

March 24, 2023

The Honorable Sara Elfreth
 104 James Senate Office Building
 11 Bladen Street
 Annapolis, Maryland 21401

The Honorable Sara Love
 210 Lowe House Office Building
 6 Bladen Street
 Annapolis, MD 21401

Dear Senator Elfreth and Delegate Love:

Thank you for considering the amendments NAIOP and MBIA recommended to HB 723 and SB 526. On behalf of our respective organizations, we write to provide more information about the reasons for several of our requested amendments ask for your reconsideration.

The reduction in the scope of administrative variances was an important improvement to the bill and one that was a priority for our organizations and other stakeholders. We appreciate you taking that amendment as well as removing the Target Ecological Area map layer, which we saw as containing features regulated by other means.

However, as explained below, other amendments are, in our opinion, incomplete or tangential to the central concerns we have with this bill and had with prior year versions: 1) unworkable mitigation ratios; 2) overly broad definition of priority forest, and; 3) lack of balance between forest conservation and growth management policies inside Priority Funding Areas. Recently, the emerging issue of effective dates has raised concerns about how the implementation schedule will affect mature development projects.

Finally, as detailed below we believe the development exemptions are flawed and should be removed and replaced with achievable mitigation ratios for all land use types.

- **Lower Forest Mitigation Ratios - NR 5-1606** – NAIOP and MBIA ask that you reconsider our proposed mitigation ratios which would double current levels to 1/2:1 for general forest, increasing to 1:1 for priority forest. The bill continues to require a fourfold increase to 1:1 for general forest and an eightfold increase to 2:1 for priority forest. A 2:1 reforestation ratio will make many forested development sites incompatible with their high-density zoning. This will significantly reduce opportunities for housing, employment and lifestyle improvements and is a poor use of already constrained development capacity within Priority Funding Areas. Accommodating more people and jobs on less land will provide better environmental and fiscal outcomes than striving for an increase or no net loss of forest on individual development sites.

The [slides linked here](#) illustrate how the 2:1 mitigation ratio affects a hypothetical 10-acre development site that removes 3 acres of priority forest. On-site mitigation requires 6 acres of planting which increases forest beyond predevelopment levels and reduces the building envelope to 1 acre. Off-site options can double the mitigation ratio to 4:1 requiring 9 acres of mitigation and rely on forest banking credits that do not exist today in most counties. Paying a fee in lieu of compliance costs \$339,768 to offset 3 acres of forest cleared.

Building Envelope = 1 Acre of 10 Acre Site	On-site Forest Replanted to Mitigate Removal of 3 Acres of Priority Forest @ 2:1 Ratio = 6 Acres			
		On-site Priority Forest Preserved = 3 Acres		

- **Narrower Definition of Priority Retention Areas – NR 5-1607** – NAIOP and MBIA ask that you reconsider our request that the Forest Interior Dwelling Species (FIDs) definition be better defined, and field verified. The DNR Forest Interior Dwelling Species GIS map carries the following disclaimer, ***“These data are only the results of a model depicting where FIDS habitat might occur based on certain criteria. These polygons have NOT been field tested or field verified for actual FIDS presence.”*** The amendment language we proposed was based on the Critical Areas definition and was more protective because it reduced the amount of contiguous forest needed from 100 acres in the Critical Area to 75 acres.

- **Effective Dates Cause Concerns for Mature Development Projects – Section 11** – The effective dates requested by our organizations were selected because HB 723 and SB 526 will have significant impacts on the design of mature projects and their mitigation requirements potentially including acquiring or developing planted mitigation banks within the same county or watershed.

The Forest Conservation Plan is always frontloaded into development design and the limits of disturbance in the plan determine the location of buildings utilities and road connections and is relied upon when creating detailed engineering and construction drawings. But not all counties follow the same process to final approval. For some, final Forest Conservation Plan approval is tied to finalizing the development plan. For phased projects the Forest Conservation Plan will receive preliminary approval and be taken to final plan before construction on each phase begins. For these reasons, the suggested approach of applying the bill to Final Forest Conservation Plans is problematic.

- **Smart Growth and Local Land Use Plans - NR 5-1603** – We appreciate that you accepted our recommendation that the General Assembly provide policy guidance to local governments that Smart Growth goals and their own land use plans should be given *due consideration* when developing a forest conservation program.

We do not understand why you did not accept the essential companion to this amendment which provided authority for local governments to modify forest conservation requirements within PFAs in order to achieve the zoning density and land uses designated by the local planning and zoning authority. Failing to provide local governments with the authority to balance their growth management and forest conservation responsibilities, undermines the commitment to Priority Funding Areas, makes the policy guidance of little use and makes it more difficult for local leaders to find the balance point necessary to meet social, economic, and environmental goals.

