

## MEMORANDUM

TO: Transportation, Infrastructure, Energy & Environment Committee

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

SUBJECT: **Worksession 2:** Bill 41-12, Streets and Roads – Roadside Trees - Protection

Bill 41-12, Streets and Roads – Roadside Trees - Protection, sponsored by Councilmembers Berliner and Elrich, was introduced on December 11, 2012. A public hearing was held on January 17 (see select testimony and correspondence beginning on ©45). A Transportation, Infrastructure, Energy and Environment Committee worksession was held on January 28.

Bill 41-12 would require certain applicants to obtain a permit for certain roadside tree activities as part of the existing right-of-way permit that the Department of Permitting Services issues, would authorize the Department of Transportation to create a tree replacement fund to pay for needed roadside trees, and would direct the County Executive to adopt regulations further specifying roadside tree work standards.

This Bill would implement a 2009 state law (2009 Laws of Maryland Chapter 289, codified at Maryland Code, Nat. Res. Art. §5-403(d)-(e)), which gave counties the authority to supplement state laws governing roadside trees. County law, however, must be more stringent as State law. This Bill was the subject of extensive pre-introduction discussions with staff from relevant County Departments and other stakeholders.

### Background

***What does the current state law require?*** The current State roadside tree law and regulations<sup>1</sup> require a person who cuts down any roadside tree, defined in state regulations as “a plant that has a woody stem or trunk that grows all, or in part, within the right-of-way of a public road”, to get a permit from the Department of Natural Resources (DNR). DNR may issue a permit only if the proposed work will eliminate a hazard to property, public safety, or health; improve or prevent a deteriorated tree condition; or improve the general aesthetic appearance of the right-of-way. A state permit is not required:

- if the tree is uprooted or branches are broken and contact electricity wires;
- if the tree or branches are an immediate danger to person or property;

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<sup>1</sup>See State law, ©20-22, and regulations, ©23-32.

- if the tree is in the right-of-way of an unsurfaced road and the abutting landowner removes the tree for the landowner's own use;
- to cut or clear land for an electric generating station;
- for routine maintenance of a public utility right-of-way; or
- to cut or clear a public utility right-of-way or land for a new utility transmission or distribution line.

State regulations also require permittees to adhere to specific tree care standards (see ©28-30). Unless DNR waives the requirement, if a permittee removes a roadside tree the permittee must plant a replacement tree that is on DNR's recommended tree list. Anyone seeking to remove a roadside tree must obtain the consent of the property owner.

***What would Bill 41-12 require?*** Bill 41-12 closely mirrors the requirements in state law and regulations, but allows the County Department of Permitting Services (DPS) to enforce them. Under Bill 41-12, a person seeking to cut, clear, or do other tree work on a roadside tree would need to get a permit from DPS. Bill 41-12 would define roadside tree as a "single-stem plant that has a woody stem or trunk that grows all, or in part, in the right-of-way of any County or State public road or shared use trail." *Roadside tree* would include the tree's critical root zone. Bill 41-12 closely follows the State law's exceptions to the permit requirement.

***Is Bill 41-12 more stringent than state law?*** As noted above, state law allows the County to enact a more stringent roadside tree law. The sponsors of this Bill crafted it to closely mirror state law. For a comparison showing where Bill 41-12 goes beyond state law, see ©34-44. In a January 25 letter, DNR staff indicated that they did not believe Bill 41-12 was more stringent than state law (see ©81).<sup>2</sup>

In some respects, Bill 41-12 as introduced is more stringent than the state law. For instance, as introduced, Bill 41-12 would define "roadside tree" to include the critical root zone (though the Committee pared the definition of roadside tree back to essentially the state definition). Bill 41-12 would also be stricter than state law in that state law allows an abutting landowner to cut down a tree without a permit if the tree is in a right-of-way that does not have an improved surface, but County law would require a permit in that case.

In many other respects, Bill 41-12 and state law are similar. The Bill, however, has a few provisions that on first glance appear to be less stringent than state law. For instance, state regulations specify the information that must be on the permit,<sup>3</sup> the fee schedule, and specific roadside tree care standards, including where limb cuts should be made, what tree clearance for overhead facilities should be, ground disturbance requirements, and protection of tree roots. Bill 41-12 does not replicate these requirements, but instead directs the County Executive to develop regulations that are at least as stringent as the state law.

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<sup>2</sup>It is important to note that Council staff is unaware of any provision of state law that requires or authorizes DNR to approve the County's law. However, to achieve the goal of a unified regulatory program administered by the County, cooperation from DNR staff will be needed.

<sup>3</sup>For instance, name and address of permittee, type of tree care permitted, and any limitations on the permit.

In our view, the County law would be more stringent than the state law if the County law mirrors the state law but requires a more vigorous replanting/replacement requirement (see page 5 for further discussion of this issue).

### **First Committee worksession**

At the January 28 worksession on Bill 41-12, Committee members discussed many issues and made several recommendations, including amending the Bill to:

- ensure that the definition of roadside tree excludes the critical root zone;
- clarify that the Bill would not apply to an expanded definition of a utility's routine maintenance in its right-of-way; and
- require a County permit to remove a stump in the right-of-way (Councilmember Floreen dissented from this recommendation).

These amendments are shown in Draft 12 on ©1-12A.

### **Remaining Issues for Committee Discussion**

*1) Is County legislation needed?* This is the first question that Committee members should discuss. Several speakers questioned whether Bill 41-12 was unnecessarily duplicative of state law. Some landowners obtain the appropriate state permit before removing or performing tree work on a roadside tree, but almost certainly others do not. For instance, in 2011 – the latest data that staff has – DNR issued 112 private roadside tree care permits. For the same year, DNR issued 189 total permits, including private, government, and utility permits. Data from DNR indicates that the number of permits issued is trending up. But, by its own admission, because of inadequate staffing DNR rarely, if ever, follows up or supervises tree care practices on any private permit. (DNR does follow up on permits issued to utilities.)

Other speakers alleged violations of tree care work standards on roadside trees. Simply put, there appears an apparent lack of adequate enforcement and follow-up for the State permit. (See Conservation Montgomery statement on ©45.) Currently, to get a building permit, DPS requires the permittee to submit an affidavit declaring that either no roadside trees are involved in the permit; roadside trees are in the area, but they would not be affected by the proposed construction; or roadside trees are in the area and will be affected by the construction and the permit applicant has received the appropriate permit from DNR (see ©33). However, there are limits to what DPS can require. The County Attorney has indicated that in order to enforce County roadside tree requirements, the County needs an appropriate legal basis in either state or County law or regulations. Since the County does not now have the authority to enforce State law<sup>4</sup>, the County would have to enact its own law to effectively offer more protection to roadside trees.

To further clarify this issue, Council staff posed a series of questions to Executive branch staff:

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<sup>4</sup>State law (Nat. Res. Art. §5-404(b); see ©21) allows DNR to transfer authority to the County to enforce state law. Committee Chair Berliner expects to send a letter to DNR Secretary Griffin, assuming that this Bill will be enacted, proposing a Memorandum of Understanding between DNR and the County to give the County clear-cut authority to enforce the state and County laws, eliminating the need for a state permit.

- Under the current state and County laws, does the County (DOT, DPS, or anyone else) have the authority to disapprove any action taken with respect to a roadside tree located on a County right-of-way by a private party other than a public utility (i.e. an abutting landowner)?
- Is the County's approval regularly sought for such actions? Is it regularly given?
- Does the answer depend on who "owns" the tree in question? Does it depend on the nature of the County's right-of-way (fee simple, easement, etc.)?
- What is the purpose and effect of the "roadside tree affidavit" that DPS requires applicants to file? Is that affidavit required by state law, by County law, or simply as a matter of County practice?

At this point we have not received answers to these questions from Executive branch staff.

**2) *Should trees in certain parts of the right-of-way be excluded from 41-12?*** Councilmembers Floreen and Riemer expressed concerns that, because homeowners will not know where the County's right-of-way begins, they may not know to apply for a permit or otherwise unintentionally violate the law. Councilmembers Floreen and Riemer questioned whether the Bill's scope could be narrowed to include only trees that are between the paved road and sidewalk. After further reflection, Council staff does not believe that trees within the right-of-way, but inside of a sidewalk, can be excluded from the law's scope. Those trees are clearly covered by the state roadside tree law, and to exclude them from Bill 41-12 could violate the state law's stringency requirement. However, as Executive branch staff have suggested, certain permit requirements could be tailored to the differing needs of those locations.

**3) *Should agricultural activities be exempt from the County law?*** The Council heard testimony and received correspondence from the Soil Conservation District and the Farm Bureau urging the Council to exempt routine maintenance on public rights-of-ways and agriculturally assessed properties from the permit requirement (see ©56-57 and 58-61). At its first worksession, the Committee directed staff to review whether the County's agricultural areas could be excluded from Bill 41-12. It is not clear that the County law can directly exclude all rights-of-way in agricultural areas without running afoul of the state's stringency requirement. After further review, Council staff believes that the County could exclude rights-of-way in "prescriptive easements" from the bill. These easements are addressed in current County Code §49-6:

**49-6. Roads used for 20 years may be declared public highways.**

- (a) Whenever any road has been used by the public for 20 or more years, though the road may never have been condemned or granted as a public highway, the County Executive may by Executive order published in the County Register declare the road to be a public highway.
- (b) The public right-of-way of a road declared as a public highway under subsection (a) must include permanent maintenance easements which extend 10 feet beyond each pavement edge.

Council staff believes that excluding these easements would address many concerns raised about rights-of-way in the agricultural areas. Therefore, we recommend inserting the following amendment on ©6 after line 93:

- (D) cutting or clearing a tree that is in the right-of-way of a road declared as a public highway under Section 49-6(a).

**4) *How should the County law apply in municipalities?*** Bill 41-12 would apply to state or County rights-of-way in any municipality where the County is responsible for maintaining trees in the right-of-way. The City of Takoma Park requested an exemption from the County law because it enforces its own tree permitting process. Council staff believes that the County law already does not (and probably cannot) apply to any municipality that maintains its own rights-of-way. Therefore, the amendment proposed by the Takoma Park City Attorney on ©73, while not inconsistent, probably is unnecessary.

**5) *Should homeowners be allowed to perform reasonable care to street trees without a permit?*** As introduced, Bill 41-12 would require a permit for any tree work on a roadside tree, including protecting the health of the tree (see the definition of “tree work” on ©4, lines 66-73, and ©8, line 156). Neighbors of the Northwest Branch urged the Council to amend the Bill to allow property owners to take reasonable care of a tree without a permit. An issue arises, however, if a property owner believes that they are performing “reasonable care” for a roadside tree when in fact they may take actions that would harm the tree. For instance, applying a certain amount of mulch to a tree can be very beneficial; improperly applying too much mulch can kill it. Council staff recommends leaving the protection language in the Bill. At the first Committee worksession, Permitting Services Director Diane Schwartz Jones noted that they intend, if this Bill is enacted, to issue an omnibus permit to homeowners seeking to trim trees in the right-of-way to minimize the burden on each homeowner of obtaining routine permits.

**6) *Should the County or the permittee be responsible for street tree replanting?*** As introduced, Bill 41-12 would require each permittee that removes a roadside tree to pay a fee, to be set by Method 3 regulation, into a tree replacement fund. (For the criteria and formula to set that fee, based on the current District of Columbia law, see ©9, lines 199-207.) DPS would use that fund to replant appropriate trees in suitable locations. State law requires a person who removes a roadside tree to plant a tree, unless DNR waives that requirement, but we are not sure how consistently it is enforced. The Maryland-National Capital Building Industry Association (BIA) opposed the County taking on the replanting responsibility.<sup>5</sup>

Speaking with staff at DNR, it became clear that, in their view, allowing a permittee to pay into a fund instead of replanting a tree is less stringent than state law. To address this issue, Council staff drafted an amendment that would require a permittee who wants to remove a roadside tree to replant a tree (as required by state law) and also pay a fee that corresponds to the value of the tree that was lost less the value of the tree that was replanted. The fund in which these fees are paid would be used to plant more roadside trees.

Our research into formulas used to determine a tree’s value revealed that it is not a simple calculation and depends on highly variable factors. What appears to be an often used method of valuing large trees is termed the “trunk formula method” and is used for trees that, due to their size,

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<sup>5</sup>At the first worksession, Council staff noted that a legal issue arose after the hearing on whether the fee under this provision must be treated, for notice and hearing purposes, as a tax. The County Attorney concluded (see opinion, ©77), and County staff concurs, that this fee need not be treated as a tax and can properly be enacted as a fee.

cannot be transplanted (i.e., large trees). This method uses the following factors in determining replacement cost: diameter, species, condition, and location. Because of the variable nature of these factors, we don't believe it is practical to legislate all of these factors, but any fee should take them into account. The amendment on ©82 reflects this.<sup>6</sup>

**8) Additional amendments** After further review, several additional amendments to Bill 41-12 could help the bill more closely mirror state law. These amendments, which staff recommends, start on ©85.

Additionally, Council staff suggests, at PEPCO's urging, the following additional clarifying amendment to the language Committee members already endorsed which exempts a utility's routine maintenance in its right-of-way from the requirement to obtain a right-of-way and roadside tree work permit:

Revise ©4, line 75:

- (1) The following activities are not subject to this subsection and do not require a right-of-way and roadside tree work permit:

| This packet contains:                              | Circle # |
|----------------------------------------------------|----------|
| Bill 41-12                                         | 1        |
| Legislative Request Report                         | 12       |
| Fiscal and Economic Impact Statement               | 13       |
| State roadside tree law                            | 20       |
| State regulations                                  | 23       |
| DPS Affidavit                                      | 33       |
| Comparison of Bill 41-12 and state law             | 34       |
| Selected testimony                                 |          |
| Conservation Montgomery                            | 45       |
| Mark Buscaino                                      | 50       |
| Maryland-National Capital Building Industry Assoc. | 54       |
| Montgomery County Farm Bureau                      | 56       |
| Montgomery Soil Conservation District              | 58       |
| Neighbors of the Northwest Branch                  | 62       |
| Pepco                                              | 64       |
| Renewing Montgomery                                | 67       |
| Takoma Park memos                                  | 71       |
| County Attorney memo                               | 77       |
| DNR letter                                         | 81       |
| Replanting amendment                               | 82       |
| Conforming amendment                               | 85       |

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<sup>6</sup>For further information, see: <http://www.ag-econ.ncsu.edu/faculty/vanderhoeven/TREELOSS.PDF> and <https://utextension.tennessee.edu/publications/Documents/SP614.pdf>.

Bill No. 41-12  
Concerning: Streets and Roads -  
Roadside Trees - Protection  
Revised: 2/21/2013 Draft No. 12  
Introduced: December 11, 2012  
Expires: June 11, 2014  
Enacted: \_\_\_\_\_  
Executive: \_\_\_\_\_  
Effective: \_\_\_\_\_  
Ch.     , Laws of Mont. Co.     

## COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

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By: Councilmembers Berliner and Elrich

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**AN ACT** to:

- (1) require a permit for certain activities affecting roadside trees;
- (2) require certain persons to pay into a roadside tree replacement fund under certain circumstances;
- (3) require the County Executive to adopt regulations specifying certain roadside tree protection, conservation, and replacement standards; and
- (4) generally amend the law regarding streets and roads.

By amending

Montgomery County Code  
Chapter 49, Streets and Roads  
Sections 49-35 and 49-36

By adding

Chapter 49, Streets and Roads  
Section 49-36A

**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:*

**Sec. 1. Sections 49-35 and 49-36 are amended and Section 49-36A is added as follows:**

**49-35. [Permits for grading and construction] Right-of-way and roadside tree work permit.**

(a) (1) A person must not construct any road, sidewalk, shared use path, curb and gutter, driveway, or drainage structure[, or]; begin any such construction (including clearing, grading, and tree cutting)[,]; or perform any tree work on any roadside tree, without a permit from the Director of Permitting Services. Any permit issued for roadside tree work must comply with Section 49-36A.

(2) In this Section and Sections 49-36, 49-36A, and 49-37, unless otherwise specified, Director refers to the Director of Permitting Services and Department refers to the Department of Permitting Services.

\* \* \*

(b) The County Executive must collect a fee, set by Method 3 regulation, for each right-of-way and roadside tree work permit application.

(c) \* \* \*

[(c)] (d) \* \* \*

[(d)] (e) Any violation of this Section is a Class A violation.

[(e)] (f) [Half] The Director must refund half the fees required by this Section [must be refunded] to the applicant if a permit is rejected or withdrawn [prior to the commencement of] before construction begins. If an applicant proposes to undertake a project using materials, standards, or specifications superior to those required under this Article, the fees



charged must be computed on the estimated cost of the project as if it met those requirements.

[(f)] (g) \* \* \*

[(g)] (h) \* \* \*

**49-36A. Roadside tree work.**

(a) Definitions. In this Section, the following words have the meanings indicated:

Certified arborist means a person who is certified as an arborist by the International Society of Arboriculture or who the Director finds has an equivalent level of experience and training.

