those lots. It establishes procedures, standards, and requirements to minimize the disturbance or loss of tree canopy as the result of development and other land disturbing activities. In accordance with Section 55-9 of the proposed legislation, the applicant for a sediment control permit whose planned activities will involve the cutting or clearing of trees must mitigate the resulting on-site disturbance or loss of tree canopy by paying into a special fund, the Tree Canopy Conservation Fund, whose purpose would essentially be to pay for the County's off-site replacement of those trees as part of the overall regulatory scheme designed to maximize tree canopy retention and enhancement throughout the County. The amount of the "mitigation fee" would be directly tied to the square footage of on-site tree canopy disturbance. Not only would any monies deposited into the Tree Canopy Conservation Fund be statutorily prohibited from reverting to the County's General Fund; they must be expended exclusively to cover County costs associated with establishing and enhancing tree canopy, including the identification and acquisition of suitable sites, as needed, to replace the disturbed tree canopy.

DISCUSSION

Distinguishing between Regulatory Fees and Taxes

In a nutshell, taxes are compulsory payments imposed by legislative authority on persons or property to raise money for public purposes. *United States v. Maryland*, 471 F. Supp. 1030, 1036 (D. Md. 1979) (citing *United States v. LaFranca*, 282 U.S. 568, 572, 51 S. Ct. 278 (1931)). There is generally no requirement that any connection exist between the property or activities taxed and the use of the proceeds. Nor is there any mandatory connection between the taxpayer burdened and the person or group benefited. *Allied American Mut. Fire Ins. Co. v. Commissioner of Motor Vehicles*, 219 Md. 607, 616, 150 A.2d 421 (1959). Unless the legislative body enacting the taxes chooses to earmark the payments, tax revenue may be used for any governmental function that the lawmakers reasonably determine is a public purpose. Hugh D. Spitzer, *Taxes vs. Fees: A Curious Confusion*, 38:2 Gonz. L. Rev. 335, 338-39 (2002/03). The basic principle followed by Maryland courts in distinguishing between taxes and fees is that a tax is a revenue raising measure enacted under the government's taxing power for the benefit of the general public; whereas a fee, adopted under the government's police power, is imposed to cover the cost of a government program or regulatory scheme that benefits in a special way the payer of the fee. See *Maryland Theatrical Corporation v. Brennan*, 180 Md. 377, 381, 24 A.2d 911 (1942).

Although the Maryland Court of Appeals has consistently recognized a distinction between the imposition of fees as an essential part of a regulatory measure and the imposition of a tax for revenue purposes, *see, e.g., Campbell v. City of Annapolis*, 289 Md. 300, 304-05, 424 A.2d 738 (1981), it should be noted that the practical application of the that distinction to specific legislation is not always as clear-cut as these widely accepted definitions of taxes and fees might suggest. Regardless of how a particular charge might be designated in the statute, categorizing it correctly requires focusing on the purpose of the legislation rather than simply the label given to the charge in the text of the statute. *Eastern Diversified Properties, Inc. v. Montgomery County*, 319 Md. 45, 53, 570 A.2d 850 (1990). Although the Court of Appeals has acknowledged that there is no set rule by which it can always be determined in which category a particular statute primarily belongs, the Court nonetheless stated in *Eastern Diversified Properties, Inc. v. Montgomery County, supra*, that “[a] regulatory measure may produce revenue, but in such a case the amount must be reasonable and have some definite relation to the purpose of the Act.” A revenue measure, on the other hand, may also provide for regulation, but if the raising of revenue is the primary purpose, the amount of the tax is not subject to review by the courts. *Id.*

In determining whether revenue generation rather than regulation is the main objective of a charge designated in legislation as a fee, Maryland courts take into account the amount of the charge imposed and whether the statute requires compliance with certain conditions in addition to the payment of the prescribed sum. This is because one characteristic of a regulatory measure is that it generally requires the person subject to the charge to comply with certain conditions beyond mere payment of the charge. *County Comm’rs of Anne Arundel County v. English*, 182 Md. 514, 520, 35 A.2d 135 (1943). If so, the payment is considered to be a fee imposed by virtue of the police power; assuming, of course, that the revenue generated by the payment is reasonable—i.e., not more than what is necessary to pay for implementation and enforcement—and and bears “some definite relation” to the purpose of the regulatory scheme. *Ocean City v. Purnell-Jarvis, Ltd.*, 86 Md. App. 390, 405-06, 586 A.2d 816 (1991).

Payments for Tree Canopy Disturbance Mitigation under Bill 35-12

There is nothing in the language of Section 55-9 of Bill 35-12 from which one can automatically infer that revenue generation is the primary objective of the mitigation fee imposed under that provision. Minimizing the loss of existing tree canopy is the clearly stated objective of that section, and all of the plans and submittals required under the legislation along with payment of the fee are consistent with that stated objective.