- **Mitigation Banking – Access for Priority Funding Area Developments – NR 5-1607** - The reprint continues to require 50% of banking credits come from planted forest. We are aware of no accurate inventory of available credits in planted banks. [As we noted in our March 13th memo](#), the Hughes study reported that 80% of state-wide credits are located in Charles and Prince George’s Counties. There are no available credits of any kind in Montgomery County.

As a way to avoid problems with the supply and location of banked credits our organizations recommended allowing development projects located within Priority Funding Areas to utilize planted banks for up to 100% of mitigation subject to local approval. Without access to banked

credits, many more projects will pay fees into local forest conservation funds. Just in 2019, the General Assembly passed legislation to discourage the use of fee in lieu and encourage the use of mitigation banking.

➤ **Exemptions are Less Protective of Forest than Current Law, Do Not Fully Exempt Multifamily – NR 5-1602 -**

The 3-19-23 reprint applies a forest mitigation standard to exempt development that is less protective than current law and significantly lower than what is required for non-exempt development in the reprint. Currently, the Forest Conservation Act awards 1/2 acre of mitigation credit for each 1-acre of forest preserved. As shown in the table below, in the reprint an exempt property would be required to permanently protect 1/2 acre of forest for each 1 acre of priority forest removed – 1-acre of credit for each 1/2 acre preserved. Non-exempt development is required to preserve 4-acres of forest as mitigation for clearing 1-acre of priority forest.

Mitigation	Exempt TOD & Multifamily	Non-Exempt Development
Reprint - Forest replanted	1/4 acre for 1-acre general forest cleared.	1 acre for 1-acre general forest cleared.
	1/4 acre for 1-acre priority forest cleared.	2 acres for 1-acre priority forest cleared.
Reprint - Forest protected	1/2 acre for 1-acre general forest cleared.	2 acres for 1-acre of general forest cleared.
	1/2 acre for 1-acre priority forest cleared.	4 acres for 1-acre of priority forest cleared.

Currently only clearing above the forest conservation thresholds is mitigated by planting a 1/4 acre for each 1 acre removed. The mitigation requirement increases to 2:1 for clearing below the conservation thresholds. The reprint removes the forest conservation thresholds meaning that all clearing on exempt property would be mitigated at the same rate of 1/4:1.

The multifamily exemption language does not apply well to mixed-use and institutional land use categories where multifamily is most often built. Designated Transit Oriented Development zones make up a fraction of the acreage within Priority Funding Areas leaving a significant amount of land zoned for high-density uses without a realistic pathway to compliance. Together the exemptions do not result in realistic compliance pathways for the four high-density land use categories in the law: 1) High Density Residential, 2) Institutional. 3) Mixed-Use and Planned Unit Development, and; 4) Commercial Industrial. The development exemptions should be removed and replaced with achievable mitigation ratios for all land use types.

➤ **Setting the Stage for Judicial Review of Forest Conservation Plans – NR 5-1605 & NR 5-1607 –**

Thank you for accepting our request to clarify that judicial review of forest conservation plans be limited to the administrative record. You also indicated your intention to add three additional provisions related to the timing and filing of appeals. These changes are in addition to previous reprints that required notice to eligible appellants, public hearing, and written comment periods prior to approval of a forest conservation plan that proposes to clear priority forest.

The bill contains separate changes in NR 5-1607, discussed above, that require an additional public comment period and direct project review by the Department of Natural Resources prior to approval of a mitigation plan that uses more than 50% forest mitigation banks that preserve existing forest.

We do prefer that the rules of appeal be clear. But whether intended or not, it is our view that these provisions set the table for tactical litigation of forest conservation plans which will be time consuming, expensive and have a chilling effect on attempts to achieve density on forested development sites.

On behalf of our member companies, we appreciate the opportunity to present our point of view and will continue to seek out constructive and comprehensive revisions to the Forest Conservation Act.

Sincerely,



Tom Ballentine, V.P. for Policy
NAIOP Maryland



Lori Graf, CEO
Maryland Building Industry Association

cc: The Honorable Brian J. Feldman
The Honorable Kumar P. Barve

NAIOP – MBIA Language shaded grey double underlined. – Red Amendment Not Accepted
Yellow – Amendment Accepted – Green New Language Added by Sponsors

Article - Natural Resources

§5–1603.

(a) (1) A unit of local government having planning and zoning authority shall develop a local forest conservation program:

(I) consistent with the intent, requirements, and standards of this subtitle, AND;

(II) AFFORDING DUE CONSIDERATION TO THE POLICY GOALS ESTABLISHED IN 5-7A-01 OF THE STATE FINANCE AND PROCUREMENT ARTICLE AND THE PLANS ADOPTED IN ACCORDANCE WITH SUBTITLE 4 AND TITLE 3 OF THE LAND USE ARTICLE.