Critical root zone means the minimum area beneath a tree (typically a concentric circle not less than 1.5 feet per diameter/inch of the tree, measured at 4.5 feet above ground level) that must be protected to preserve sufficient root mass to give the tree a reasonable chance of long-term survival.

Licensed tree expert means a person licensed under Title 5, Subtitle 4 of the Natural Resources Article of the Maryland Code or any successor provision.

Pesticide means a:

(1) chemical or biological preparation used to kill, inhibit, or regulate growth on a targeted plant, plant spore, or plant seed, including:

(A) an herbicide;

(B) an insecticide;

(C) a tree growth regulator; and

(D) a fungicide; or

(2) substance or mixture of substances intended:

- (A) to prevent, destroy, repel, or mitigate a pest;
- (B) for use as a plant regulator, defoliant, or desiccant; or
- (C) for use as a spray adjuvant, such as a wetting agent or adhesive.

Recommended County tree list means a list of trees approved by the Director after consulting the Chief of Tree Maintenance in the Department of Transportation. The recommended tree list must include each tree that the Department identifies as suitable for planting on specific sites and conditions in the right-of-way of a public road.

Roadside tree means any single-stem plant that has a woody stem or trunk that grows all, or in part, in the right-of-way of any County or State public road or shared use trail. [[Roadside tree includes the tree's critical root zone.]]

Tree work means any activity affecting a roadside tree, including:

- (1) removal of a roadside tree or a remaining stump;
- (2) planting pruning, root-pruning, or trimming a roadside tree;
- (3) application of pesticide directly to or in the [[critical root zone of]] right-of-way abutting a roadside tree;
- (4) protection of a roadside tree; or
- (5) treatment that may adversely affect the health or growth of a roadside tree.

(b) Applicability; exceptions.

- (1) The following activities do not require a right-of-way and roadside tree work permit:
  - (A) cutting or clearing a public utility right-of-way or land for an electric generating station licensed under Sections 7-

204, 7-205, 7-207, or 7-208 of the Public Utilities Article of the Maryland Code, or any successor provision, if:

(i) any required certificate of public convenience and necessity has been issued under Section 5-1603(f) of the Natural Resources Article of the Maryland Code or any successor provision; and

(ii) the cutting or clearing is conducted in a way that minimizes the loss of forest;

(B) routine maintenance of a public utility right-of-way, and cutting or clearing any tree by a public utility as necessary to comply with applicable vegetation management requirements or to maintain, repair, replace, or upgrade any public utility transmission or distribution line; or

(C) cutting or clearing a public utility right-of-way or land for a new transmission or distribution line.

(2) A licensed tree expert need not obtain a permit for work performed on:

(A) a tree that is uprooted or truncated because of a storm or vehicular collision;

(B) a tree branch that is broken and contacts a telephone, cable television, electric power, or other wire carrying electric current; or

(C) a tree or tree branch that a certified arborist or licensed tree expert finds is endangering a person or property.

(3) A certified arborist or licensed tree expert who provides tree work under paragraph (2) must, within one week after an action is taken, give the Department:

(A) notice of the property address, if available, and general area where the action was taken; and

(B) a proposed plan to upgrade the work, if necessary, to the tree work standards in this Section and applicable regulations.

The Department must approve, modify, or reject the proposed plan, after reviewing the actions taken, within 14 days after receiving the information. If the Department does not act on the proposed plan within 14 days, the plan is approved by default. The Department may require further information, and may extend this deadline once for an additional 15 days in extenuating circumstances. The Director also may extend this deadline at the request of the applicant.

(c) Right-of-way and roadside tree work permit required.

(1) The Department must not issue a building or related permit to an applicant for any demolition, clearing, pre-construction activity, construction, or development that is likely to result in the trimming, pruning, root-pruning, cutting, removal, or injury of a roadside tree unless the applicant first obtains a right-of-way and roadside tree work permit from the Department.

(2) [[A]] Except as provided in subsection (b)(1), a right-of-way and roadside tree work permit is required for any tree work on a utility located in a right-of-way, such as a:

- 129                   (A) sewer;  
 130                   (B) water or gas pipe;  
 131                   (C) storm drain;  
 132                   (D) electric, telephone, or television cable or conduit;  
 133                   (E) sidewalk;  
 134                   (F) driveway;  
 135                   (G) sump pump;  
 136                   (H) gutter outflow line; or  
 137                   (I) roadway or similar structure.
- 138           (3) A person may receive a right-of-way and roadside tree work  
 139               permit to perform tree work if the person:
- 140                   (A) holds title to the land where the roadside tree is located;  
 141                   (B) owns property abutting the right-of-way at the point where  
 142                       the tree is located  
 143                   (C) is a government agency that has an easement for the public  
 144                       right-of-way where the tree is located;  
 145                   (D) is responsible for providing tree care to the tree; or  
 146                   (E) is an authorized agent of any of these.
- 147       (d) Permit issuance and administration.
- 148           (1) After receiving an application for a right-of-way and roadside  
 149               tree work permit, the Department may meet with the applicant  
 150               and conduct an on-site examination of the proposed tree work.
- 151           (2) The Department should consult with the Chief of Tree  
 152               Maintenance in the Department of Transportation regarding any  
 153               application under which the applicant would perform tree work.

- (3) The Department may issue a permit if the applicant shows that the proposed tree work is necessary to:
- (A) protect the health of the tree;
  - (B) eliminate or reduce a hazard to property, public safety, or health;
  - (C) improve or prevent a deteriorated tree condition;
  - (D) improve the overall appearance of the right-of-way; or
  - (E) carry out a development which has received all other applicable development approvals.
- (4) The Department may issue:
- (A) a permit for a specific tree or group of trees for specific tree work for a term not to exceed 1 year after the permit is issued; and
  - (B) a permit for a comprehensive and continuing program of general tree work.
- (5) A permit issued under paragraph (4)(B) must specify the types of tree work it covers, as allowed by the license of the person who will supervise the program.
- (6) If the Department denies a permit application, the Department must notify the applicant of the reason.
- (7) The Department may:
- (A) modify any term or condition of a permit to best achieve the objectives of this Article; or
  - (B) suspend or revoke a permit if the holder violates a condition of the permit or a provision of this Section or the Natural Resources Article of the Maryland Code.

(e) Tree work performance; inspection; replacement.

(1) Each permittee must take all necessary measures to protect a roadside tree from damage during all phases of clearing, construction, or development of a building or other structure, including installing protective fencing, avoiding soil compaction, and protecting critical root zones in the right-of-way.

(2) A permittee must repair any damage a tree sustains during construction or development, including any broken limb, root, or scarred trunk, and any damage caused by soil compaction.

(3) (A) Before any bond filed with the Department under this Chapter is released, or (if no bond has been filed) before any certificate of occupancy or similar final approval is issued, the Department must inspect each affected roadside tree to determine, after consulting the Chief of Tree Maintenance in the Department of Transportation, whether the tree has a reasonable chance of achieving the typical maximum age of a roadside tree in that location.

(B) If the Department does not find that an affected tree has a reasonable chance of achieving the typical maximum age of a roadside tree in that location, or if the permittee has removed a roadside tree, the Department must require the permittee to pay an amount set by regulation into a tree replacement fund maintained by the Department of Transportation.

(C) The amount of payment must be set by Method 3 regulation; must be proportionate to the cost of replacing

each affected tree, using a replacement ratio specified by regulation that takes into account the survival rate of newly-planted trees; must be computed according to the size of the affected tree; may consider the species, age, rarity, and historical value (if any) of the affected tree; and must not be less than \$35 per circumference/inch of the affected tree.

(D) The permittee must pay the required amount within 30 days after the Director notifies the permittee that the payment is required. The Director may treat any unpaid funds as a lien on the property where the affected tree is located, and must not issue a certificate of occupancy or similar final approval for the site until full payment is received.

(f) Use of pesticides.

(1) Any permittee who applies a pesticide directly to a roadside tree must be certified and licensed as required by the State Department of Agriculture, and must comply with applicable state regulations.

(2) Any permittee who applies a pesticide must only use a pesticide that is registered for that use by the U.S. Environmental Protection Agency and the State Department of Agriculture. Any permittee who applies a pesticide must follow the manufacturer's label directions for proper use.

(3) Before applying a pesticide, a permittee must notify the Department of the approximate time and place of application.



(4) Unless the Department directs otherwise, a permittee must not apply an herbicide to a tree if the tree is 6 feet tall or higher.

(5) A permittee must remove dead plant material resulting from the application of an herbicide if removal is necessary for safety reasons.

(6) A permittee must take reasonable precautions in selecting and applying a pesticide on or near a roadside tree to:

(A) avoid the use of an herbicide on vegetation that contributes to soil retention, especially at a highway cut or fill and any other area with a steep slope; and

(B) prevent stream pollution and damage to any adjoining property.

(g) Roadside tree planting.

(1) Any tree that is planted on a public right-of-way must be of a species and variety from the recommended County tree list and must conform to the American Standard for Nursery Stock or standards that the Director identifies as equivalent.

(2) Each roadside tree planting must comply with a planting plan approved by the Department after consulting the Chief of Tree Maintenance in the Department of Transportation. The planting plan must cover:

(A) stump removal, including a requirement to fill in any resulting hole;

(B) size and type of planting stock;

(C) planting specifications;

(D) spacing;

- 258 (E) species;  
 259 (F) proximity to overhead wires;  
 260 (G) care and maintenance; and  
 261 (H) any other site consideration.
- 262 (h) Regulations. The County Executive must adopt regulations under  
 263 Method 2 that are at least as stringent as applicable state roadside tree  
 264 standards and requirements. These regulations may specify further:
- 265 (1) criteria for right-of-way and roadside tree work permit issuance;  
 266 (2) roadside tree work standards and practices, including  
 267 construction practices that will minimize damage to roadside  
 268 trees;  
 269 (3) criteria for the use of pesticides; and  
 270 (4) roadside tree planting requirements.

271 *Approved:*

272

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Nancy Navarro, President, County Council

Date

273 *Approved:*

274

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Isiah Leggett, County Executive

Date

275 *This is a correct copy of Council action.*

276

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Linda M. Lauer, Clerk of the Council

Date

## LEGISLATIVE REQUEST REPORT

Bill 41-12

*Streets and Roads – Roadside Trees - Protection*

**DESCRIPTION:** Would require certain applicants to obtain a permit for certain roadside tree activities as part of the existing right-of-way permit that the Department of Permitting Services issues; would authorize the Department of Transportation to create a tree replacement fund to pay for needed roadside trees; and would direct the County Executive to adopt regulations further specifying roadside tree work standards

**PROBLEM:** Need to better protect and maintain roadside trees in County rights-of-way.

**GOALS AND OBJECTIVES:** To authorize the County to supplement state regulation and protection of roadside trees.

**COORDINATION:** Departments of Permitting Services, Transportation, Environmental Protection

**FISCAL IMPACT:** To be requested.

**ECONOMIC IMPACT:** To be requested.

**EVALUATION:** To be requested.

**EXPERIENCE ELSEWHERE:** To be researched.

**SOURCE OF INFORMATION:** Michael Faden, Senior Legislative Attorney, 240-777-7905; Amanda Mihill, Legislative Attorney, 240-777-7815

**APPLICATION WITHIN MUNICIPALITIES:** To be researched.

**PENALTIES:** Class A.



ROCKVILLE, MARYLAND

MEMORANDUM

January 14, 2013

TO: Nancy Navarro, President, County Council

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

SUBJECT: Council Bill 41-12 – Streets and Roads – Roadside Trees – Protection

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

JAH:dh

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  
Joseph F. Beach, Director, Department of Finance  
Michael Coveyou, Department of Finance  
Bob Hoyt, Department of Environmental Protection  
Art Holmes, Department of Transportation  
Diane Schwartz Jones, Department of Permitting Services  
Alex Espinosa, Office of Management and Budget  
Amy Wilson, Office of Management and Budget  
Dennis Hetman, Office of Management and Budget  
Ayo Apollon, Office of Management and Budget

**Fiscal Impact Statement**  
**Council Bill 41-12, Streets and Roads – Roadside Trees - Protection**

**1. Legislative Summary**

The proposed bill requires certain applicants to obtain a permit for certain roadside tree activities as part of the existing right-of-way permit issued by the Department of Permitting Services (DPS); authorizes the Department of Transportation (DOT) to create a tree replacement fund to pay for needed roadside trees; and directs the County Executive to adopt regulations further specifying roadside tree work standards.

The Department of Permitting Services will administer the law. The Department of Transportation's Chief of Tree Maintenance will manage the consultations pertaining to a recommended county tree list that will include each tree the Department identifies as suitable for planting on specific sites and conditions in the right-of-way of a public road.

**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.**

- The Department of Permitting Services (DPS) estimates additional staffing will be necessary to meet the required reviews and inspections:
  - 1 Certified Arborist (Grade 26)
  - .25 Senior Permitting Services Specialist (Grade 26)
  - 2 Senior Permitting Services Inspectors (Grade 23)
  - .30 Senior Permit Technician (Grade 19)

First year expenditures are projected at \$347,075 consisting of \$258,687 in personnel costs and \$88,388 in operating costs of which \$71,464 are one-time costs for vehicles and equipment. DPS estimates the bill will generate an additional 500 permits per year at a minimum of \$135 per permit for projected additional annual revenues of \$67,500. DPS has indicated they can absorb the fractional positions within existing staff.

- The Department of Environmental Protection (DEP) does not anticipate any measurable fiscal impact from the proposed bill.
- The Department of General Services (DGS) estimates the cost of an average county project will increase between \$2,000 and \$12,500 with consultant costs comprising an estimated \$1,500 to \$5,000 per project and construction costs an estimated \$500 to \$7,500 per project. DGS notes it will take several iterations of the proposed projects in order to accurately project a predictable cost. For the purpose of the FY15-20 CIP, each project will be budgeted and scheduled using the high end projections given implementation of the bill. DGS estimates permit fee costs of \$250 to \$1,500 per project and assumes five project starts per year.
- The Department of Transportation (DOT) does not anticipate additional costs associated with the proposed changes. Projects that currently need NRI/FSD and forest conservation plan (FCP) approval through M-NCPPC will continue to follow the current permit issuance process and will therefore be exempt from requirements of the proposed bill. Any projects small enough to be covered under the proposed bill of 40,000 square feet and less will be required to have tree replacement and stump grinding or tree protection. All of these activities are currently completed on most DOT projects of this

size. Montgomery County Code, Chapter 49 exempts DOT from the permit process when conducting routine tree maintenance and emergency tree maintenance in the County right-of-way. Consequently, this bill will have little or no effect on DOT's tree maintenance programs.

The proposed bill creates a Tree Replacement Fund for fees collected as a result of tree disturbance and as the source of funds to pay for needed roadside trees. DOT would manage this fund. The tree replacement fund would have additional work hours attributed to office staff to maintain the fund and to the field operations portion of the planting program. DOT has a \$100,000 annual planting program where the additional tree planting completed as a consequence of the replacement fund can be implemented into the current program efficiently and with relative ease and negligible costs. With respect to revenue, DOT has indicated the number of payments to the tree fund cannot be predicted.

**3. Revenue and expenditure estimates covering at least the next 6 fiscal years.**

- DPS projects expenditures of \$347,075 during year one and \$276,331 annually thereafter for a six year total of \$1,728,730. The bill is estimated to generate an additional 500 permits per year at a minimum of \$135 per permit for projected additional annual revenues of \$67,500 or \$405,000 for six years.
- DGS estimates the cost of an average county project will increase between \$2,000 and \$12,500 for a six year total between \$12,000 and \$75,000. DGS notes it will take several iterations of the proposed projects in order to accurately project a predictable cost.

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

Not applicable. The proposed 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 proposed bill requires the County Executive to amend the law regarding streets and roads and adopt regulations that are at least as stringent as applicable state roadside tree standards and requirements specifying road side tree protection, conservation, and replacement standards. The County Executive's amendments in addition to potential state actions may cause expenditures to change on imposed mandatory requirements particularly if the County adopts requirements that are more stringent than statewide requirements.

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

DPS estimates additional staffing will be necessary to meet the required reviews and inspections:

- 1 Certified Arborist (Grade 26)
- .25 Senior Permitting Services Specialist (Grade 26)
- 2 Senior Permitting Services Inspectors (Grade 23)
- .30 Senior Permit Technician (Grade 19)

For the certified arborist job class the enactment of the bill includes an additional 1,550 hours of time or the equivalent of 1 work year.

- 150 hours or ½ hour per plan for review of roughly 300 existing DNR permits for tree removal
- 500 hours or ½ hour per plan for review of roughly 1,000 existing ROW and sediment control permits that affect critical root zone
- 250 hours or ½ hour per plan for review of approximately 500 existing activities not currently requiring a DPS ROW or sediment control permit such as house additions, plumbing, and utility activities outside of the right of way
- 300 hours for blanket permits as specified in the proposed bill.
- 250 hours for administration of exceptions as specified in the proposed bill for emergency work and certain utility work
- 100 hours to work with other agencies on administration, technical support, construction standards and training

For the 2 senior permitting inspector positions the enactment of the bill includes an additional 3,050 hours of time for inspection staff or the equivalent of 2 work years.

