

ITEMS FOR CONSIDERATION
IN PREPARATION OF THE FAIRFAX COUNTY LEGISLATIVE PROGRAM
2020 VIRGINIA GENERAL ASSEMBLY

October 22, 2019

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ITEMS FOR INITIAL CONSIDERATION

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ENVIRONMENT — TREES

PROPOSAL:

Consider legislation that would assist the County in further protecting the current tree canopy.

SOURCE:

Board of Supervisors
September 17, 2019

BACKGROUND:

Trees provide significant levels of environmental, social, and economic benefits to the community. For over 30 years, Fairfax County has been proactive in raising awareness about the importance of trees and forests, including through the enactment of a tree ordinance and a Tree Action Plan.

Land development drives approximately 60-80 percent of all tree removals in Fairfax County, while the remaining 20-40 percent of tree removals are typically due to a homeowner's choice. Though in general property owners in Virginia have the ability to remove individual trees on their own property, there are some limitations on tree removal on private property including:

- A homeowner's association may restrict removal of vegetation through its covenants.
- The harvesting of timber on private property is regulated by the Virginia Department of Forestry.
- Requirements in the County's zoning ordinance, such as transitional screening or parking lot landscaping, restrict the removal of trees on private property.
- Areas on private property that are designated as Resource Protection Areas (RPA) or that are subject to conservation easements may also have restrictions – in general, a property owner is permitted to remove trees that are dead, dying or diseased in these areas, provided they are removed by hand and replaced with similar vegetation.

Unfortunately, the County has few tools to protect this important resource. State law enables localities to regulate tree loss from development in one of two ways. Localities can adopt an ordinance focused on the planting and replacement of trees lost during development ("replacement statute") or can adopt an ordinance focused on conserving trees during development ("conservation statute") – localities may not adopt both. The conservation statute was passed by the General Assembly (GA) in 2008, and is the authority the County utilizes for its tree conservation ordinance. It allows any locality within Planning District 8 that meets certain conditions (population density and certain federal Clean Air Act criteria) to adopt an ordinance providing for the conservation of trees

during the land development process. Fairfax County is the locality that has used this authority at present, though other localities are considering requesting changes in the 2020 GA to the current authority to better suit their communities.

The County's ordinance requires engineered site plans to provide for the preservation or replacement of trees on all development sites such that the minimum tree canopy 10 years after the development is:

- 10 percent tree canopy for a site zoned business, commercial, or industrial;
- 10 percent tree canopy for a residential site zoned 20 or more units per acre;
- 15 percent tree canopy for a residential site zoned more than eight but less than 20 units per acre;
- 20 percent tree canopy for a residential site zoned more than four but not more than eight units per acre;
- 25 percent tree canopy for a residential site zoned more than two but not more than four units per acre; and,
- 30 percent tree canopy for a residential site zoned two or fewer units per acre.

State law also requires that tree replacement be allowed where meeting the above percentages is not feasible, including situations where:

- Meeting the preservation target would prevent the development of uses and densities otherwise allowed by the zoning ordinance;
- Meeting the preservation target would require the preservation of trees and forested areas that do not meet standards for health, structural condition, and other vegetation and risk management requirements; or,
- Construction activities could be reasonably expected to impact existing trees to the extent that they would not likely survive in a healthy and structurally sound manner.

Because the County's authority only provides for the conservation of trees during the land development process, cases where trees are removed before an application is filed do not trigger a violation. Other state code sections provide the County additional tree authority in specific circumstances. The County's Erosion and Sediment Control Ordinance allows the County to enforce unpermitted land disturbances which exceed 2,500 square feet. The Chesapeake Bay Preservation Ordinance permits the County to enforce unpermitted encroachment in RPAs irrespective of the size of the land disturbance (but this has limited application since the disturbance must be in an RPA).