(3) (i) A local authority shall review and amend, as appropriate, all current local ordinances, policies and procedures that are inconsistent with the intent and requirements of this subtitle such as parking, road width, setback, curb and gutter, grading, and sidewalk requirements.

(ii) A local forest conservation program, when approved by the Department, may:

1. Allow clustering and other innovative land use techniques that protect and establish forests where open space is preserved, sensitive areas are protected, and development is physically concentrated; and

2. Waive PROVIDE FOR THE WAIVER OR MODIFICATION OF the requirements of this subtitle for:

(I) previously developed areas covered by impervious surface and located in priority funding areas at the time of the application for subdivision plan, grading, or sediment control permit approval, AND

(II) TO ACHIEVE ZONING DENSITY AND ALLOWABLE USES WITHIN A PRIORITY FUNDING AREA THAT ARE CONSISTENT WITH THE LAND USE CATEGORIES DESIGNATED BY THE

LOCAL PLANNING AND ZONING AUTHORITY.

§5-1605.

(d) (1) AT LEAST 20 DAYS BEFORE APPROVAL OF THE FOREST CONSERVATION PLAN, THE DEPARTMENT OR LOCAL AUTHORITY SHALL:

(I) PROVIDE NOTICE THAT IS CONSISTENT WITH LOCAL AUTHORITY NOTICE REQUIREMENTS TO ALL PROPERTY OWNERS ABUTTING AND ADJACENT TO THE BOUNDARY OF THE SUBJECT PROPERTY OF ANY PROPOSED CLEARING OF A PRIORITY RETENTION AREA AS DESCRIBED IN § 5-1607(C) OF THIS SUBTITLE; AND

(II) 1. ON A NET TRACT AREA OF AT LEAST 5 ACRES AND IF AT LEAST 75% OF THE PRIORITY RETENTION AREA IS PROPOSED TO BE CLEARED, PROVIDE AN OPPORTUNITY FOR WRITTEN AND VERBAL COMMENT BEFORE PLAN APPROVAL; OR

2. FOR ANY OTHER PROJECT WHERE PRIORITY RETENTION AREA IS PROPOSED FOR CLEARING, PROVIDE AN OPPORTUNITY FOR PUBLIC WRITTEN COMMENT BEFORE PLAN APPROVAL.

(2) PROPERTY SEPARATED FROM THE SUBJECT PROPERTY BY A PUBLIC RIGHT OF WAY SHALL BE CONSIDERED ABUTTING AND ADJACENT.

(3) Within 45 days from receipt of the forest conservation plan, the Department or local authority shall notify the applicant whether the forest conservation plan is complete. If the Department or local authority fails to notify the applicant about the forest conservation plan within 45 days, the plan shall be treated as complete and approved. The Department or local authority may require further information or provide for an extension of this deadline for an additional 15 days for extenuating circumstances. In addition, at the request of the applicant, the State or local authority may extend this deadline for extenuating circumstances.

(4)(I) A PERSON PETITIONING FOR JUDICIAL REVIEW OF AN APPROVED FOREST CONSERVATION PLAN SHALL FILE THE PETITION IN ACCORDANCE WITH THE MARYLAND RULES.

(II) A PARTY SUBMITTING A PETITION FOR JUDICIAL REVIEW SHALL FILE THE PETITION WITHIN 30 DAYS OF APPROVAL OF A FOREST CONSERVATION PLAN.

(III) AN ACTION FOR JUDICIAL REVIEW BROUGHT IN ACCORDANCE WITH § 5-1605 or § 5-1607 OF THIS SUBTITLE SHALL BE CONDUCTED IN ACCORDANCE WITH THE MARYLAND RULES.

(4) ANY JUDICIAL REVIEW OF A FOREST CONSERVATION PLAN SHALL BE LIMITED TO THE RECORD COMPILED BY THE LOCAL APPROVAL AUTHORITY.

§5-1606.

~~(d)~~ (1) Subject to the provisions of **1606.1 OF THIS SUBTITLE;**

(I) EXCEPT AS PROVIDED IN paragraph (2) of this subsection, for all existing forest cover measured to the nearest 1/10 acre cleared on the net tract area above the applicable forest conservation threshold, the area of forest removed shall be reforested at a ratio of ~~1/4 $\frac{1}{2}$ acre planted for every 1 acre removed.~~
REMOVED; AND

(2) (I) FOR ALL EXISTING PRIORITY FOREST COVER, AS DESCRIBED IN 5-1607 (C) OF THIS SUBTITLE, MEASURED TO THE NEAREST 1/10 ACRE CLEARED ON A SITE, THE AREA OF FOREST CLEARED SHALL BE REFORESTED AT A RATIO OF 1 $\frac{2}{3}$ ACRES PLANTED FOR EVERY 1 ACRE CLEARED.