- 1,500 hours or 1.5 additional inspections for roughly 1,000 existing ROW and sediment control permits that affect critical root zone
- 1,000 hours or 2 inspections per permit for approximately 500 existing activities not currently requiring a DPS ROW or sediment control permit such as house additions, plumbing, and utility activities outside of the right of way
- 300 hours for blanket permits
- 250 hours for administration of exceptions for emergency work and certain utility work

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

DPS projects the need for 3 additional staff to meet the required number of reviews and inspections. DPS will absorb the fractional positions within existing staff.

**8. An estimate of costs when an additional appropriation is needed.**

No additional appropriation is required in FY13. In FY14 and beyond additional appropriation will be required to cover estimated costs for DPS (\$276,331). Additional costs for DGS (\$75,000) will be reflected in the cost of CIP projects. Costs will be offset by increased revenues.

**9. A description of any variable that could affect revenue and cost estimates.**

Article I, Section 49-35 (b) states the County Executive must collect a fee for each right-of-way and roadside tree work permit. This fee would be set by method 3 regulation and must be proportionate to the cost of replacing each affected tree using a replacement ratio specified by regulation that takes into account the survival rate of newly planted trees; must be computed according to the size of the affected tree, may consider the species, age, rarity, and historical value (if any) of the affected tree; and must not be less than \$35 per circumference/inch of the affected tree. All listed fee calculation variables have a potential impact on revenue estimates.

The proposed bill also defines a recommended County list of approved trees. Any tree that is planted on a public right-of-way must be a species and variety from the

recommended County tree list and must conform to the American Standard for Nursery Stock. The breadth of criteria for an approved tree will affect the volume of permits and thereby corresponding revenues and cost estimates.

DOT has indicated the number of payments to the tree fund cannot be predicted.

**10. Ranges of revenue or expenditures that are uncertain or difficult to project.**

See #9

**11. If a bill is likely to have no fiscal impact, why that is the case.**

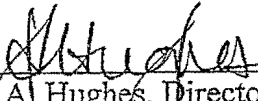
Not applicable.

**12. Other fiscal impacts or comments.**

Not applicable.

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

Rick Brush, Department of Permitting Services;  
Donald Scheuerman Jr., Department of General Services;  
Stan Edwards, Department of Environmental Protection;  
R. Keith Compton, Department of Transportation;  
Brett Linkletter, Department of Transportation;  
Amy Wilson, Office of Management and Budget;  
Dennis Hetman, Office of Management and Budget

  
\_\_\_\_\_  
Jennifer A. Hughes, Director  
Office of Management and Budget

1/11/13  
Date



**Economic Impact Statement**  
Council Bill 41-12  
Streets and Road, - Roadside Trees - Protection

**Background:**

This proposed legislation would:

- require a permit for certain roadside tree activities as part of the existing right-of-way permit issued by the Department of Permitting Services (DPS);
- authorize the Department of Transportation (DOT) to create a tree replacement fund to pay for needed roadside trees;
- direct the County Executive to adopt regulations further specifying roadside tree work standards;
- amend Chapter 49, Sections 49-35 and 49-36, of the Montgomery County Code;
- require the Department of Permitting Services to administer the law; and
- require the Department of Transportation's Chief of Tree Maintenance to manage the consultations pertaining to a recommended county tree list that will include each tree the Department identifies as suitable for planting on specific sites and conditions in the right-of-way of a public road.

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

Estimates of permit activity, permit costs, and additional development costs as a result of the subject legislation per the Departments of Permitting Services, Transportation, and General Services (see Fiscal Impact Statement).

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

The number of projects subject to the new permitting requirements, the cost of permit fees, and the additional consultation and construction costs required to comply with the terms of the subject legislation and resulting regulations.

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

Based on preliminary estimates of permit costs, additional development costs, and the number of projects subject to the new permitting requirements, the legislation is not expected to have a material or quantifiable impact on employment, spending, saving, investment income, or property values in the County. Development costs may increase based on the legislation because of the permit fees and the costs of compliance with the legislation. The cost per project will vary based on the location, scope, nature, and other circumstances of each project. However, using the estimate of the potential number of new permits from DPS and the range of cost impact per County project by DGS the table below indicates a range of potentially increased development costs.

**Economic Impact Statement**  
Council Bill 41-12  
Streets and Road, - Roadside Trees - Protection

|            | Number of<br>Permits | Permit Fee | Total Permit Fees | Costs Per Project | Total Costs Per<br>Project (including<br>Fees) |
|------------|----------------------|------------|-------------------|-------------------|------------------------------------------------|
| Low Range  | 500 \$               | 135 \$     | 67,500 \$         | 2,000 \$          | 1,067,500                                      |
| High Range | 500 \$               | 135 \$     | 67,500            | 12500 \$          | 6,317,500                                      |

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

See item #3.

5. The following contributed to and concurred with this analysis: David Platt and Mike Coveyou, Finance and Richard Brush, Department of Permitting Services.

  
\_\_\_\_\_  
Joseph F. Beach, Director  
Department of Finance

1/14/13  
Date

**SUBTITLE 4. TREES AND FOREST NURSERIES**  
**PART I. ROADSIDE TREES**

**5-401. Definition.**

In this subtitle, roadside tree means any tree or shrub growing within the right-of-way of any public road. [An. Code 1957, art. 66C, § 359; 1973, 1st Sp. Sess., ch. 4, § 1; 2009, ch. 289.]

**5-402. Powers of Department generally; establishment of State forest nurseries.**

The Department may plant trees along the roadsides, make rules and regulations governing the planting, care for and protect any roadside tree, and establish one or more State forest nurseries for the propagation of trees for any roadside planting. [An. Code 1957, art. 66C, § 358; 1973, 1st Sp. Sess., ch. 4, § 1; 2009, ch. 289.]

**5-403. Plans for planting or care of trees.**

(a) *Application.*- If the governing body or the road supervisors of any county of the State, the Department of Transportation, the council of any municipality, or any organization or person applies to the Department to plant, care for, or protect any roadside tree, the Department shall evaluate the application and inform the applicant concerning the advisability of the requested planting, care, or protection. If, in the judgment of the Department, the requested planting, care, or protection is advisable, the Department shall prepare and submit to the applicant a plan for the same, including an estimate of the cost.

(b) *Approval and implementation of plan.*- Any plan to plant, care for, or protect roadside trees may not become operative until the applicant approves the plan and has guaranteed to the Department the cost of the work. When the applicant approves a plan the Department has prepared, and the applicant has guaranteed payment of the cost in a manner satisfactory to the Department, the Department shall perform, or cause to be performed, the specified planting, care, or protection of roadside trees.

(c) *Payment of unexpended balances.*- The Department, without being requested as provided in subsection (a) or guaranteed as provided in subsection (b), may plant, care for, and protect roadside trees and pay for the work out of any unexpended balance of the amount appropriated for the purposes of this subtitle. However, no tree may be planted under the provisions of this section without the consent and approval of the owner of the land on which planted.

(d) *More stringent local law allowed.*- Except as provided in subsection (e) of this section, a county or municipality may adopt a local law or ordinance for the planting, care, and protection of roadside trees that is more stringent than the requirements of §§ 5-402 and 5-406 of this subtitle if the local law or ordinance does not conflict with the provisions of §§ 5-402 and 5-406 of this subtitle.

(e) *Exceptions.*- A county or municipality may not adopt a local law or ordinance for the planting, care, and protection of roadside trees that applies to:

(1) The cutting or clearing of public utility rights-of-way or land for electric generating stations licensed under § 7-204, § 7-205, § 7-207, or § 7-208 of the Public Utility Companies Article, provided that:

(i) Any required certificates of public convenience and necessity have been issued in accordance with § 5-1603(f) of this title; and

(ii) The cutting or clearing of the forest is conducted so as to minimize the loss of forest;

(2) The routine maintenance of public utility rights-of-way; and

(3) The cutting or clearing of public utility rights-of-way or land for new transmission or distribution lines.

(f) *Stop work order.*- A county or municipality that adopts a local law or ordinance in accordance with subsection (d) of this section may issue a stop work order against any person that violates any provision of the local law or ordinance. [An. Code 1957, art. 66C, §§ 360-362; 1973, 1st Sp. Sess., ch. 4, § 1; 2009, ch. 289.]

#### **5-404. Authority of enforcement.**

(a) *Forest wardens and others.*- Forest wardens and other persons having police powers in the State, in addition to their regular duties, shall enforce the law for the care and protection of roadside trees. In the enforcement of these laws, they possess the same powers as a peace officer to arrest with a warrant.

(b) *County or municipality.*- The Department may authorize a county or municipality to enforce §§ 5-402 and 5-406 of this subtitle. [An. Code 1957, art. 66C, § 363; 1973, 1st Sp. Sess., ch. 4, § 1; 2009, ch. 289.]

#### **5-405. Payment by Department to forest warden for making required examinations, planting and care of trees, etc.; reimbursement of Department by applicant for payments.**

For his services in making examinations, as provided in § 5-403 (a) of this subtitle, the Department shall pay the forest warden upon presentation and approval of his accounts with vouchers, for services in planting roadside trees, trimming, spraying, or otherwise caring for existing roadside trees, as provided in § 5-403 (b) of this subtitle. The applicant who guarantees the cost of work shall reimburse the Department for the services of the forest warden and his helpers upon presentation of the forest warden's accounts with vouchers, and upon the approval of the Department. The applicant shall pay for the forest warden's services in examining conditions serving as a basis for permits

applied for under § 5-406 of this subtitle, for issuing permits, and for supervising work authorized by the permits. The Department shall determine the rate to be paid under this section. [An. Code 1957, art. 66C, § 364; 1973, 1st Sp. Sess., ch. 4, § 1; 2004, ch. 25, § 6.]

**5-406. Permit to cut down or trim trees; exceptions; prohibited conduct without permit; penalty.**

(a) *Application for permit required.*- Except as provided in subsection (b) of this section, any person who desires to cut down or trim any roadside tree shall apply to the Department for a permit.

(b) *Exceptions.*-

(1) A person may remove a tree or its branches without first obtaining a permit from the Department if the tree is unrooted or its branches broken so as to contact telephone, telegraph, electric power, or other wires carrying electric current, or if the tree or its branches endanger persons or property.

(2) A tree may be cut down and removed by an abutting landowner for the landowner's own use without first obtaining a permit if the tree is standing within the right-of-way of a public road which has not been surfaced with either stone, shell, gravel, concrete, brick, asphalt, or other improved surface.

(c) *Prohibited conduct.*- A person may not cut down, trim, mutilate, or in any manner injure any roadside tree, except as authorized by this section, without a permit from the Department.

(d) *Restriction by county or municipality to issue building permit.*- A county or municipality may not issue a building permit to an applicant for any clearing, construction, or development that will result in the trimming, cutting, removal, or injury of a roadside tree until the applicant first obtains a permit from the Department in accordance with this section.

(e) *Penalty.*- A person who trims, cuts, removes, or injures a roadside tree in violation of a regulation adopted under § 5-402 of this subtitle or a permit issued under this section or who fails to obtain a permit as required by this section is liable for the imposition of a penalty:

(1) Not exceeding \$2,000 for a first offense; and

(2) Not exceeding \$5,000 for a second or subsequent offense.

[An. Code 1957, art. 66C, § 365; 1973, 1st Sp. Sess., ch. 4, § 1; 2009, ch. 289.]

# **Title 08 DEPARTMENT OF NATURAL RESOURCES**

## **Subtitle 07 FORESTS AND PARKS**

### **Chapter 02 Roadside Tree Care**

**Authority:** Natural Resources Article, §§5-209 and 5-406, Annotated Code of  
Maryland

#### **.01 Purpose.**

The purpose of these regulations is to implement Natural Resources Article, § 5-401–5-406, Annotated Code of Maryland, to ensure the proper care of roadside trees in the interest of promoting and maintaining healthy trees and safe, unobstructed, and aesthetically pleasing public roads and rights-of-way.

#### **.02 Definitions.**

A. In this chapter, the following terms have the meanings indicated.

B. Terms Defined.

(1) "Director" means Director of the Maryland Forest Service.

(2) "Dripline" is a line extending from the outer reaches of a tree crown vertically to the ground.

(3) "Forest Service" means the Maryland Forest Service.

(4) "Licensed tree expert" means a person licensed under Natural Resources Article, §5-415 et seq., Annotated Code of Maryland.

(5) "Person" includes the State, a county, municipal corporation, or other political subdivision of the State, or their units, or an individual, receiver, trustee, guardian, executor, administrator, fiduciary, or representative of any kind, or a partnership, firm, association, public or private corporation, or other entity.

(6) "Pesticide" means a:

(a) Chemical or biological preparation used to kill, inhibit, or regulate growth on targeted plants, their spores or seed, including:

- (i) Herbicides,
- (ii) Insecticides,
- (iii) Tree growth regulators, and
- (iv) Fungicides;

(b) Substance or mixture of substances intended for:

- (i) Preventing, destroying, repelling, or mitigating pests,
- (ii) Use as a plant regulator, defoliant, or desiccant, or
- (iii) Use as a spray adjuvant such as a wetting agent or adhesive.

(7) "Public road" means a road the title to which, or the easement for the use of which, is vested in a public body or governmental agency.

(8) "Recommended tree list" means a list of trees approved by the Forest Service and those recommended by the Forest Service that are suitable for planting on specific sites and for specific conditions within the right-of-way of a public road.

(9) "Right-of-way of a public road" means that land the title to which, or an easement for which, is held by the State, county, or a municipality for use as a public road.

(10) "Roadside tree" or "tree" means a plant that has a woody stem or trunk that grows all, or in part, within the right-of-way of a public road.

(11) "Roadside tree care expert" means an individual representing a governmental agency who:

(a) Is designated to supervise that government's roadside tree planting and maintenance operations;

(b) Has passed the Forest Service's examination for Roadside Tree Care Experts; and

(c) Has been approved by the Forest Service as qualified to supervise that government's tree care program.

(12) "Tree care" means:

- (a) Removal of a roadside tree;
- (b) Planting or maintenance, or both, of a roadside tree;
- (c) Application of pesticide to a roadside tree; or
- (d) Treatment that may affect the health or growth of a roadside tree.

(13) "Tree care crew" means a unit from a public or private entity whose purpose is to maintain roadside trees as defined in §B(10) of this regulation, characterized by a service truck and supervised by a licensed tree expert.

(14) "Tree care standards" means tree care approved by the Forest Service and in accordance with the roadside tree care standards set forth in Regulations .07—.09 of this chapter.

### **.02-1 Incorporation by Reference.**

A. In this chapter, the following document is incorporated by reference.

B. Document Incorporated. American Standard for Nursery Stock, ANSI Z60.1-1996, (American National Standards Institute, Inc. November 6, 1996).

### **.03 Permit Required.**

A. A person may cut down or prune a roadside tree without a permit if the tree:

(1) Is uprooted or its branches are broken to contact telephone, telegraph, electric power, or other wires carrying electricity, or if the tree or its branches are an immediate danger to person or property; or

(2) Stands within the right-of-way of a public road which has not been surfaced with either stone, shell, gravel, concrete, brick, asphalt, or other improved surface material, and only if the tree is cut down and removed by, or at the request of, the abutting landowner for the landowner's own use.

B. Except as provided in §A of this regulation, a person shall obtain a permit to perform tree care to a roadside tree.

C. A person providing tree care under §A(1) of this regulation shall inform the Forest Service, by calling or writing within 1 week of the action taken, of the place or general area where that action was taken, and provide a proposed plan to upgrade the work, if necessary, to tree care standards. The Forest Service shall approve, modify, or reject a proposed plan within 2 weeks after an examination of the work.

### **.04 Types of Roadside Tree Care Permits.**

A. Roadside tree care permits are of two types:

(1) Permits issued for a specific tree or group of trees for specific tree care operations for a term not exceeding 1 year from the date of issuance; and

(2) Permits issued for comprehensive and continuing programs of general tree care such as those administered by State agencies, counties, municipalities, corporations, and public utilities.



- B. Permits issued under §A(2) of this regulation are issued only for specified types of tree care, based upon the skills of those supervising the program.
- C. For tree care not authorized in a permit issued under §A(2) of this regulation, a permittee shall obtain a separate tree care permit.
- D. Permits are issued for a calendar year, and may be renewed upon application.