One option would be to seek state authority allowing localities to require permits for the removal of trees over a certain diameter (for example, twelve inches). The permit application could require that the tree be assessed by a certified arborist prior to removal (any application fee could be waived for a tree determined to be dead or diseased). Any permit fee collected could be allocated to the Tree Preservation and Planting Fund and used to replace lost tree canopy. It is important to note that a permitting process for tree removal could create challenges for homeowners seeking to landscape their property for a variety of reasons, including the removal of trees that are not diseased or damaged but are growing too close to a home. Additionally, such an option would likely be opposed

by development groups that have significant influence at the GA. During the 2019 GA, two bills seeking to give localities additional tree authority failed. **HB 2146** (Turpin) would have extended the County's existing authority to any locality in the Commonwealth. **HB 2333** (Keam) would have authorized a locality to adopt an ordinance exceeding the minimum tree canopy requirements for tree preservation, planting, or replacement during the development process in order to assist in achieving certain specific water quality or water quantity goals identified in the ordinance.

Another threat to the tree canopy is caused by the unnecessary removal of trees by unlicensed contractors taking advantage of unsuspecting property owners. Often the trees removed could have been saved and were removed to increase the contractor's profit. Virginia law requires a state license – not just a local business license – for most contracting work or bids over \$1,000. A license is generally not required just for tree trimming or removal, but stump-grinding or other below-grade, land-disturbing work usually triggers the need for licensure. A potential solution to that issue would be for the Virginia Department of Professional and Occupational Regulation (DPOR) to create a new license category for contractors seeking to remove trees. Licensure would likely include professional certification and insurance requirements. This licensing requirement could protect the tree canopy by weeding out unscrupulous contractors looking to scam County residents by charging exorbitant amounts to remove healthy trees. In addition, licensing such contractors ensures that qualified professionals are available to consider whether trees need to be removed.

However, legislation creating a new licensing requirement is likely to face significant challenges at the GA. Such a bill would have a fiscal impact, as DPOR would need to develop licensing criteria, administer the license, and provide enforcement of violations. Additionally, a study by the Joint Legislative Audit and Review Commission (JLARC) in 2018 (*Operations and Performance of the Department of Professional and Occupational Regulation*) actually recommended reducing licensing requirements on a number of industries, and also recommended that the Board for Professional Occupational Regulation (BPOR) review the need for continued regulation of additional industries, including landscape architects and soil scientists.

RECOMMENDATION:

Board discussion.

PROCUREMENT – BEST VALUE DEFINITION

PROPOSAL:

Initiate legislation to revise the definition of best value for procurement in the Code of Virginia.

SOURCE:

Department of Procurement and Material Management
September 3, 2019

BACKGROUND:

In Virginia, public purchasing is governed by the Virginia Public Procurement Act (VPPA), which requires public bodies in the Commonwealth to: obtain high quality goods and services at reasonable cost; ensure that all procurement procedures be conducted in a fair and impartial manner with avoidance of any impropriety or appearance of impropriety; allow all qualified vendors have access to public business; and, ensure that no offeror be arbitrarily or capriciously excluded. The VPPA also requires that competition be sought to the maximum feasible degree.

Virginia public bodies are allowed to consider best value concepts when procuring goods and non-professional services. The VPPA defines best value as the overall combination of quality, price, and various elements of required services that in total are optimal relative to a public body's needs. The criteria, factors, basis, and process for the consideration of best value must be stated in the procurement solicitation. As currently defined, best value can only include factors and criteria directly related to the goods and services being procured – for example, quality and price. However, best value may not include factors of environmental, socioeconomic and community benefit value. For example, considerations of best value cannot include: the participation of local workers; the participation of marginalized workers; or, the inclusion of solutions which support environmental sustainability and reduce negative impact to human health and natural resources. It is important to note that such factors could be difficult to assess during the procurement process.

The General Assembly (GA) has been reluctant to allow localities additional authority to consider such issues in the past. In 2018, the GA went further by trying to prohibit localities from requiring contractors to pay a living wage by passing **HB 375** (Davis). HB 375 would have prohibited local governing bodies from establishing provisions related to procurement of goods, professional services, or construction that would require a wage floor or any other employee benefit or compensation above what is otherwise required by state or federal law to be provided by a contractor to one or more of the contractor's employees as part of a contract with the locality. Though the bill passed both the House and Senate, it was ultimately vetoed by Governor Northam.

Additionally, the 2018 GA passed **SB 652** (McPike), which established a workgroup under the Secretary of Administration to examine and make recommendations regarding public employment of individuals with significant disabilities. The report by the Secretary of Administration was due to the Governor and GA by July 1, 2019. The results of the study would seem to be particularly informative in assessing this issue; however, the status of the study and any report remains unclear at present.

