



CHESAPEAKE BAY FOUNDATION
Saving a National Treasure

**Statement in Support, with Amendments, of the City of Annapolis Ordinance
No. O-21-13**

June 18, 2013

Please accept this statement on behalf of the Chesapeake Bay Foundation (“CBF”) and our over 2,500 Annapolis members on the City of Annapolis Ordinance No. O-21-13. CBF is pleased that the City of Annapolis is proposing an ordinance that would bring the City into substantial compliance with the state Forest Conservation Act, Md. Natural Resources Code Ann. §5-1601 et seq. (“FCA”). However, a few amendments to the Ordinance are required to bring the City into full compliance with the state law.

The FCA requires that each unit of local government that has planning and zoning authority must develop a local forest conservation program “consistent with the intent, requirements, and standards” of the FCA. Md. Natural Resources Code Ann. §5-1603(a)(1). The local program *must* include the following elements: a policy document; “all applicable new and amended local ordinances relating to the implementation of the regulated activities, exemptions, the review, approval *and appeal process*, incentives, legal instruments for protection, enforcement program, and penalties;” a technical manual outlining forest stand delineation requirements, “required information for the approval of a forest conservation plan, specific forest conservation criteria and protection techniques.” Md. Natural Resources Code Ann. §5-1603(2) (emphasis added).

Currently, the City program does not include several of the elements mandated by state law. The proposed Ordinance is a huge step towards coming into compliance, but requires a few amendments relating to the appeals process and variance procedure as detailed below.

1. The appeals process must be amended to comply with several provisions of state law and to satisfy the well-established public policy in favor of citizen participation.

Recently, the debate over the proposed Reserve at Quiet Waters (RQW) development has brought to light serious problems regarding the City’s review and appeals systems in regard to implementation of the Forest Conservation Act. During the appeal process, the Annapolis Board of Appeals (BOA) reviewed the RQW planned development application submitted by the Department of Planning and Zoning, which included extensive Forest Conservation testimony, and found that they lacked jurisdiction to consider the forest conservation issues:

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“Jurisdiction over issues relating to forest conservation, including the forest conservation plan and forest conservation plan delineation, is found in City Code 17.09.025. Since the Board of Appeals has no powers with respect to Title 17 matters, the Board of Appeals makes no findings of fact or conclusions of law with respect to the merits of any forest conservation issue.”

Board of Appeals Opinion and Order for QW Properties, LLC, 733 Annapolis Neck Road, Case No. 2010-004.

Ordinance 21-13 provides that “The Planning Commission shall make the final determination whether to approve a final forest conservation plan submitted with a planned development application in accordance with Chapter 21.24.” Section 17.09.190(II)(E). It also states “any other person” than the applicant who objects to the Department’s issuance of a certificate of approval may comment during the Planning Commission review. However, the public participation ends there, allowing *no appeal process* for anyone other than the developer. As demonstrated in the Quiet Waters case, the BOA asserts that they cannot review the Forest Conservation Act testimony submitted to the Planning Commission. Similarly, the Building Board of Appeals dismissed a challenge to the Quiet Waters FCP because it was not “final,” having only a recommendation coming out of the Department of Neighborhood and Environmental Programs (DNEP), which is the same process now contemplated in O-21-13.

The process in O-21-13 as it now stands is contrary to state law. The Planning Commission is authorized to carry out their functions under the Land Use Article of the Maryland Code. *See* Md. Land Use Code Ann. §2-105. Under Section 4-305 of the Land Use Article, state law says that a “board of appeals may hear and decide appeals when it is alleged that there is an error in any order, requirement, decision, or determination made by an administrative officer or unit under this division or of any local law adopted under this division...” Md. Land Use Code Ann. §4-305(1). That state requirement includes the local Planning Commissions authorized under that Article, and therefore the City Ordinance *must allow for an appeal* by the public, not just by the applicant.

Further, there is a long-standing public policy in favor of citizen participation in local land use decisions, as demonstrated by the public notice, comment and hearing requirements in many state and local land use and government laws. This is because citizens are the ones most impacted by local land use decisions that influence the character and composition of their communities. The public policy of allowing citizen review is especially relevant here, as O-21-13 contemplates the approval of preliminary forest conservation plans simply by the *lack* of a response from DNEP.

2. The reasonable justification and variance showings must be in compliance with the spirit and intent of the FCA.

The local programs developed under the state Forest Conservation Act are intended to follow the spirit and intent of the state law. *See* Md. Natural Resources Code Ann. §5-1603(a)(1). The 2013 Maryland General Assembly recently amended the Act to implement a policy of “no net loss” of tree canopy, meaning no loss of the current coverage. §5-102(b)(1). The FCA also specifically requires that “[t]he preferred sequence for afforestation and reforestation shall be established by the state or local authority in accordance with the following **after all techniques for retaining existing forest cover on-site have been exhausted.**” Md. Natural Resources Code Ann. §5-1607. This evidences a strong intent in Maryland to have all existing forest cover preserved, unless the applicant can make a compelling showing of why such preservation is unwarranted. Further, Maryland case law examining “unwarranted” or “undue” hardship with regard to land use decisions has uniformly found that “mere financial hardship or an opportunity to get an increased return from the property is not a sufficient reason...” *Anderson v. Board of Appeals*, 22 Md. App. 28, 38-39 (1974); *see also, Marino v. City of Baltimore*, 215 Md. 206, 217 (1957). The Annapolis proposed ordinance should similarly include robust, objective justification standards and specify that financial concerns should not be considered.

In light of the state policy of no-net-loss, the FCA’s requirements for local programs to be in compliance with the spirit and intent of the Act, and the well-established case law that excludes financial reasons from a showing of hardship, the local forest conservation programs such as that in the City of Rockville are most appropriate. The Rockville program specifically states that in showing why a development cannot be altered to preserve priority retention areas, “[c]ost, alone, or the desire not to alter preferred site design shall not be sufficient justification for not altering the development to preserve priority retention areas.” City of Rockville Code Chapter 10.5-21(c)(4).

At the very least, in accordance with Maryland state law, the variance procedure under Section 17.09.240 must state that financial considerations are not appropriate to show that enforcement of the law would result in a hardship.

CONCLUSION

CBF strongly encourages the City to adopt Ordinance No. O-21-13 with the amendments detailed above, to ensure that the City is complying with state law under the Forest Conservation Act. Thank you for the opportunity to present CBF’s views.