## **.05 Issuance of Roadside Tree Care Permits.**

### **A. A request for a roadside tree care permit:**

#### **(1) May be made by:**

- (a) A person owning title to the land on which the tree or trees are located,
- (b) A governmental entity possessing an easement for the public road right-of-way in which the tree or trees are located,
- (c) A person responsible for providing tree care to the tree or trees,
- (d) A person whose property abuts the right-of-way at the point at which the tree or trees are located,
- (e) A public utility, or
- (f) An authorized agent of one of the entities in §A(1)(a)----(e) of this regulation;

and

#### **(2) Shall be made by an applicant to the appropriate office of the Forest Service.**

- B. Following a request for a permit, a representative of the Forest Service shall meet with the applicant and conduct an on-site examination of the proposed tree care.
- C. For permits authorizing continued tree care programs under Regulation .04A(2) of this chapter, an examination is necessary only as specified in the permit. An examination is not required for the renewal of the permit.
- D. The Forest Service may issue a permit for tree care if the applicant shows that the proposed tree care will meet one of the following conditions:
  - (1) Eliminate a hazard to property, public safety, or health;
  - (2) Improve or prevent a deteriorated tree condition; or
  - (3) Improve the general aesthetic appearance of the right-of-way.
- E. Unless exempted by the Forest Service, if a tree is removed it shall be followed by replanting of a species on the recommended tree list that is suitable to the location.
- F. Roadside tree care permits shall specify:
  - (1) The name and address of the permittee;
  - (2) The area where the tree care will occur;
  - (3) The particular tree or trees involved;
  - (4) The type of tree care permitted;

- (5) The term of the permit;
- (6) Whether supervision of the tree care is required; and
- (7) Limitations or conditions on the tree care or planting considered advisable by the Forest Service.

G. Except for a tree care permit issued to a government agency for which tree care is provided under the supervision of a roadside tree care expert, the Forest Service shall provide supervision for the tree care work.

H. If the Forest Service denies a permit, the Forest Service shall notify the applicant of the reasons for denial within 10 days of receipt of the application for the permit.

I. The Forest Service may:

- (1) Modify the terms and conditions of a permit in accordance with provisions and objectives of the roadside tree care laws and regulations; or
- (2) Suspend or cancel a permit for a violation of a:
  - (a) Condition of the permit, or
  - (b) Provision of Natural Resources Article, §5-401 et seq., Annotated Code of Maryland, or implementing regulation.

J. Request for Hearing.

(1) A person whose request for a roadside tree care permit is denied, or whose roadside tree care permit is suspended or revoked, has the right to be heard regarding the denial or suspension or revocation of the permit, after submitting a request in writing not later than 10 days after the date on which the denial or suspension or revocation notice is served.

(2) The Director shall schedule a hearing within 10 days from receipt of a request and render a decision within 10 days from the date of the hearing.

## **.06 Fees.**

A. Fees for roadside tree care permits are calculated according to the following schedule:

(1) If Forest Service supervision of the proposed tree care is required for a permit under Regulation .04A(2) of this chapter, the fee for issuing the permit, and for supervising work authorized by the permit, is:

- (a) \$2,500 per year per tree care crew, or
- (b) \$250 per month per tree care crew;

(2) The fee for issuing the permit and for supervising work authorized by the permit under Regulation .04A(1) of this chapter is \$25; and

(3) A fee is not required for a tree care permit issued to an applicant that is a government agency.

B. If a permit request is denied, a fee is not required.

C. Billing for tree care crews is made either annually or quarterly, at the option of the tree care crew.

## **.07 Roadside Tree Care Standards.**

A. General Requirements. Unless the Forest Service grants an exception, treatment of roadside trees authorized by permit shall be performed according to the following standards:

- (1) Branches to be removed shall be cut back to a live lateral branch at least 1/3 the diameter of the severed branch;
- (2) Cuts shall be made sufficiently close to the trunk or parent limb without cutting into the branch collar or leaving a protruding stub;
- (3) Proper pruning techniques shall be followed at all times;
- (4) Except when directed by the Forest Service, pruning cuts shall be left unpainted for aesthetic reasons;
- (5) If the painting of cuts is required, only materials nontoxic to the cambial layer shall be used;
- (6) Dangerous deadwood and broken limbs which are located within the scope of the work as defined in the permit shall be removed;
- (7) Except when authorized by the Forest Service or when the tree is being removed, climbing hooks or spurs are prohibited;
- (8) Chips resulting from roadside tree care may:
  - (a) Be broadcast on a right-of-way except in ditches, waterways, turf, and surfaced areas, and
  - (b) Not exceed 6 inches in depth on the right-of-way;
- (9) The wrapping or winding of cable, wires, and other attachments around a tree, fastening attachments to a tree to bruise or injure a tree, or cavity work performed on a tree, is prohibited; and
- (10) When trees are removed, replacement of those trees according to a plan may be required by the Forest Service.

### **B. Tree Clearance for Overhead Facilities.**

- (1) In addition to the requirements of §A of this regulation, a person who trims a tree to provide clearance for utility wires, cables, or other facilities shall:
  - (a) Allow sufficient clearance for 2 years growth normally expected after trimming, unless otherwise directed by the Forest Service;
  - (b) Take into account the health of the tree; and
  - (c) Make proper cuts that direct growth away from overhead wires and facilities in compliance with safety standards and government regulations.

(2) If a trimmed tree dies within 1 year or is in poor condition of growth as a result of that trimming, the permittee shall, if required by the Forest Service, remove the tree and plant replacement trees.

(3) Replacement trees shall be:

- (a) Furnished by the permittee;
- (b) In good condition;
- (c) Of a recommended size and species; and
- (d) Properly planted at locations to be determined by the Forest Service.

C. Ground Disturbance Requirements.

(1) The requirements set forth in this section:

(a) Are intended to protect roadside trees during construction, installation, and maintenance of a structure requiring excavation;

(b) Apply to underground utilities such as:

- (i) Sewers,
- (ii) Water and gas pipes,
- (iii) Storm drains,
- (iv) Electric, telephone, and television cables or conduits,
- (v) Sidewalks,
- (vi) Driveways, or
- (vii) Roadways or similar structures.

(2) A permittee shall take all necessary measures to protect roadside trees from damage during construction and associated activities.

(3) Damage sustained by a tree, such as broken limbs, roots, or scarred trunks, including compaction damage, shall be repaired by the permittee.

(4) The Forest Service shall supervise the measures taken to protect and repair roadside trees under this section.

D. Protection of Tree Roots.

(1) When an underground project subject to §C of this regulation encounters the roots of a roadside tree, a permittee, in accordance with the guidelines in §D(2)---(15) of this regulation or other criteria approved by the Forest Service, shall tunnel or bore under the tree or modify the project to protect the tree's root system.

(2) For trees under 6 inches in diameter as measured 4 1/2 feet above average ground level, all machine digging shall stop at the dripline of the tree, or where specified by the Forest Service.

(3) For trees over 6 inches in diameter as measured 4 1/2 feet above average ground level, all machine digging shall stop when roots of 1 inch or more in diameter are encountered, or when specified by the Forest Service.

- (4) Roots 1 inch or more in diameter may not be cut without approval of the Forest Service.
- (5) A tunnel or other method of modification of the project under or around the tree shall be used if considered necessary by the Forest Service.
- (6) The procedure noted in §D(5) of this regulation also shall be used to approach the tree from the opposite side.
- (7) At least 24 inches of undisturbed earth shall remain over the tunnel or bore, or above other type of installation.
- (8) For operations using shallow trenching techniques up to 12 inches deep, care shall be taken to minimize root damage and protect the trunk of the tree.
- (9) Roots 1 inch or larger, damaged during construction, shall be sawed off close to the tree side of the ditch. Clean cuts shall be made at all times.
- (10) Installations affecting roadside trees shall be completed in as short a time as possible to prevent the drying out of exposed roots.
- (11) If considered necessary, the exposed root area within the ditch shall be watered and fertilized as directed by the Forest Service.
- (12) Tunnels shall be refilled and the soil tamped tightly to original firmness.
- (13) Trenches shall be filled to achieve and maintain original grade.
- (14) Excess soil shall be removed from the site or disposed of as directed by the Forest Service.
- (15) Unless otherwise directed by the Forest Service, the ground shall be fertilized and reseeded, cover shall be restored, and other procedures shall be followed as necessary to prevent erosion around trees.

**E. Violations of Roadside Tree Standards.**

- (1) The Forest Service may require a person who fails to comply with §C or D of this regulation to:
  - (a) Remove and replace a tree which dies within 1 year after the treatment activity is completed;
  - (b) Document for 3 years the condition of a tree which shows decline within 1 year after the treatment activity is completed; and
  - (c) Remove and replace a tree which dies after 3 years following the completion of the treatment activity, if the tree has been the subject of the documentation in §E(1)(b) of this regulation.
- (2) The value of a tree to be replaced is determined as of the date of the violation.

**.08 Use of Pesticides.**

A. The use or application of a pesticide to a tree on a public road right-of-way in the State is controlled as follows:

(1) A person applying a pesticide to a roadside tree shall have acquired certification and licensure required by the Maryland Department of Agriculture and shall adhere to regulations in COMAR 15.05.01;

(2) A person applying a pesticide shall apply only those pesticides registered for that use by the U.S. Environmental Protection Agency and the Maryland Department of Agriculture, and shall follow the manufacturer's label directions for proper use;

(3) Before the time of pesticide application, the Forest Service shall be notified by a permittee of the approximate time and place of application;

(4) Except when authorized by the Forest Service, a tree may not be treated with herbicides unless it is 6 feet or less in height;

(5) Dead plant material resulting from the application of an herbicide shall be removed if necessary for aesthetic or safety reasons, or both;

(6) Reasonable precautions shall be taken to:

(a) Avoid the use of herbicides on vegetation which contributes to soil retention, particularly at highway cuts and fills and other areas with steep slopes, and

(b) Prevent the pollution of streams, and damage to adjoining properties.

## **.09 Roadside Tree Planting.**

A. Trees to be planted on a public road right-of-way are subject to the conditions in §§B and C of this regulation, in addition to conditions imposed by local ordinances.

B. Trees shall be of a species and variety from the recommended tree list, and shall conform to the American Standard for Nursery Stock.

C. Roadside tree planting shall comply with a planting plan approved by the Forest Service, which may include:

- (1) Stump removal;
- (2) Size and type of planting stock;
- (3) Planting specifications;
- (4) Spacing;
- (5) Species;
- (6) Proximity to overhead wires;
- (7) Care and maintenance; and
- (8) Other site considerations.

**.10 Penalties.**

Noncompliance with the provisions of this regulation constitutes a violation of law subject to the penalties provided in Natural Resources Article, § 5-1301, Annotated Code of Maryland.



Department of Permitting Services  
255 Rockville Pike, 2nd Floor  
Rockville, MD 20850-4166  
Phone: 311 in Montgomery County or (240) 777-0311  
Fax (240)-777-6262  
<http://www.montgomerycountymd.gov/permittingservices>



## Affidavit For Residential/Commercial Building Permit

Property Address \_\_\_\_\_

Building AP #(s) \_\_\_\_\_ Demolition # \_\_\_\_\_

To be signed by the PROPERTY OWNER – original signature required

Natural Resources Article Section 5-406(d) provides: *A county or municipality may not issue a building permit to an applicant for any clearing, construction, or development that will result in the trimming, cutting, removal, or injury of a roadside tree until the applicant first obtains a permit from the Department (Maryland State Department of Natural Resources) in accordance with this section.*

I, \_\_\_\_\_, declare and affirm that: (please choose only ONE)  
**Property Owner** (please print)

- ☐ The building permit for which I am applying does not involve any roadside tree(s).
- ☐ There is (are) a roadside tree(s) located within the area of building permit for which I am applying, however, the construction will not result in the trimming, cutting, removal, or injury to the tree(s).
- ☐ There is (are) a roadside tree(s) located within the area of the building permit for which I am applying and the clearing, construction, or development will result in the trimming, cutting, removal, or injury to the tree(s). I have applied for a Tree Care Permit from the Maryland Department of Natural Resources and understand that my building permit will not be issued until a copy of the issued Tree Care Permit is submitted to DPS.

\_\_\_\_\_  
**Property Owner Signature**

\_\_\_\_\_  
**Date**



Bill No. 41-12  
Concerning: Streets and Roads -  
Roadside Trees - Protection  
Revised: 12-6-12 Draft No. 11  
Introduced: December 11, 2012  
Expires: June 11, 2014  
Enacted: \_\_\_\_\_  
Executive: \_\_\_\_\_  
Effective: \_\_\_\_\_  
Ch.     , Laws of Mont. Co.     

## COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

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By: Councilmembers Berliner and Elrich

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**AN ACT** to:

- (1) require a permit for certain activities affecting roadside trees;
- (2) require certain persons to pay into a roadside tree replacement fund under certain circumstances;
- (3) require the County Executive to adopt regulations specifying certain roadside tree protection, conservation, and replacement standards; and
- (4) generally amend the law regarding streets and roads.

By amending

Montgomery County Code  
Chapter 49, Streets and Roads  
Sections 49-35 and 49-36

By adding

Chapter 49, Streets and Roads  
Section 49-36A

**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:*

Sec. 1. Sections 49-35 and 49-36 are amended and Section 49-36A is added as follows:

49-35. [Permits for grading and construction] Right-of-way and roadside tree work permit.

(a) (1) A person must not construct any road, sidewalk, shared use path, curb and gutter, driveway, or drainage structure[, or]; begin any such construction (including clearing, grading, and tree cutting)[,]; or perform any tree work on any roadside tree, without a permit from the Director of Permitting Services. Any permit issued for roadside tree work must comply with Section 49-36A.

(2) In this Section and Sections 49-36, 49-36A, and 49-37, unless otherwise specified, Director refers to the Director of Permitting Services and Department refers to the Department of Permitting Services.

\* \* \*

(b) The County Executive must collect a fee, set by Method 3 regulation, for each right-of-way and roadside tree work permit application.

\* \* \*

(c)

\* \* \*

[(c)] (d)

[(d)] (e) Any violation of this Section is a Class A violation.

[(e)] (f) [Half] The Director must refund half the fees required by this Section [must be refunded] to the applicant if a permit is rejected or withdrawn [prior to the commencement of] before construction begins. If an applicant proposes to undertake a project using materials, standards, or specifications superior to those required under this Article, the fees charged must be computed on the estimated cost of the project as if it

met those requirements.

[(f)] (g) \* \* \*

[(g)] (h) \* \* \*

**49-36A. Roadside tree work.**

(a) Definitions. In this Section, the following words have the meanings indicated:

Certified arborist means a person who is certified as an arborist by the International Society of Arboriculture or who the Director finds has an equivalent level of experience and training.

Critical root zone means the minimum area beneath a tree (typically a concentric circle not less than 1.5 feet per diameter/inch of the tree, measured at 4.5 feet above ground level) that must be protected to preserve sufficient root mass to give the tree a reasonable chance of long-term survival.

Licensed tree expert means a person licensed under Title 5, Subtitle 4 of the Natural Resources Article of the Maryland Code or any successor provision.

Pesticide means a:

(1) chemical or biological preparation used to kill, inhibit, or regulate growth on a targeted plant, plant spore, or plant seed, including:

(A) an herbicide;

(B) an insecticide;

(C) a tree growth regulator; and

(D) a fungicide; or

(2) substance or mixture of substances intended:

(A) to prevent, destroy, repel, or mitigate a pest;

(B) for use as a plant regulator, defoliant, or desiccant; or

(C) for use as a spray adjuvant, such as a wetting agent or adhesive.

Recommended County tree list means a list of trees approved by the Director after consulting the Chief of Tree Maintenance in the Department of Transportation. The recommended tree list must include each tree that the Department identifies as suitable for planting on specific sites and conditions in the right-of-way of a public road.

Roadside tree means any single-stem plant that has a woody stem or trunk that grows all, or in part, in the right-of-way of any County or State public road or shared use trail. Roadside tree includes the tree's critical root zone.

Tree work means any activity affecting a roadside tree, including:

- (1) removal of a roadside tree or a remaining stump;
- (2) planting pruning, root-pruning, or trimming a roadside tree;
- (3) application of pesticide directly to or in the critical root zone of a roadside tree;
- (4) protection of a roadside tree; or
- (5) treatment that may adversely affect the health or growth of a roadside tree.

(b) Applicability: exceptions.

(1) The following activities do not require a right-of-way and roadside tree work permit:

- (A) cutting or clearing a public utility right-of-way or land for an electric generating station licensed under Sections 7-204, 7-205, 7-207, or 7-208 of the Public Utilities Article of the Maryland Code, or any successor provision, if:

- (i) any required certificate of public convenience and necessity has been issued under Section 5-1603(f) of the Natural Resources Article of the Maryland Code or any successor provision; and
    - (ii) the cutting or clearing is conducted in a way that minimizes the loss of forest;
  - (B) routine maintenance of a public utility right-of-way; or
  - (C) cutting or clearing a public utility right-of-way or land for a new transmission or distribution line.
- (2) A licensed tree expert need not obtain a permit for work performed on:
- (A) a tree that is uprooted or truncated because of a storm or vehicular collision;
  - (B) a tree branch that is broken and contacts a telephone, cable television, electric power, or other wire carrying electric current; or
  - (C) a tree or tree branch that a certified arborist or licensed tree expert finds is endangering a person or property.
- (3) A certified arborist or licensed tree expert who provides tree work under paragraph (2) must, within one week after an action is taken, give the Department:
- (A) notice of the property address, if available, and general area where the action was taken; and
  - (B) a proposed plan to upgrade the work, if necessary, to the tree work standards in this Section and applicable regulations.