RECOMMENDATION:

Direct staff to research this issue further, including determining the disposition of the study directed in 2018, and provide an update at the November 26 Legislative Committee meeting.

ELECTIONS – REPLACING CANDIDATES ON THE BALLOT

PROPOSAL:

Adjust the timeline for replacing candidates who pass away to minimize conflict with the timeline for finalizing the ballots for absentee voting.

SOURCE:

Fairfax County Board of Supervisors
September 17, 2019

BACKGROUND:

Under Virginia Code § 24.2-539, when a nominee for office passes away, withdraws or has his nomination set aside for any reason, the political party losing their nominee may fill the vacancy according to their own rules. The opposing party, if the candidate was previously unopposed, or an independent candidate also may file a notice of candidacy to be added to the ballot pursuant to Va. Code §24.2-540. Va. Code §24.2-541 allows new candidates to be added to the ballot up until 25 days prior to the election, if a party nominee passes away, and up until 60 days prior to the election, if a party nominee withdraws or has his or her nomination set aside. In such circumstances, the local electoral board must either reprint the entire ballot or, if the ballot has already been printed, print a separate ballot for the office for which the nominees have changed. However, the general registrar is required to make ballots available for absentee voting beginning 45 days prior to an election (Va. Code §24.2-612), allowing for a situation in which a party candidate passes away and a new candidate(s) is added to the ballot after ballots have been printed and voted.

Though such circumstances are rare, this situation has arisen in the 2019 general election for the Providence District Supervisor in Fairfax County. Following the death of the Republican candidate on August 12, 2019, the Virginia Department of Elections advised the Fairfax County Republican Committee that a replacement Republican candidate could be nominated through Friday, October 11, 2019 (an independent candidate could also be added to the ballot during this window). Pursuant to Va. Code §24.2-612, absentee ballots for this election were required to be available to voters on September 20, 2019.

As a result, ballots were printed and cast prior to the nomination of the new Republican candidate (who became a certified candidate on October 9, 2019). No independent candidates came forward to be added to the ballot. As of October 10, 2019, a total of 1,239 Providence District voters requested absentee ballots by mail and, of that, 139 voted ballots were returned to the Fairfax County Office of Elections; an additional 138 voters voted in-person absentee. Any votes cast on those ballots in the Providence District Supervisor election cannot be counted because additional candidates qualified for the race (votes cast for other offices that appear on that ballot can be counted), and such voters are entitled to receive a second ballot, containing only the Providence District contest, so they can choose from all qualified candidates when casting a vote for that office (Va. Code § 24.2-541).

This situation triggered a number of issues. First, the Fairfax County Electoral Board had planned to start absentee voting in-person at nine satellite locations (vote centers) throughout the County on October 12, 2019, but postponed the start date to October 17, 2019, to ensure adequate time to print updated ballots. Second, extensive training for staff managing the satellite locations was needed to ensure that absentee ballots containing the Providence District Supervisor race would be appropriately counted. Third, additional resources were needed to research, confirm, print labels, mail, and hand count the second ballots. Finally, sending a second ballot by mail to Providence District voters who had already cast a ballot will likely create confusion among voters (only the Providence District Supervisor race is on the second ballot), though it is too soon to tell the extent of that confusion, as the second ballots were only recently mailed (on October 15 and 16, 2019).

To avoid such issues in the future, adjusting the timeline for adding a party or independent nominee to the ballot in such circumstances could be helpful. In particular, it could be helpful to distinguish between situations involving candidates who die prior to the 45-day deadline for making absentee ballots available to voters and those that occur after that deadline, when ballots have already been voted. However, a bill that adjusts the deadline for adding a party or independent nominee to the ballot may raise concerns among party representatives about impeding access to the ballot. Case law on this topic illustrates that the courts evaluate whether such a statute violates the 14th Amendment of the U.S. Constitution by balancing the right of voters to vote for the candidate of their choice with a state's interest in keeping elections fair, honest, and orderly; any proposed deadlines would need to satisfy that balancing test.

RECOMMENDATION:

Direct staff to bring relevant legislation introduced during the 2020 GA to Legislative Committee for consideration by the Board of Supervisors (members of the Fairfax County delegation are aware of the issue and may pursue a legislative remedy).