The mitigation fee could be described as a sort of burden offset charge in that the charge allocates and recovers the cost of handling the negative impacts on public resources from those who cause them. Yet it differs from the type of development impact “fee” that was at issue in *Eastern Diversified, supra*, because of its direct connection to, and payment for, a system of dealing with the the negative public impacts of the private activities that Bill 35-12 seeks to

regulate. In that regard alone, the mitigation fee can be viewed as a tool of regulation. By contrast, one of the findings that led the Court of Appeals in *Eastern Diversified* to conclude that the County's development impact "fee" was in reality a tax was that the required payment was not directly correlated to any demand for roads created by the development being charged. *Eastern Diversified*, 319 Md. at 51. Nor would the revenue generated by the charge necessarily be directed to roads that would benefit the development that paid the charge. The Court also noted that nothing in the language of the impact fee statute suggested that the impact fees were charged on the basis of any service provided that benefited the payer any differently than the public generally, or to defray the expenses associated with the development regulatory process. *Id.* at 54-55. The mitigation fee imposed under Section 55-9 (b), however, appears to be sufficiently earmarked under Section 55-14 (b) to establish the type of legal nexus required to confirm the charge as a regulatory fee. Not only does that section specify how the mitigation fees paid into the Tree Canopy Conservation Fund must be spent; it also prohibits those payments from reverting to the General Fund. The permissible expenditures are directly related to the purpose of Bill 35-12 and are an essential component of the legislation's comprehensive approach to protecting and enhancing the the County's existing tree canopy.

It should also be noted that as part of that comprehensive approach the payer of the fee must also submit detailed limits of tree canopy disturbance information and plans to either the Department of Permitting Services or Department of Planning for concurrent review with the submissions required to obtain a sediment control permit. In that respect, the mitigation fee also differs from the impact tax in *Eastern Diversified*, *supra*. The same can be said when comparing the mitigation fee with, for example, the Water Quality Protection Charge (WQPC), whose sole purpose is to generate the revenue needed to support the County's stormwater management and water quality programs. Similar to the impact tax, the WQPC does not require compliance with any conditions in particular that go beyond mere payment of the charge.

Finally, although the amount of the fee is to be set by regulation, the regulatory parameters contained in Bill 35-12, which require that the amount charged be tied to the square footage of tree canopy disturbed, are intended to ensure that a payment does not exceed the cost to the County of mitigating the loss of tree canopy caused by the payer's land disturbing activities. This can also be read as an indication that revenue generation is not the main purpose of the obligation to pay mitigation fees when certain land disturbing activities will result in the County's loss of tree canopy. The payer also directly benefits by not being burdened with the responsibility of identifying and acquiring a suitable mitigation site to replace the lost tree canopy from the disturbed site. The payer is simply required to defray the costs incurred by the County for undertaking those responsibilities based on a pre-determined formula. Of course, the regulations will need to be written so that they are consistent with the legislative intent that they not be excessive when the formula is applied to specific dollar amounts.

CONCLUSION

For the foregoing reasons, it is our opinion that the charge designated as a tree canopy disturbance mitigation fee is more likely than not a regulatory fee. While this conclusion might not be beyond question, we believe that the charge can be defended as a regulatory measure under the County's police power as long as the legislative history makes clear the regulatory intent of the Bill and the amount imposed does not clearly exceed what is needed to defray the cost to the County of mitigating the loss or disturbance of tree canopy. To accomplish this, the regulatory intent underlying the charge can be made clearer by amending the Bill in a way that requires the owner to provide, to the extent practical, for on-site mitigation in the form of protective measures for the remaining trees. The payer would in turn be credited based on the degree to which those mitigation measures attenuate the on-site tree canopy disturbance. This is a change that we would recommend to replace the current provision in the legislation that takes on-site landscaping into account, but simply credits the payer for the first 5 percent of tree canopy disturbed.

Finally, we note that even if a court were to rule that the mitigation fee is actually a tax, the County's authority to enact it as a tax can be found in Section 52-17 of the County Code. This would allow the County to cure any defect in imposing this charge as a fee by retroactively imposing the charge as a tax. *See, e.g., Montgomery County v. Waters Landing Ltd. Partnership*, 99 Md. App. 1, 26, 635 A.2d 48 (1994) (citing *U.S. v. Heinszen*, 206 U.S. 370, 27 S.Ct. 742 (1907)). Of course, the effect of imposing this charge as a tax would be that the charge would be applicable within the County's municipalities unless language is added to the legislation that explicitly exempts them.

We trust that this memorandum has been fully responsive to your inquiry. Please let us know if we might be of further assistance.

cc: Kathleen Boucher, Office of the County Executive
Mac Spicer, Office of the County Attorney
Robert Hoyt, Department of Environmental Protection
Stan Edwards, Department of Environmental Protection
Laura Miller, Department of Environmental Protection
Diane Jones, Department of Permitting Services
Rick Brush, Department of Permitting Services