



DEVELOPMENT REVIEW BULLETIN

Bulletin No. 2-2021

Subject: The Office of the Attorney General Concluded that the Placement of a Protective Easement on Existing Forest, as Opposed to Intentionally Created or Restored Forest, Does Not Qualify as a Forest Mitigation Bank under the Maryland Forest Conservation Act

Resource: Environmental Planning Section, Countywide Planning Division

Date: January 28, 2021

On October 26, 2020, the Office of the Attorney General issued an Opinion regarding forest mitigation banking under the Maryland Forest Conservation Act (“FCA”). 105 Md. Op. Att’y Gen. 66 (Oct. 26, 2020). Under the FCA, which is codified in Sections 5-1601 to 5-1613 of the Natural Resources Article (“NR”) of the Maryland Code, “forest mitigation banking” is defined as “the intentional restoration or creation of forests undertaken expressly for the purpose of providing credits for afforestation or reforestation requirements with enhanced environmental benefits from future activities.” The Opinion addressed whether an off-site *existing* forest that was not intentionally created or restored but was, nevertheless, encumbered with a protective easement could qualify as a forest mitigation bank. The Office of the Attorney General determined that it could not. Specifically, the Attorney General concluded:

“In our opinion, the plain language of the Forest Conservation Act makes clear that the only forests in Maryland that are eligible for treatment as “forest mitigation banks” from which developers may buy credits for that offset method are forests that were “intentional[ly]” created or restored “expressly” for that purpose and located in accordance with the Act’s “priority” location provisions. NR §§ 5-1601(o), 5-1601.1(c). Although existing trees that are preserved and protected in accordance with NR § 51607(b)(2)(ii) might meet the Act’s requirements in a municipality, existing population center, or other designated area that a local jurisdiction has designated with DNR’s approval as part of a program approved by DNR—and although a local program’s implementation of that method might have elements in common with mitigation banking—the preservation of those trees would not qualify for treatment as a “mitigation bank.”

To comply with this Opinion, the Planning Department has determined that, effective immediately, it cannot transfer off-site woodland conservation credits from mitigation banks

established with existing forest. The Planning Department, however, will continue to transfer any off-site woodland conservation credits in accordance with the provisions of the FCA and the Opinion of the Office of the Attorney General.

Should you have any questions regarding this Bulletin, please do not hesitate to contact the Environmental Planning Section, 240-524-8397.