The Department must approve, modify, or reject the proposed plan, after reviewing the actions taken, within 14 days after receiving the information. If the Department does not act on the proposed plan within 14 days, the plan is approved by default. The Department may require further information, and may extend this deadline once for an additional 15 days in extenuating circumstances. The Director also may extend this deadline at the request of the applicant.

(c) Right-of-way and roadside tree work permit required.

(1) The Department must not issue a building or related permit to an applicant for any demolition, clearing, pre-construction activity, construction, or development that is likely to result in the trimming, pruning, root-pruning, cutting, removal, or injury of a roadside tree unless the applicant first obtains a right-of-way and roadside tree work permit from the Department.

(2) A right-of-way and roadside tree work permit is required for any tree work on a utility located in a right-of-way, such as a:

(A) sewer;

(B) water or gas pipe;

(C) storm drain;

(D) electric, telephone, or television cable or conduit;

(E) sidewalk;

(F) driveway;

(G) sump pump;

(H) gutter outflow line; or

(I) roadway or similar structure.

(3) A person may receive a right-of-way and roadside tree work

permit to perform tree work if the person:

(A) holds title to the land where the roadside tree is located;

(B) owns property abutting the right-of-way at the point where the tree is located

(C) is a government agency that has an easement for the public right-of-way where the tree is located;

(D) is responsible for providing tree care to the tree; or

(E) is an authorized agent of any of these.

(d) Permit issuance and administration.

(1) After receiving an application for a right-of-way and roadside tree work permit, the Department may meet with the applicant and conduct an on-site examination of the proposed tree work.

(2) The Department should consult with the Chief of Tree Maintenance in the Department of Transportation regarding any application under which the applicant would perform tree work.

(3) The Department may issue a permit if the applicant shows that the proposed tree work is necessary to:

(A) protect the health of the tree;

(B) eliminate or reduce a hazard to property, public safety, or health;

(C) improve or prevent a deteriorated tree condition;

(D) improve the overall appearance of the right-of-way; or

(E) carry out a development which has received all other applicable development approvals.

(4) The Department may issue:

- (A) a permit for a specific tree or group of trees for specific tree work for a term not to exceed 1 year after the permit is issued; and
- (B) a permit for a comprehensive and continuing program of general tree work.
- (5) A permit issued under paragraph (4)(B) must specify the types of tree work it covers, as allowed by the license of the person who will supervise the program.
- (6) If the Department denies a permit application, the Department must notify the applicant of the reason.
- (7) The Department may:
- (A) modify any term or condition of a permit to best achieve the objectives of this Article; or
- (B) suspend or revoke a permit if the holder violates a condition of the permit or a provision of this Section or the Natural Resources Article of the Maryland Code.
- (e) Tree work performance; inspection; replacement.
- (1) Each permittee must take all necessary measures to protect a roadside tree from damage during all phases of clearing, construction, or development of a building or other structure, including installing protective fencing, avoiding soil compaction, and protecting critical root zones.
- (2) A permittee must repair any damage a tree sustains during construction or development, including any broken limb, root, or scarred trunk, and any damage caused by soil compaction.
- (3) (A) Before any bond filed with the Department under this Chapter is released, or (if no bond has been filed) before



186 any certificate of occupancy or similar final approval is  
187 issued, the Department must inspect each affected roadside  
188 tree to determine, after consulting the Chief of Tree  
189 Maintenance in the Department of Transportation, whether  
190 the tree has a reasonable chance of achieving the typical  
191 maximum age of a roadside tree in that location.

192 (B) If the Department does not find that an affected tree has a  
193 reasonable chance of achieving the typical maximum age  
194 of a roadside tree in that location, or if the permittee has  
195 removed a roadside tree, the Department must require the  
196 permittee to pay an amount set by regulation into a tree  
197 replacement fund maintained by the Department of  
198 Transportation.

199 (C) The amount of payment must be set by Method 3  
200 regulation; must be proportionate to the cost of replacing  
201 each affected tree, using a replacement ratio specified by  
202 regulation that takes into account the survival rate of  
203 newly-planted trees; must be computed according to the  
204 size of the affected tree; may consider the species, age,  
205 rarity, and historical value (if any) of the affected tree; and  
206 must not be less than \$35 per circumference/inch of the  
207 affected tree.

208 (D) The permittee must pay the required amount within 30  
209 days after the Director notifies the permittee that the  
210 payment is required. The Director may treat any unpaid  
211 funds as a lien on the property where the affected tree is  
212 located, and must not issue a certificate of occupancy or

similar final approval for the site until full payment is received.

(f) Use of pesticides.

(1) Any permittee who applies a pesticide directly to a roadside tree must be certified and licensed as required by the State Department of Agriculture, and must comply with applicable state regulations.

(2) Any permittee who applies a pesticide must only use a pesticide that is registered for that use by the U.S. Environmental Protection Agency and the State Department of Agriculture. Any permittee who applies a pesticide must follow the manufacturer's label directions for proper use.

(3) Before applying a pesticide, a permittee must notify the Department of the approximate time and place of application.

(4) Unless the Department directs otherwise, a permittee must not apply an herbicide to a tree if the tree is 6 feet tall or higher.

(5) A permittee must remove dead plant material resulting from the application of an herbicide if removal is necessary for safety reasons.

(6) A permittee must take reasonable precautions in selecting and applying a pesticide on or near a roadside tree to:

(A) avoid the use of an herbicide on vegetation that contributes to soil retention, especially at a highway cut or fill and any other area with a steep slope; and

(B) prevent stream pollution and damage to any adjoining property.

(g) Roadside tree planting.

(1) Any tree that is planted on a public right-of-way must be of a species and variety from the recommended County tree list and must conform to the American Standard for Nursery Stock or standards that the Director identifies as equivalent.

(2) Each roadside tree planting must comply with a planting plan approved by the Department after consulting the Chief of Tree Maintenance in the Department of Transportation. The planting plan must cover:

(A) stump removal, including a requirement to fill in any resulting hole;

(B) size and type of planting stock;

(C) planting specifications;

(D) spacing;

(E) species;

(F) proximity to overhead wires;

(G) care and maintenance; and

(H) any other site consideration.

(h) Regulations. The County Executive must adopt regulations under Method 2 that are at least as stringent as applicable state roadside tree standards and requirements. These regulations may specify further:

(1) criteria for right-of-way and roadside tree work permit issuance;

(2) roadside tree work standards and practices, including construction practices that will minimize damage to roadside trees;

(3) criteria for the use of pesticides; and

(4) roadside tree planting requirements.



Conservation Montgomery

**TESTIMONY**

**Regarding Montgomery County Council Bill 41-12,  
Streets and Roads -- Roadside Trees -- Protection**

Delivered to  
Montgomery County Council  
by Arlene Bruhn  
On behalf of Conservation Montgomery  
January 17, 2013

President Navarro and Members of the Council:

I would like to take this opportunity to answer some questions that have arisen regarding the street tree bill.

First -- Why do we need this bill? We already have a State Law.

The State law is not working. The Department of Natural Resources does not have staff to enforce it. There is only one ranger to patrol the whole County. It often takes two weeks or more to get a site inspection.

What makes the County think it can do better?

The County already requires right-of-way permits. Protecting roadside trees will be part of the permit. The County has several inspectors who already enforce right of way permits and who can investigate quickly.

Next -- But why should the County get involved with trees?

The trees along County roads are significant County assets. They are the backbone of our green infrastructure. They are essential to our quality of life. They enhance property values. They attract new residents to the County. These are tough economic times. We know trees promote retail business and home sales.

Next -- Will a homeowner still be able to remove the tree in front of his house? Why bother replanting? We've got plenty of trees.

There is nothing in this bill that prevents a property owner from removing a street tree. However, if he chooses to do so, he will be required to contribute to a fund for replanting nearby.

We require this because we stand at a crossroads with respect to climate change. We face increasing CO2 emissions. More traffic makes our urbanizing areas centers for air pollution. Large expanses of brick and concrete transform densely built commercial zones into unhealthy heat islands. We need trees to stay cool in summer and absorb CO2. We need trees in winter to shelter us from harsh winds. The cheapest way to mitigate climate change is to plant trees.

What about property rights?

Please understand: I value independent initiative and self-reliance. But I also value limits and common sense. Running roughshod over a County street tree is not an inalienable right granted by our County charter. Our shaded sidewalks and walking paths are cherished community spaces that bring added value to our neighborhoods. We must sustain our walkable communities, and it's absolutely right that street trees have the strongest protections.

Allow me in closing to quote Thomas Jefferson:

"I am not an advocate for frequent changes in laws ... But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, ..., new truths discovered..., institutions must advance ... to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of his ... ancestors." -- *Thomas Jefferson*

Thank you,

Respectfully submitted,

Arlene P. Bruhn  
7820 Glenbrook Road  
Bethesda, MD 20814  
301-986-5927  
[a.p.bruhn@verizon.net](mailto:a.p.bruhn@verizon.net)

## **State Roadside Tree Law and Bill 41-12 Issues and Responses**

### **Introduction:**

Bill 41-12 gives Montgomery County control of its street trees – control it currently does not have. For a fee based on the tree(s) removed, the Bill allows any needed removal of street trees. The fee would then be used by the County to replant street trees based on resident demand and County-identified need.

Several questions have surfaced regarding the Bill – the need for it, its utility, and impact. Below is list of those issues and responses to them.

### **Issues and Responses:**

1. This bill is not needed because the State Roadside Tree Law (RTL) provides adequate protection for the County's rights-of-way, or street trees.

Maryland's State Forester has clearly stated that his office does not have adequate staff to enforce the RTL. Also, there are many cases of tree damage, destruction and abuse associated with new home construction and property improvement projects that have been reported by County residents over the years. The County needs to be responsible stewards of its street trees for the benefit of all county residents, and it must be realistic in its assessment of how that resource is treated by those who do not own it.

2. The bill is not needed because the County already has jurisdiction over the street trees in its rights-of-way.

State law gives State DNR jurisdiction over street trees in Montgomery County, not Montgomery County itself. The 1914 law does not deny that the trees are a County asset, but it does assert jurisdiction over them. In addition, only the State has enforcement authority for the Roadside Tree Law through the DNR police. The law and associated regulations may be found at: <http://www.dnr.state.md.us/forests/programapps/newrtlalaw.asp>

3. The bill is not needed because the RTL already requires builders and developers to replant street trees if removed.

This is untrue. Replacements may be required at the discretion of the State Forester, not Montgomery County arborists. Also, when the State Forester does require a replacement, the ratio is one tree removed for one tree replanted with no consideration given to the size of the tree removed. (See DNR regulations: Title 8, Chapter 02, Subsection 07, A., 10 )

For example, the requirement to replace, a large, healthy, mature oak 70 feet in height would be satisfied by planting a 7-foot-tall maple. The County is clearly not getting an equal value for an asset lost. This is a good deal for the person removing the tree, and a very bad deal for Montgomery County.

4. It is alleged that the bill will use fee moneys to hire an arborist to track it, thereby eliminating any benefit in additional plantings of trees.

There will be little additional staffing needed. The bill creates a fee-based-system that requires payment, based on the diameter and/or canopy size of the tree removed, into the County's planting fund. These moneys would be used to plant trees under various planting contracts already managed by county staff.

Bill 41-12 will require little if any additional staffing because it is based on a fee system. If a tree is removed a fee is paid, and with those fees the County plants street trees -- which it does annually. The planting contract it currently has can be expanded to plant more trees with little or no impact to staff executing this contract at present. Contracting costs should also decrease if tree numbers increase, along with increased satisfaction from County residents who have been on a list to receive a street tree for months or even years.

In addition, County oversight costs will be reduced. County staff would not be required to approve developers' choice of trees to replant in the right-of-way, nor inspect trees for proper planting procedures, inspect them for mortality two years after planting, nor wrangle with a property owner or developer to get a tree replanted if it dies years after planting.

5. The bill will create duplicative and confusing permitting requirements for those who need to remove a County-owned street tree.

The bill is as stringent or more stringent than the RTL, and as such, DPS would be able to get a blanket permit from DNR to place all permitting authority for street tree removals and plantings within existing County processes, thereby streamlining the permitting process.

Regulations regarding removal of trees along State rights-of-way and along rural road rights-of-way/easements however, would remain unchanged. This bill impacts only street trees within County-owned rights-of-way.

6. Most builders comply with the RTL, therefore no additional laws are required.

For builders (or anyone else) complying with the existing RTL, this Bill will have minimal impact. The required County permit will be subsumed under the County right-of-way permit that is already required. The principal modification is that the

process for replacements is streamlined. It is a fee-based system and a fair formula for canopy replacement.

7. County DPS already requires tree protection, therefore, a new law is not needed.

DPS requirements for tree protections are guidelines and therefore unenforceable. While some builders comply with these guidelines, others do not. This law will rectify this problem and will not impact persons already complying with tree protection standards.

8. Fees will have to be paid to remove hazardous trees that may be dead or dying.

The bill does not require a permittee to pay for the removal of a hazardous tree.

9. Homeowners will be required to get a permit to care for a roadside tree, e.g., to mulch it, to apply anti-gypsy moth tape, etc., even to water it.

When the County plants a street tree they do so only with the permission of the adjacent homeowner, with the hope that that homeowner will water and care for that tree until it becomes established. The County would be hard pressed to prevail in any actions against homeowners who properly care for their street trees.

10. This bill will restrict adjacent property owners in the Agricultural District who need to clear the road rights of way for passage of farm equipment.

Funding needs to be restored for proper roadside vegetation maintenance. The goal would be to ensure that any roadside tree removal is indeed necessary for farming.

Most trees along agricultural district roads would not be subject to this law. For those that are, the goal would be to ensure that any roadside tree removal is indeed necessary for the clearance of moving farm equipment from place to place, or for farming the adjacent lands.

11. Volunteer (trash) trees in the rights-of-way will make enforcement impractical.

The Bill is intended to protect and replace County-planted trees and those planted by permit. While some volunteer trees may grow into a desirable street tree, many do not, and a visit by a County arborist may be needed to make that determination.



## TESTIMONY OF MARK BUSCAINO 41-12: ROADSIDE TREES – PROTECTION

JANUARY 17, 2013

My name is Mark Buscaino, a County resident, Executive Director of Casey Trees and a professional arborist. I'm testifying in support of Bill 41-12

Montgomery County's residents value their street trees. They provide numerous benefits we know about – such as cooling and stormwater mitigation – and some we don't – such as increasing the life of asphalt roadways. Bill 41-12 is designed to ensure the County's street trees remain plentiful by:

- 1) Establishing a "pay to play" system where street trees may be removed so long as the appropriate fee is paid;
- 2) Placing the responsibility for replanting trees with the County, and;
- 3) Requiring a sensible number of replacements for trees removed.

1) Pay to Play:

This bill **does not** eliminate one's ability to remove a tree to build a home, construct a driveway, etc. It allows tree removal so long as the required fee is paid into the County's tree replacement fund. This **pay to play** mechanism was adopted in response to concerns that the bill would make it impossible to remove a tree, or onerous from a permitting standpoint. While imperfect in that trees are not truly "protected" as the Bill's title suggests, it is perhaps the best way to give flexibility for tree removals while ensuring that trees removed will be replaced.

2) Replanting decisions placed with the County

Currently, when someone removes a street tree they can plant the replacement tree themselves. This requires County staff to choose or approve the tree species and location, inspect the tree after it's planted – and if it dies – try to get the person to replant it which may require a bond. This system is costly, inefficient, and a poor use of taxpayer dollars. Washington DC has tried the same system now for 10 years and it has failed.

Bill 41-12 simplifies this by collecting a fee which the County uses to plant street trees based on its own identification of need or resident requests. This reduces staff time and cost per tree planted, and is far more efficient. It takes the County out of the equation by creating a simple transaction (remove the tree, pay a fee) that is finite, understandable and streamlined.



Furthermore, this is an equitable system where the County responds to resident street tree planting requests on a first-come, first-served basis. This ensures that people who really want a street tree get one, which is a good County investment because those people will water and care for that tree, ensuring its survival.

If the person or developer removing the street tree wishes to replant, the County would allow it after review of location and tree type, but this would not reduce the required fee. The County would, however, if requested by the **property owner**, add their request to the others received by residents county-wide. This eliminates the inequity of allowing someone who removes a large tree from getting a replacement quicker than someone who has been on the waiting list for months or perhaps years. It also eliminates the conflict created when a developer plants a tree with County dollars which ultimately may not be wanted by the person who purchases the lot.