§5-1607.

(4) The State or local jurisdiction may allow an alternative sequence for a specific project if necessary to achieve the objectives of a local jurisdiction's land use plans or policies or to take advantage of opportunities to consolidate forest conservation efforts.

(c) Standards for meeting afforestation or reforestation requirements shall be established by the State or local program using one or more of the following methods:

(1) Forest creation in accordance with a forest conservation plan using one or more of the following:

- (i) Transplanted or nursery stock;
- (ii) Whip and seedling stock; or
- (iii) Natural regeneration where it can be shown to adequately meet the objective of the forest conservation plan.

(2) ~~(I) FOR A QUALIFIED PROJECT SUBJECT TO SUBPARAGRAPH (II) OF THIS PARAGRAPH, THE~~ use of qualified conservation completed in a forest mitigation bank, ~~TO MEET UP TO 50% OF THE AFFORESTATION OR REFORESTATION REQUIREMENT~~ in which case, the afforestation or reforestation credit granted may not exceed 50% of the forest area encumbered in perpetuity.

~~(II) FOR A PROJECT LOCATED WITHIN A PRIORITY FUNDING AREA, A LOCAL JURISDICTION MAY PROPOSE AND THE DEPARTMENT MAY APPROVE AFTER PUBLIC COMMENT, A WRITTEN JUSTIFICATION THAT ALLOWS THE USE OF QUALIFIED CONSERVATION TO MEET UP TO 60% 100% OF THE AFFORESTATION OR REFORESTATION REQUIREMENT.~~

(c) (1) The following trees, shrubs, plants, and specific areas shall be considered priority for retention and protection, and they shall be left in an undisturbed condition unless the applicant has demonstrated, to the satisfaction of the State or local authority, that reasonable efforts have been made to protect them and the plan cannot reasonably be altered:

~~(II) FOREST SUITABLE FOR WHICH CONTAINS FOREST INTERIOR DWELLING SPECIES AS VERIFIED BY A STUDY IN ACCORDANCE WITH "A GUIDE TO THE CONSERVATION OF FOREST INTERIOR DWELLING BIRDS IN THE CHESAPEAKE BAY CRITICAL AREA" AND CONSISTS OF:~~

~~(1) A MINIMUM OF 75 ACRES OF CONTIGUOUS FOREST WITH 10 OR MORE ACRES OF CONTIGUOUS FOREST LOCATED MORE THAN 300 FEET FROM THE NEAREST FOREST EDGE; OR~~

~~(2) A MINIMUM OF 75 ACRES OF CONTIGUOUS RIPARIAN FORESTS ALONG A PERENNIAL STREAM WITH AN AVERAGE WIDTH OF AT LEAST 300 FEET.~~

~~(IV) FOREST LOCATED IN A TARGETED ECOLOGICAL AREA AS IDENTIFIED BY THE DEPARTMENT.~~

~~(2) THE DEPARTMENT OR A LOCAL AUTHORITY SHALL ISSUE WRITTEN FINDINGS AND JUSTIFICATION FOR ANY CLEARING OF THE PRIORITY RETENTION AREAS DESCRIBED IN PARAGRAPH (1) OF THIS SUBSECTION.~~

(3) ANY JUDICIAL REVIEW OF A FINAL FOREST CONSERVATION PLAN DETERMINATION SHALL BE LIMITED TO THE RECORD COMPILED BY THE LOCAL APPROVAL AUTHORITY.

SECTION 11. AND BE IT FURTHER ENACTED. That this act may not apply to:

(1) A FOREST CONSERVATION PLAN APPROVED BEFORE JULY 1, 2024 THAT IS ASSOCIATED WITH A SUBDIVISION PLAN, SITE PLAN, BUILDING PERMIT, OR GRADING OR SEDIMENT CONTROL APPLICATION;

(2) A PRELIMINARY SUBDIVISION PLAN, PRELIMINARY SITE PLAN, GRADING OR SEDIMENT CONTROL APPLICATION MADE PRIOR TO JULY 1, 2024;

(3) APPLICATIONS FOR BUILDING AND GRADING PERMITS THAT ARE NOT ASSOCIATED WITH A SUBDIVISION OR SITE DEVELOPMENT PLAN FILED PRIOR TO JULY 1, 2024, AND;

(4) REVISIONS TO THE PLANS AND PERMITS REFERENCED IN SUBPARAGRAPHS (I) AND (II) THAT DO NOT MATERIALLY ALTER THE PROPOSED OR ACTUAL LIMITS OF DISTURBANCE.