Finally, and perhaps most important, developers have clearly stated that they want a simple system minimizing County involvement because time is money. However, when developers use tree removal fees to replant right-of-way trees the system slows down. The County must approve the tree, its location, and the County must follow up to ensure the tree is planted according to the agreement – which should require a bond – yet another step and more costs. Better the developer plants trees within the property itself with their own resources eliminating County involvement altogether.

### 3) Replacement formula

Currently, removal of a 30 inch diameter tree – or any tree – requires one tree to be planted in its place. This is bad deal for the County, unfair to residents who benefit from that street tree, and; it provides absolutely no disincentive to removing trees when alternative solutions exist.

Using the 30" diameter tree as an example, the proposed legislation mandates payment into the fund which would allow the county to plant 12 trees instead of one. If that seems like a lot, consider the size of the trees planted and removed in the illustration shown on Attachment 1.

As the illustration shows, even this replacement formula does not truly "replace" what the County has lost, and furthermore this replacement scenario does not take into account time. ***Very few street trees survive the 60-70 years needed to reach a diameter of 30 inches. In DC, only 5% of the city's 130,000 street trees are 30 inches in diameter or greater.*** Using this as a guide, growing another 30" diameter tree might well take ***more than*** 12 replacements. And, one must also consider the time lost in accrued benefits when that 30" diameter tree is removed and those planted to replace it reach 30" – if they ever reach it at all.

My last comment deals with concerns about "double-permitting" with MD-DNR State Permits. The State does not have adequate staff to review and address street tree removals, and this bill equals or exceeds State requirements. If passed, therefore, the County could obtain a blanket permit from the State, essentially acting as their agent,

TESTIMONY OF MARK BUSCAINO  
BILLS 41-12  
JANUARY 17, 2013  
PAGE 3 OF 3

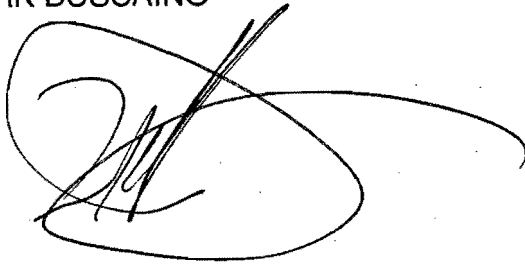
eliminating the dual State-County permit process. The State should have no objection because again, the County's requirements are equal or greater than what the State requires, and again, the State has inadequate staff to enforce/monitor.

Conclusion

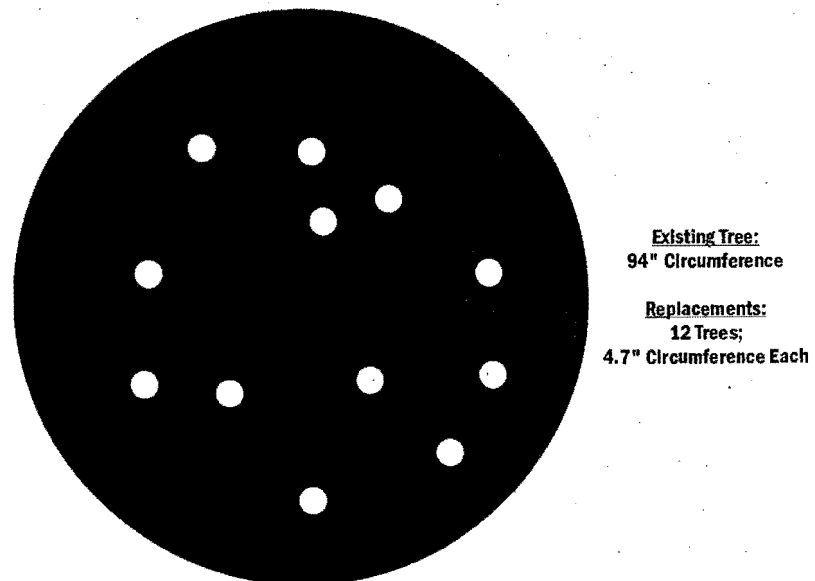
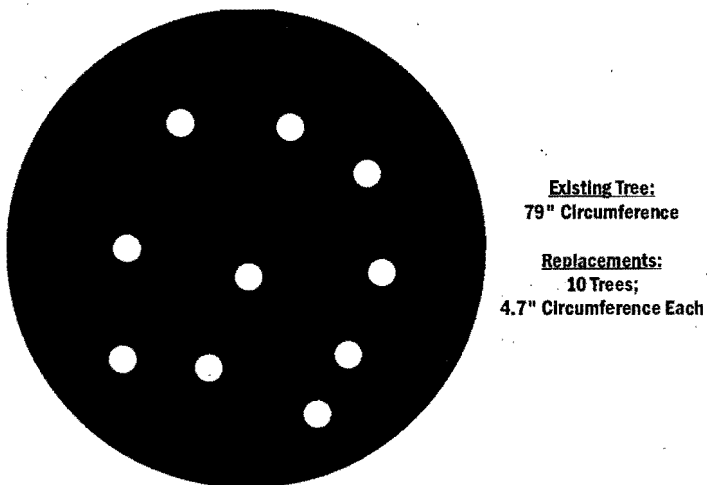
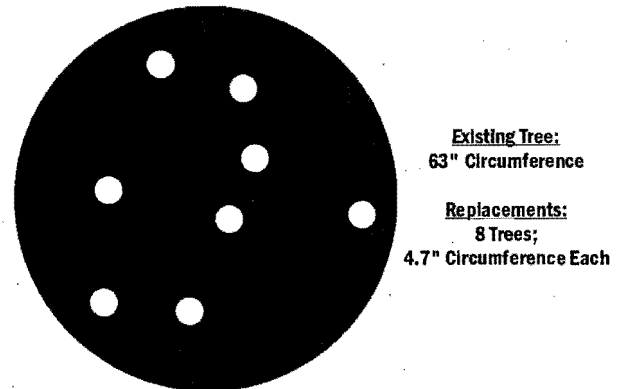
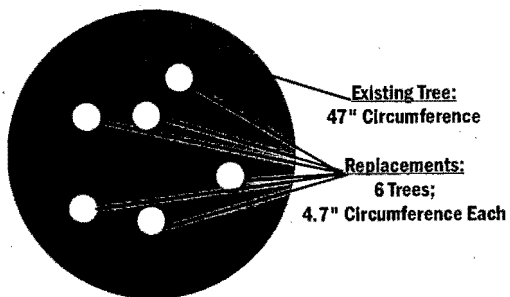
Bill 41-12 makes sense. It protects a County resource that is beloved by its residents, but does not eliminate one's ability to remove a County-owned tree if it must go. When a tree does need to be removed, it requires a fee be paid that will ensure the County can plant a reasonable number of replacement trees to make up for tree canopy lost. And, when replanting, the County would do so in an efficient and effective manner that responds equitably to resident street tree planting requests on a first-come, first-served basis.

I urge you to pass this bill, and thank you for the opportunity to testify.

MARK BUSCAINO

A handwritten signature in black ink, appearing to be 'Mark Buscaino', with a large, sweeping loop at the end.

# Attachment 1: Tree Replacement Scenario Bill 41-12





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

MONTGOMERY COUNTY FARM BUREAU  
24110 Laytonsville Road  
Gaithersburg, Maryland 20882  
301 253-1501

January 8, 2013

The Honorable Isiah Leggett  
Montgomery County Executive  
101 Monroe Street  
Rockville Maryland, 20850

Dear County Executive Leggett:

RE: Bill 41-12 Streets and Roads-Roadside  
Trees-Protections

On behalf of the Montgomery County Farm Bureau-MCFB Board of Directors we are submitting our comments regarding Bill 41-12 Streets and Roads-Roadside Trees-Protections. The MCFB cannot support this Bill 41-12 unless it is amended as outlined in this letter to address the needs of the agricultural community in Montgomery County.

The MCFB was very encouraged by the trimming of roadside trees that the Department of Transportation-DOT completed during the summer of 2012. Many County farmers have provided positive comments regarding the trimming that was done on several rural roads. Many rural and rustic roads are still in need of tree trimming to insure the safe movement of vehicles and farm equipment. The Department of Transportation staff should be commended for the good work they did last year and the MCFB encourages the DOT to continue these tree trimming efforts this year 2013. Unfortunately it appears the DOT efforts for trimming roadside trees will be negatively impacted by the Bill 41-12.

It is our understanding that the Department of Permitting Services will issue the Right-of-way and roadside tree work permit. The MCFB thinks this means that if the DOT plans to conduct tree trimming again in 2013 the DOT will need to obtain a permit from the DPS before any tree work can be done. This outcome does not make any sense to us and we strongly oppose this requirement if this represents the correct reading of Bill 41-12.

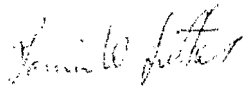
We understand the Bill 41-12 will require a Right-of-way and roadside tree work permit for performing any tree work on any roadside tree. The MCFB understands that an exception is proposed in the Bill 41-12 for cutting or clearing a public utility right-of-way or land and this exemption includes routine maintenance. The MCFB is concerned that Bill 41-12 appears to prevent the type of trimming of roadside trees done last year by the DOT as discussed above unless DOT obtains the permit from the DPS.

The MCFB respectfully recommends the Bill 41-12 be amended so that tree cutting, clearing, and routine maintenance on all public rights-of-ways (All public roads whether they are In Fee or Prescriptive rights-of-ways) and all agriculturally assessed properties needs to be added into the Exceptions section of the Bill 41-12.

During the County Council public hearing on June 12, 2012 regarding the withdrawn Bill 16-12, Council member Nancy Floreen acknowledged that the rural and rustic roads in the Agricultural Reserve are very different from the types of roads down county and therefore, the rural and rustic roads should be looked at differently for the purposes of tree trimming and routine maintenance. The MCFB strongly agrees with Council member Nancy Floreen and the amendments listed above attempts to address what Council member Nancy Floreen was advocating last year.

Thank you for considering the views of the Montgomery County Farm Bureau regarding Bill 41-12.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "Lonnie Luther".

Lonnie Luther, President of Montgomery County Farm Bureau

Cc: County Council Members  
Arthur Holmes, Director, DOT





21

## Montgomery Soil Conservation District

18410 Muncaster Road - Derwood, MD 20855 - Phone (301) 590-2855  
www.montgomeryscd.org

January 17, 2013

The Honorable Nancy Navarro  
Montgomery County Council President  
100 Maryland Avenue  
Rockville, MD 209050

Re: Bill 41-12, Streets and Roads – Roadside Trees – Protection and  
Bill 35-12 Trees – Tree Canopy Conservation

Dear Council President Navarro and Council Members:

On behalf of the Montgomery Soil Conservation District (MSCD) I would like to thank you for the opportunity to provide comments on Bill 41-12 and Bill 35-12. As farmers and landowners in the Agricultural Reserve, we would like to express our concerns about roadside tree maintenance and the challenges trees present for the agricultural community.

I would first like to mention the observations made by Council Member Floreen during our last discussion regarding a tree bill. Back in June 2012 when we met to discuss Bill 16-12, Council Member Floreen pointed out that our urban and rural sections of the County have distinct and critical differences regarding tree management issues. While we all acknowledge the values that trees provide, we also recognize that the intended purpose of the Agricultural Reserve is to produce the food and fiber needed by a growing population. As in June, the Montgomery Soil Conservation District opposes these bills as they pertain to the rural areas of the County, and respectfully requests that the County Council provide exemptions to these bills for the agricultural community.

The lack of maintenance on roadside trees in the rural areas of the county has become a serious concern. Critical public safety issues and economic impacts created by unmanaged roadside trees continue to be ignored. I have provided along with my testimony several pictures of an incident that occurred Tuesday on Travilah Road. Problems like this exist throughout the county and they are dangerous and costly.

As our rural roads continue to become commuter routes, the volume of traffic combined with overhanging, unmanaged branches has created a hazardous situation throughout the county. Many of the trees along our rural roads represent an accident waiting to happen, and the only question is whether it will impact farm equipment, emergency vehicles, a school bus, or some other county citizen.

Ask any farmer in this county about tree maintenance along the roads and you will begin to understand the problems farmers experience with poorly maintained roadside trees:

- Constant and expensive damage to all farm equipment on both the roadways and on the field side where overgrown trees impede planting and harvesting.
- Lost production due to shading and moisture impacts of roadside trees.

58

- Spreading of invasive and exotic trees, shrubs, and vines that start in roadside hedgerows and relocate throughout the farm and create increased costs to control.
- Dangerous limited sight distances when pulling out of fields onto roads.
- Longer delays in power restoration when trees cause outages in rural areas. It is not uncommon for rural homeowners to be out of power many more days than urban residents because they live in less populated areas, and therefore become a lower priority.

Specifically regarding Bill 41-12, we request that the county provide the agricultural community with an exemption to the law under Section 49-36A Roadside tree work (b) Applicability; Exceptions. This exemption is critical for rural landowners if we ever hope to address the safety and economic concerns along the roads in our agricultural areas. We also recommend that fees collected from this bill be designated to trim trees and provide a fund to reimburse residents for damages caused by roadside trees.

The focus of Bill 35-12, Trees –Tree Canopy Conservation appears to be on minimizing “the loss and disturbance of tree canopy as a result of development.” However, it does not provide a clear exemption for all agricultural practices. **Section 55-5 Exemptions** reads “This Chapter does not apply to: any tree nursery activity performed with an approved Soil Conservation and Water Quality Plan as defined in Section 19-48;” We believe this first exemption should be amended to include any agricultural or conservation activity performed with an approved SCWQ Plan.

Many Council Members attended the Farming at Metro’s Edge conference last weekend. A recurring theme at this landmark event was that constant increases in regulation represent one of the biggest threats to the future prosperity of the Ag Reserve. These bills, along with the lack of tree maintenance along our rural roads, create an obstacle for many of the rural businesses and policies we strive to promote. Along our rural roadways, trees must be managed so they do not impede commerce, public safety, power reliability, or private property rights.

I would like to thank the County Council for providing this opportunity to present our concerns on Bills 41-12 and 35-12, and for their continued support for agriculture. We look forward to participating in the work sessions on these two bills.

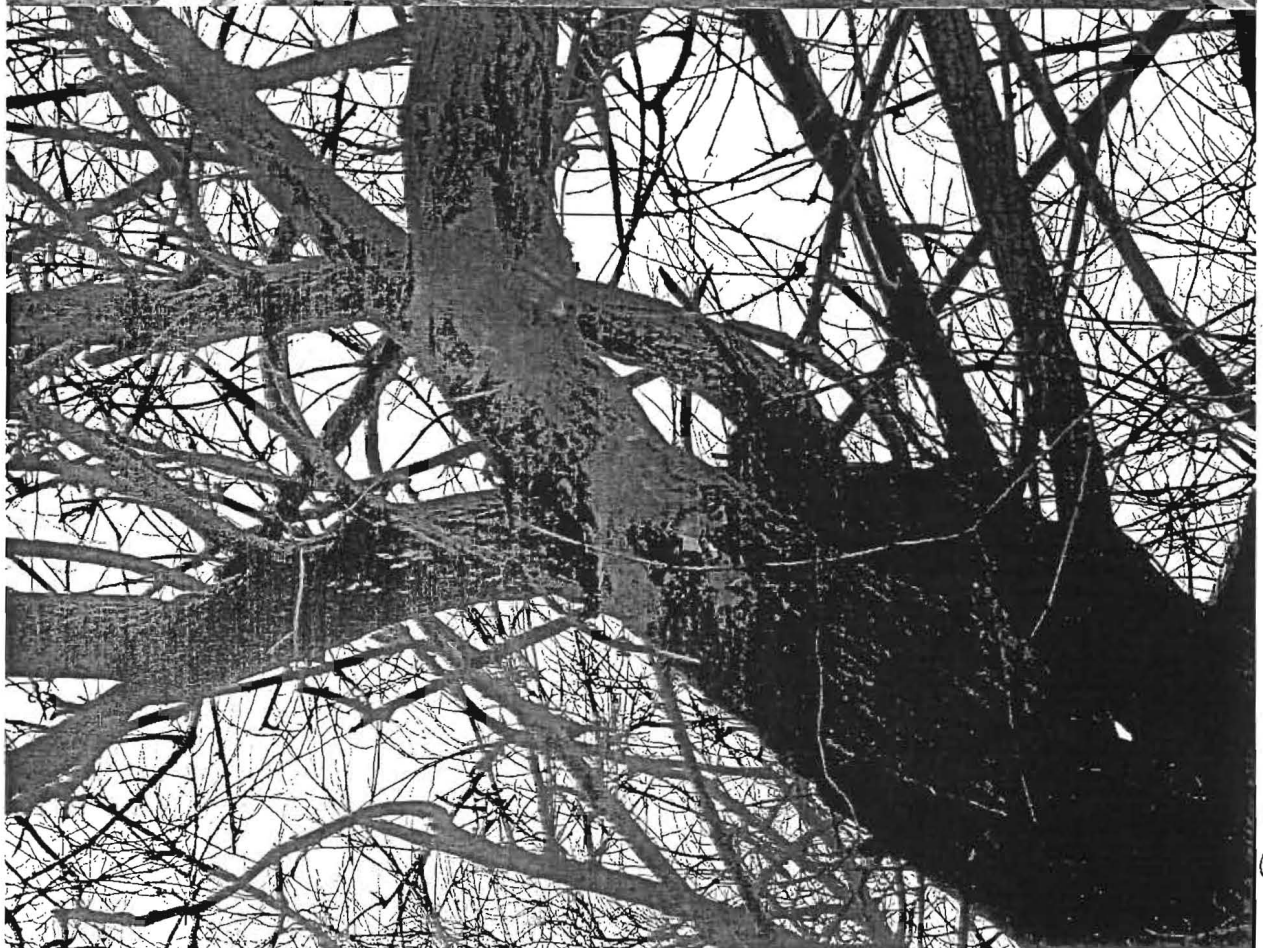
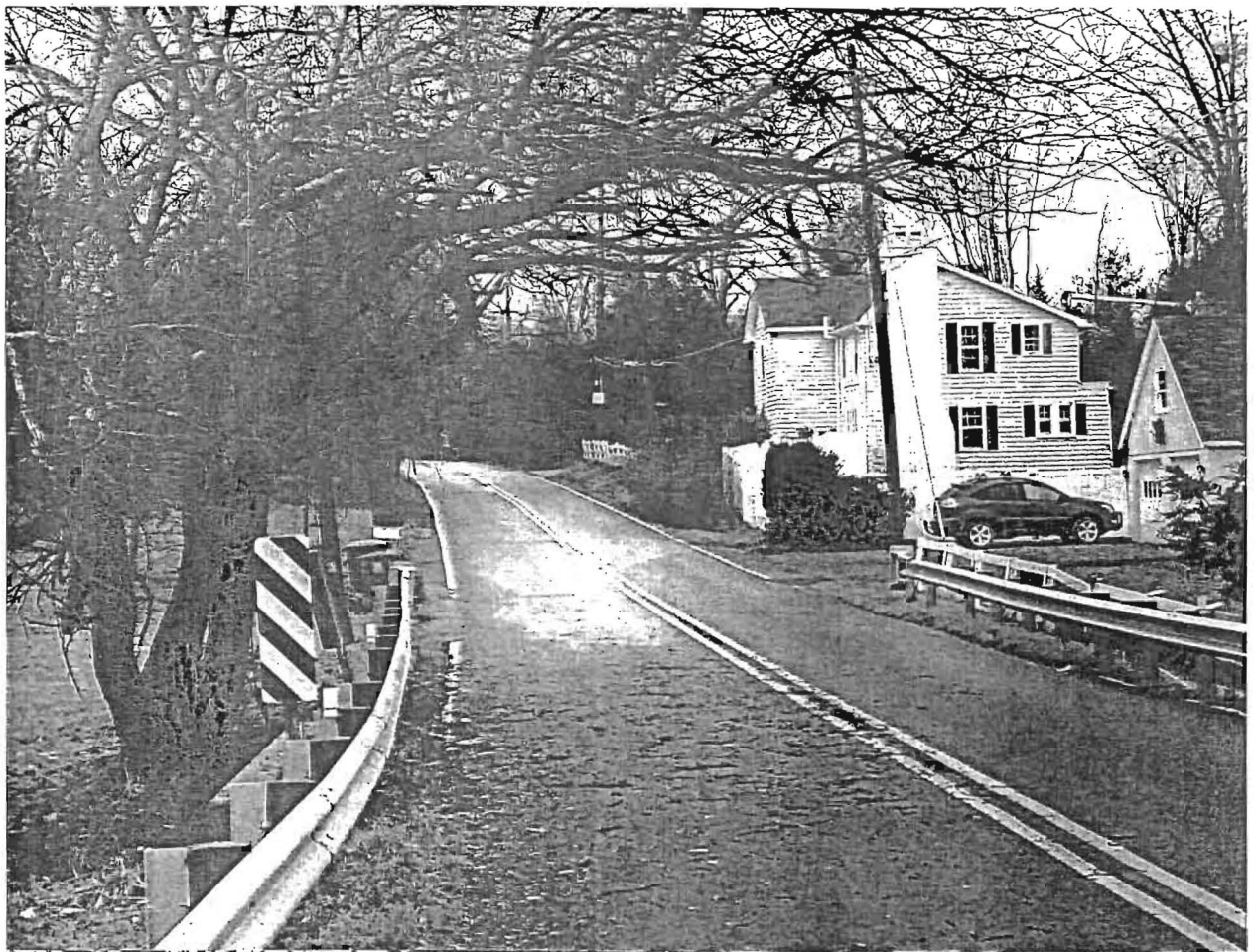
Respectfully,



Wade Butler, Treasurer  
Montgomery SCD Board of Supervisors

Cc: Council Members  
Jeremy Criss, Ag Services Division Manager









of the Anacostia  
River

P.O. Box 4314  
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Anne Ambler  
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James Graham

Kimberley Knox

Glenn Welch

Tiffany Wright

+++++

Edward Murtagh  
Liaison, Friends of  
Sligo Creek

Elaine Lamirande  
Chair, Woodmoor  
Green Team

[www.neighborsnwb.org](http://www.neighborsnwb.org)

## Testimony on Bill 35-12, Tree Canopy and Bill 41-12, Roadside Tree Protection

County Council, January 17, 2013

Good evening. I am James Graham speaking on behalf of Neighbors of the Northwest Branch. Neighbors strongly supports both Bill 35-12 and Bill 41-12, with some adjustments.

Neighbors of the Northwest Branch is a nonprofit, all-volunteer organization dedicated to restoring the health of the Northwest Branch, the longest tributary of the Anacostia River. The Northwest Branch has the luxury of a wide, wooded parkland buffer; yet its banks are deeply eroded from storm water gushing in from every storm drain, and its waters rate from "fair" to "poor" for macro-invertebrates. WSSC's estimated billion dollar renovation of our sewer system includes over \$25 million just to relocate some of the pipes and rebury some of the manholes exposed by severe erosion in the Northwest Branch stream valley. Our waterways and our pocketbooks desperately need additional trees throughout the county intercepting rainwater, evaporating and transpiring it back into the air, and allowing it to soak into the ground. Trees are a very effective tool for complying with our MS4 Clean Water Act requirements.

**Bill 35-12** complements our Forest Conservation Law by addressing tree removal and disturbance below the FCL applicability threshold. We do have some concerns: (1) Tree Canopy Conservations funds must go also to maintaining replacement trees; (2) who controls the fund needs clarification; (3) the inference that only fines, not mitigation fees, may be used to administer the program needs clarification; and (4) site visits during construction should be mandated.

**Bill 41-12**, in largely duplicating state law, brings enforcement to the local county level. The bill seems aimed primarily at redevelopment, infill, major yard projects, and roadside maintenance. We applaud it wholeheartedly.

However, the bill could benefit from some alteration to encourage the support of homeowners, whose cooperation is very much needed to maintain street trees on home easements.

Here are two examples:

- A homeowner, after repeated calls, gets the Department of Transportation to take down the dead street tree in front of his house, only to be left with a stump--indefinitely. If at personal expense he seeks to remove the stump to plant a tree, he must first pay for a permit—to do what the county should have done but couldn't.

- A homeowner seeks to protect her street tree with an inch of mulch so that the lawnmower doesn't nick the trunk. According to this law, she must get a permit and hire an arborist. This would also be true if she wanted to protect the tree from gypsy moths with a burlap wrap, as we were asked to do several years ago.

So, to accommodate these responsible property owners, we first suggest that stump removal be exempted and that in the definition of "tree work" in this bill, language be added allowing for "reasonable care by the property owner" without the necessity of a permit.

Secondly, we recommend that, if a separate fund must be created for 41-12, its use be as clearly spelled out as that of the Tree Canopy Conservation Fund. Again, these funds should be used for maintaining trees as well as for planting them.

Finally, it is critical that all funds collected through these bills be strictly dedicated to increasing a healthy tree canopy, that is, not available for plugging other holes in the budget. This, we believe, will go a long way in encouraging public acceptance and cooperation.

Thank you for the opportunity to comment.

James Graham  
Neighbors of the Northwest Branch  
307 Lexington Drive

Public Hearing Testimony  
Bills 35-12 and 41-12  
January 17, 2013

Mr. Chairman, Councilmembers - good evening.

My name is Jerry Pasternak and I am here on behalf of Pepco to testify on Bills 35-12 and 41-12.

Pepco takes seriously its commitment to environmental stewardship. For example, we have an ongoing partnership with the Arbor Day Foundation and the Energy Saving Tree Program. This program debuted as a pilot in Pepco's service territory in the Fall of 2011, and it was so successful that we offered it twice in 2012. Since the beginning of this program, Pepco has delivered approximately 10,000 utility compatible trees to nearly 7,100 customers.

In addition, Pepco has earned Tree Line USA certification every year since 2002. The Tree Line USA program, sponsored by the Arbor Day Foundation in cooperation with the National Association of State Foresters, recognizes utilities for superior vegetation management on right-of-way based on three criteria: a

program of quality tree care, annual training in quality tree care for their foresters, and a tree planting and public education program.

Balancing our environmental stewardship is our state mandate -- and the demands of our customers and your constituents -- to provide safe and reliable electric service. This includes meeting our vegetation management obligations to maintain appropriate clearance from electric conductors. This is first and foremost an issue of safety -- trees that come in contact with energized conductors can themselves become energized, thereby endangering the public. Second is service reliability. We're working hard to more effectively provide safe, reliable electric service to our customers, and a major component of that effort is tree trimming.

Recognizing the importance of utility vegetation management and the need to avoid delaying that work, each of these bills contains language that purports to exempt routine maintenance of or in public utility right of way. We appreciate this support of our reliability efforts. In 2011, where we have completed our reliability work, the average number of outages per customer is down by 58 percent and the average duration of outages per customer is down by 69 percent. From September 2010 to September 2012,



Maryland customers overall had 38 percent fewer outages and a 36 percent decrease in the duration of outages.

We have reviewed the exemption language in the bills and believe that the language in each bill should be modified. Toward that end, we have been working with the Executive Branch on Bill 35-12 to come up with better language, and we look forward to working with you on Bill 41-12 so that it is clear that you and the Council continue to support our efforts to provide safe and reliable electric service to our customers.

Thank you for the opportunity to testify, and I am happy to answer any questions you may have at this time.

## Renewing Montgomery Opposes Bill 41-12 Roadside Tree 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 41-12.

1. All property owners must *already* apply for a State DNR permit before trimming or removing a roadside tree. The application must demonstrate if there are conflicts between the tree and other agency regulations such as storm water management, driveway safety, and utilities connections. The process requires an evaluation by a State Forester and a licensed tree expert. If the permit is approved to remove a tree, the property owner is required to replace the tree. The current permit process achieves the goal of planting the next generation of trees in a gradual manner; there is no problem to solve. This bill will encourage the removal of more trees, and does *nothing* to replant trees that are removed.
2. The County already approves all State issued roadside tree permits and controls tree protection in the right of way. The County inspects the right of way before a building permit is issued. In addition they require an affidavit that property owners have obtained a State permit.
3. This bill establishes a *duplicate and redundant* permit and inspection process that *does nothing* to replant trees that must be removed.
4. The County does not have the budget or resources to remove the long backload of unhealthy dangerous trees *already scheduled* for removal. When they do remove the tree, they leave the stump – which is both unsightly and unsafe. The County does not plant

new roadside trees. Property owners are not only improving the streetscape by removing dead or dying trees and replacing them with new trees, they are *saving* the County money. This bill penalizes new homeowners, and does not hold the County to the same standard.

5. This bill requires that property owners must avoid disturbing the street tree critical root zone on *private property* or pay a fee. The critical root zone typically takes up the *entire front yard* therefore tree protection on private property is not a realistic option. This bill will essentially require the *wholesale removal* of many more roadside trees and not replace them.
6. *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.
7. Most existing healthy street trees *can survive* the temporary disturbance caused by construction, but this bill will *require their removal*. This bill will cause the removal of more trees and more severely disrupt neighborhoods than the current efficient process.
8. The bill requires any property owner seeking to improve their homes to pay a fee that is *10 times the cost of a new tree*, to plant trees *somewhere* in the County. The current process allows builders to replace the tree in the same approximate location as the one removed. Within a few years the tree grows and the canopy is rejuvenated.
9. This bill *devalues* any property with existing roadside trees as it will cost more to construct home improvements.
10. The design of any project begins months ahead of applying for any permits. Property owners must have certainty to know they can build their improvements even if they conflict with an existing tree. The property owner needs to know the costs to build their home improvements. This bill creates *uncertainty* about the design, costs, and approval for home improvements.
11. Not all trees are worth saving. The roadside trees in older neighborhoods were often planted by the homeowner after the original house was built. They are poplars, pines, Bradford Pears, or other undesirable trees. The current process replaces these trees with better species at no cost to the County.
12. It is apparent that homes built 50 – 60 years ago have become outdated, making the land worth more than the old house. This has spurred the rejuvenation of older neighborhoods with new homes. The same can be said for the roadside trees. They were planted 50 - 60 years ago, they have *outgrown the available space between the curb and the sidewalk*, they conflict with overhead

- utilities, the *best* thing for all concerned is the gradual replacement of all roadside trees – which is *achieved with the current process*.
13. This bill establishes a County violation policy that will be subject to interpretation, causing conflict between neighbors that will delay construction and create another appeal process. Every project could be stopped by a complaint regarding a roadside tree.
  14. This bill will require *every property owner to obtain a permit* to maintain the right of way using typical grass fertilizers and pesticides.
  15. This bill will require every utility company *except Pepco* to obtain a permit if their utility impacts a roadside tree. Utility connections for water, sewer, gas and phone have very little design flexibility. This requirement will significantly delay construction, increase utility fees, and extend the disruption on the community.
  16. This bill would establish a new costly and unnecessary layer of government to address a very small problem, estimated at 60 trees a year. The fees collected for this small amount of trees could not support the staff needed to implement these new regulations – much less plant replacement trees.
  17. 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.
  18. There is no evidence that the County has inadequate tree canopy. Studies show our canopy is thriving.

This bill is the epitome of a solution in search of a non-problem. The current process is working to ensure a healthy roadside tree population. This bill will do far more damage to the streetscape through the many unintended consequences and disregards the unavoidable impacts of home improvements.

New homes are more energy efficient, provide better storm water management, stabilize communities, improve property values, increase tax revenue, and replace dilapidated homes.

In exchange for the aforementioned benefits to *all* County residents this bill will *penalize* only new homeowners and those seeking to improve their homes by increasing costs in consultant fees, delaying construction, creating uncertainty in the process, not improving on

the existing permit requirements, and reducing the value of any property with roadside trees.

*This bill will require the removal of more street trees while not replacing those trees. The current State permit process achieves the goals of minimizing disruption to the community and maintaining the streetscape in a gradual efficient manner. In summary, why fix it if it isn't broke? Especially when the County is broke.*

For these reasons Renewing Montgomery *opposes* this bill and supports the *existing* Department of Natural Resources right of way tree permit process.

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



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

ATTORNEYS AT LAW

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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 41-12.

**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 protecting roadside trees embodied in Bill 41-12 and to request an amendment to the Bill that would exempt from the Montgomery County Roadside Tree Work Permit requirement activity that is already regulated by municipal tree preservation legislation that is at least as stringent as Bill 41-12.

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 41-12. However, the City is concerned that Bill 41-12 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 County permit requirements for roadside tree work activity that is already subject to comprehensive 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 every roadside 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.<sup>1</sup>

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<sup>1</sup> 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. (11)

Construction activity within the critical root zone of a protected tree requires a Takoma Park Tree Protection Plan Permit. The City Arborist aids 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. 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 roadside 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 roadside 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 41-12 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 roadside trees. Currently, work affecting roadside trees in the City requires a Takoma Park Tree Protection Permit or Tree Removal Permit. In addition, such work is also subject to the State Roadside Tree Permit requirements of the Natural Resources Article of the *Maryland Code*. Bill 41-12, as drafted, would require a Montgomery County Roadside Tree Work Permit for work in the right-of-way of State Roads in the City of Takoma Park. Requiring a County Roadside Tree Work Permit for such activity will not provide additional protection to roadside trees in Takoma Park. In addition, the City is concerned that the imposition of a third permit requirement for such activity will deter compliance with its tree protection regulations. First, in the City's experience, many contractors are unaware of the distinction between municipal and county government, so, after obtaining the less restrictive Montgomery County permit, they may proceed without obtaining a Takoma Park permit. Second, when faced with the necessity of obtaining three different tree-related permits from three different government entities, contractors may decide to proceed without obtaining any permits.

Our proposed amendment to Bill 41-12, a copy of which is attached, would provide for an exemption from the County Roadside Tree Work Permit Requirement for activity in a municipality that has enacted roadside tree protection legislation that is at least as stringent as the County's requirement. The Department of Permitting Services would be responsible for determining whether a municipal tree protection ordinance warrants an exemption from the County permit requirement.

#### 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 41-12 as amended by the attached proposal.

12

**City of Takoma Park's Suggested Amendments to  
Bill 41-12, Streets and Roads – Roadside Trees - Protection**

*Insert new paragraph (4) after line 114:*

- (4) This Section does not apply in any municipality that employs a permit system which regulates tree work affecting roadside trees if the Department certifies that the permit requirements that the municipality enforces are at least as stringent as the applicable requirements under this Section.



Susan Silber  
Linda S. Perlman  
Kenneth T. Sigman  
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## 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 of Takoma Park City Attorney; Kenneth Sigman, Asst. City Attorney

**Subject:** Response to questions raised regarding the City of Takoma Park's Tree Ordinance as it relates to roadside trees.

**Date:** February 15, 2013

We are writing on behalf of the City of Takoma Park to address questions raised by the Committee at its January 28, 2013, Worksession, based on Takoma Park's request that the Committee amend Bill 41-12 to exempt from the requirements of the Bill work affecting roadside trees in municipal corporations that have enacted tree protection legislation that is at least as stringent as the County law.

By way of background, please note that the Takoma Park Tree Ordinance (Tree Ordinance) regulates any activity that affects any protected trees. Therefore, in contrast to Bill 41-12, which protects only trees the trunk of which is located in the public right-of-way, the Tree Ordinance regulates activity in the public right-of-way that may harm trees located in the right-of-way *or trees on nearby private property*. In addition, the Tree Ordinance regulates activity on private property that might harm trees in the public right-of-way, even if the activity does not constitute "tree work" as defined in Bill 41-12. For example, if a homeowner were to install a retaining wall in their front yard and raise the grade of a large area of the yard by one foot, this activity would likely result in the destruction of a significant portion of the critical root zone of a roadside tree located in front of their property. This would render the tree structurally unsound and physiologically unhealthy. Under the Tree Ordinance, such activity would either be prohibited or limited in such a way as to protect the tree (via a tree protection plan approved by the City Arborist), or the property owner would have to pay the cost of planting enough replacement trees to restore the City's tree canopy. Under the Bill 41-12, such activity does not constitute "tree work" and would not be regulated.

### **Question presented: Whether the Takoma Park Tree Ordinance is as stringent as Bill 41-12?**

Members of the Committee and questioned whether the Takoma Park Tree Ordinance is as stringent as Bill 41-12 because, whereas Bill 41-12 protects only "roadside trees," which it defines as "any single-stem plant that has a woody stem or trunk that grows all, or in part, in the right-of-way of any County or State public road or shared use trail," including "the tree's critical root zone."

The Tree Ordinance protects every “urban forest tree,” which it defines as a tree that

- A. Measures 24 inches or more in circumference at four and one-half feet above ground level or measures seven and five-eighths inches or more DBH [diameter at breast-height]; or
- B. Is required to be planted or maintained, pursuant to governmental order, agreement, stipulation, covenant, easement, or a tree protection plan, or as a condition of issuance of a tree permit; or
- C. Is planted with government funding or under a government program.

*Takoma Park Code § 12.12.020.*

Because the Tree Ordinance protects trees of any size that are planted with government funding, it protects almost all roadside trees in the City. In addition, a person who sprays, prunes, cuts, or removes any vegetation that is greater than 24 inches high in a City right-of-way must first obtain written permission of the City of Takoma Park Department of Public Works. *Takoma Park Code* §§ 12.04.010 and 12.04.100. As noted above, the Tree Ordinance also protects trees on private property that may be affected by work in the right-of-way, which Bill 41-12 does not protect. In addition, the Tree Ordinance protects trees in the right-of-way of both City streets and State roadways. Bill 41-12 protects only trees in County and State rights-of-way, leaving trees in municipal rights-of-way unprotected.

**Question Presented: On what basis did the State Department of Natural Resources grant the City of Takoma Park an exemption from the State Roadside Tree law?**

DNR has not exempted the City of Takoma Park from the State Roadside Tree law. DNR has authorized the Takoma Park City Arborist to maintain roadside trees in the right-of-way of State highways in Takoma Park. The State Roadside Tree law continues to apply in Takoma Park, and, currently, Pepco applies for permits from DNR before working on roadside trees in Takoma Park.

Because Bill 41-12 would only apply to trees in the right-of-way of State roads in Takoma Park (there are no County roads in Takoma Park), the primary impact of Bill 41-2 upon roadside tree activity in Takoma Park would be that the City of Takoma Park would have to obtain a County roadside tree permit to perform maintenance on such trees, and contractors and private individuals would have to obtain County permits in addition to the State and City permits already required.



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: Roadside Tree Replacement Charges

QUESTION

You have requested an opinion from this office concerning the payments into a roadside tree replacement fund that would be required of persons that damage or remove trees in the public right-of-way while performing roadside tree work under a County-issued permit. Specifically, you ask whether this required payment is an excise tax or a regulatory fee.

SHORT ANSWER

The primary objective of the payments into a roadside tree replacement fund that would be mandated under Bill 41-12 does not appear to be the raising of revenue. Therefore, it is not a tax. The requirement that a person who causes tree loss or damage in the public right-of-way while performing roadside tree work under a permit pay monies into a special fund to defray the public costs incurred to replace the trees is an essential component of a regulatory scheme to protect roadside trees as part of the County's management of its rights-or-way. As a tool of regulation the payments are, therefore, in the nature of a regulatory fee.

BACKGROUND

Bill 41-12 would, with certain exceptions, prohibit tree removal, tree trimming, and certain other activities from being performed on trees located in the public right-of-way without a permit for roadside tree work issued by the Department of Permitting Services. The proposed

legislation would also authorize the Department of Transportation to create a tree replacement fund. Anyone that removes or severely damages roadside trees while performing "tree work" in the public right-of-way under a County-issued permit would be required to pay into that fund a sum of money deemed proportionate to the cost of replacing each affected tree. The amount of the payment would be set by regulation and computed according to the size of the affected tree, taking into account certain other factors such as age and historical value of the tree. However, the payment must not amount to less than \$35 per circumference/inch of the tree requiring replacement.

### DISCUSSION

#### Distinguishing between Regulatory Fees and Taxes

In evaluating whether a governmental charge is a regulatory fee or a tax, the purpose of the enactment governs rather than the label given to the charge in the legislation. *Eastern Diversified Properties, Inc. v. Montgomery County*, 319 Md. 45, 53, 570 A.2d 850 (1990). Taxes are generally defined as enforced contributions 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). Maryland courts typically distinguish taxes from fees by regarding taxes as a revenue raising measure enacted under the government's taxing authority for the benefit of the general public while regarding fees as being adopted under the government's police power and 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).

The distinction between a tax and a fee is not readily obvious in every instance. In fact, the Maryland Court of Appeals stated in *Eastern Diversified Properties, Inc. v. Montgomery County*, *supra*, there is no set rule by which it can be determined in which category a particular statute primarily belongs. *Eastern Diversified*, 319 Md. at 53. However, the Court went on to say 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 deciding whether revenue generation rather than regulation is the primary purpose of a governmental charge, 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. A regulatory measure generally requires the payer of the charge to comply with

certain conditions in addition to simply paying the charge. *County Comm'rs of Anne Arundel County v. English*, 182 Md. 514, 520, 35 A.2d 135 (1943). If that is the case, the payment is usually considered to be a fee imposed by virtue of the police power as part of a regulatory scheme. An additional requirement, however, is that any revenue produced by the payment be reasonable and bear "some definite relation" to the purpose of that regulatory scheme. *Ocean City v. Purnell-Jarvis, Ltd.*, 86 Md. App. 390, 405-06, 586 A.2d 816 (1991).

#### Mandatory Payments to the Roadside Tree Replacement Fund

By all indications, the chief purpose of the payments to a special fund that would become mandatory under Section 49-36A (e) (3) (B) of Bill 41-12 is to defray the cost of replacing roadside trees that have been removed or damaged in the course of performing tree work in the public right-of-way under a County-issued permit. There is no basis to conclude from the statutory language that the required payments were conceived primarily as a revenue-producing measure. Not only does the County have a right to manage its rights-of-way, *see, e.g., County Council for Montgomery County v. Lee*, 219 Md. 209, 215, 148 A.2d 568 (1959), the County clearly has an interest in protecting the trees placed in those rights-of-way. Roadside trees make a positive contribution to roads because they help control storm water runoff and tree shade prolongs the life of asphalt. Therefore, requiring a permittee responsible for removing or damaging those trees to help offset the cost of replacing them bears a clear relationship to purpose of requiring a permit to perform roadside tree work to begin with.

Charges that are regulatory in nature are not necessarily limited to processing and inspection fees. Similar to the mitigation fee proposed in Bill 35-12, a charge that allocates and recovers the cost of handling the negative impacts of certain activities on public resources from those who cause them can be defended as part of the regulatory scheme intentionally designed to avoid or minimize those negative impacts to the greatest extent practicable. This differs significantly from the situation with which the court was faced in *Eastern Diversified* where the Court of Appeals concluded that the County's development impact "fee" was in reality a tax because there was no direct relationship between the payments mandated in that case and any demand for roads created by the development for which the charge was imposed. *Eastern Diversified*, 319 Md. at 51. There was also no clear indication that the revenue produced by the impact "fee" in that case would be earmarked for roads that would benefit the development for which the charge was imposed. The Court also noted that nothing in the language of the impact fee statute suggested that the impact fees were charged solely on the basis of service provided to the property owner, or to defray the expenses of the development regulatory process. *Id.* at 54-55. The Court also looked to the absence of a nexus between the charges and the stated regulatory purpose, as well as the fact that the revenues would benefit a wide area, to conclude that the impact fee was not regulatory in nature. *Id.* at 55. The provisions governing the roadside tree replacement payments avoid those problems in that the legislation is worded to leave no doubt as to where the moneys paid into the tree replacement fund will be directed. Also, the nexus between those payments and the stated regulatory purpose is clearly indicated by the

Michael Faden  
February 19, 2013  
Page 4

language of the proposed amendments to Chapter 49. The creation of the fund under Section 49-36A (e) (3) (B), the assignment of responsibility for administering the fund to the Department of Transportation, and the limited purpose for which the fund is intended suggests a legislative intent that moneys deposited into the fund not be transferred to the General Fund. This is also indicative of a measure whose primary goal is not to raise revenue.

Another indication that revenue generation is not the primary goal of the tree replacement charges is that Section 49-36A (e) (3) (C) requires that the amount of the payment be proportionate to the cost of replacing each affected tree. Instead of requiring the permittee to the replace a damaged roadside tree, the County takes on the task of replacing the tree and simply requires compensation from the permittee to defray the cost of replacement.

### **CONCLUSION**

For the foregoing reasons, it is my opinion that the payments into a roadside tree replacement fund that would be mandated under the proposed amendments to Chapter 49 are regulatory fees rather than taxes.

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  
Diane Jones, Department of Permitting Services  
Rick Brush, Department of Permitting Services  
Brett Linkletter, Department of Transportation  
Art Holmes, Department of Transportation



**MARYLAND**  
DEPARTMENT OF  
NATURAL RESOURCES

**Martin O'Malley, Governor**  
**Anthony G. Brown, Lt. Governor**  
**John R. Griffin, Secretary**  
**Joseph P. Gill, Deputy Secretary**

January 25, 2013

Roger Berliner, Chair  
Transportation, Infrastructure, Energy and Environmental Committee  
Montgomery County Council  
100 Maryland Ave  
Rockville, MD 20850

RE: Bill 41-12 Streets and Roads – Roadside Trees – Protection

Dear Chair Berliner:

The MD Forest Service has reviewed the proposed Bill 41-12, Street and Roads – Roadside Trees – Protection introduced on the County Council Agenda December 11, 2012 and subsequent public hearing on January 17, 2013. My office has determined that the proposed Bill is not more stringent than existing state law, *"Except as provided in subsection (e) of this section, a county or municipality may adopt a local law or ordinance for the planting, care, and protection of roadside trees that is more stringent than the requirements of NRA 5-402 and 5-46 of this subtitle if the local law or ordinance does not conflict with the provisions of NRA 5-402 and 5-406 of this subtitle."* [NRA 5-403(d)] (emphasis added) and therefore, does not meet the required statutory standard necessary to adopt a county roadside tree law or ordinance.

I would also like to clarify language in Bill 41-12 and future tree protection bills. In the State of Maryland, only MD Licensed Tree Experts can perform tree care of any sort. This includes making diagnoses, prescribing and supervising the treatment of trees (trimming, pruning, thinning, cabling, shaping, removing or reducing the crown of trees) [NRA 5-417]. Certified Arborists are not MD Licensed Tree Experts and are in violation of the MD Tree Expert Law when performing tree care work.

If you have any questions, I can be reached at (410) 260-8511 or via email at [mhoneczy@dnr.state.md.us](mailto:mhoneczy@dnr.state.md.us) .....

Sincerely,

Marian Honeczy, AICP, CA  
Supervisor, Urban & Community Forestry

cc: Amanda Mihill, Legislative Attorney, Montgomery County  
Steve Koehn, Director / State Forester



81

## AMENDMENT

To Bill 41-12, Streets and Roads – Roadside Trees - Protection

PURPOSE: To require a person who removes a roadside tree to replant a tree and pay a fee that corresponds to the value of the tree that was lost less the value of the tree that was replanted into a tree replacement fund.

*Beginning on page 9, line 189, amend paragraph (3) to read:*

1           (3)    [(A) Before any bond filed with the Department under this  
2                   Chapter is released, or (if no bond has been filed) before  
3                   any certificate of occupancy or similar final approval is  
4                   issued, the Department must inspect each affected  
5                   roadside tree to determine, after consulting the Chief of  
6                   Tree Maintenance in the Department of Transportation,  
7                   whether the tree has a reasonable chance of achieving the  
8                   typical maximum age of a roadside tree in that location.

9                   (B) If the Department does not find that an affected tree has a  
10                  reasonable chance of achieving the typical maximum age  
11                  of a roadside tree in that location, or if the permittee has  
12                  removed a roadside tree, the Department must require the  
13                  permittee to pay an amount set by regulation into a tree  
14                  replacement fund maintained by the Department of  
15                  Transportation.

16                  (C) The amount of payment must be set by Method 3  
17                  regulation; must be proportionate to the cost of replacing  
18                  each affected tree, using a replacement ratio specified by  
19                  regulation that takes into account the survival rate of  
20                  newly-planted trees; must be computed according to the  
21                  size of the affected tree; may consider the species, age,



22 rarity, and historical value (if any) of the affected tree;  
23 and must not be less than \$35 per circumference/inch of  
24 the affected tree.

25 (D) The permittee must pay the required amount within 30  
26 days after the Director notifies the permittee that the  
27 payment is required. The Director may treat any unpaid  
28 funds as a lien on the property where the affected tree is  
29 located, and must not issue a certificate of occupancy or  
30 similar final approval for the site until full payment is  
31 received.]]

32 (A) Unless the Department waives this requirement, each  
33 permittee who removes a roadside tree must:

34 (1) plant a tree from the recommended tree list, which  
35 is suitable to that location, at or near the location  
36 of the original tree; and

37 (2) pay an amount into a Street Tree Planting Fund  
38 maintained by the Department of Transportation at  
39 a rate set by Method (3) regulation.

40 (B) The amount of the payment must be proportionate to the  
41 value of the removed tree less the value of the  
42 replacement tree planted under this paragraph. The value  
43 of the removed tree must be determined by assessing  
44 factors such as the tree's diameter, species, condition,  
45 and location.

46 (C) The permittee must pay the required amount within 30  
47 days after the Director notifies the permittee that the

48                                payment is required. The Director may treat any unpaid  
49                                funds as a lien on the permittee's property.

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## AMENDMENT

To Bill 41-12, Streets and Roads – Roadside Trees - Protection

PURPOSE: To make conforming changes to state law and clarify the application of Bill 41-12 to utilities.

*Beginning on page 4, amend lines 72-73 to read:*

1           (5)   treatment that may [[adversely]] affect the health or growth of a  
2                   roadside tree.

*Beginning on page 5, amend lines 101-102 to read:*

3           (C)   a tree or tree branch that a certified arborist or licensed  
4                   tree expert finds is [[endangering]] an immediate danger  
5                   to a person or property.

*Beginning on page 6, amend lines 103-105 to read:*

6           (3)   A [[certified arborist or]] licensed tree expert who provides tree  
7                   work under paragraph (2) must, within one week after an action  
8                   is taken, give the Department:

*Beginning on page 7, amend lines 138-146 to read:*

9           (3)   A person may receive a right-of-way and roadside tree work  
10                  permit to perform tree work if the person:

11           (A)   holds title to the land where the roadside tree is located;

12           (B)   owns property abutting the right-of-way at the point  
13                  where the tree is located

14           (C)   is a government agency that has an easement for the  
15                  public right-of-way where the tree is located;

16           (D)   is responsible for providing tree care to the tree; or

17           (E)   is a public utility; or

18           (F)   is an authorized agent of any of these.