

ORDINANCE NO. 4085

AN ORDINANCE TO AMEND CHAPTER 99, ARTICLE I, III AND V §99-5 “DEFINITIONS”, §99-21A “PERIMETER BUFFERS” AND §99-26 “INFORMATION TO BE SHOWN” AND CHAPTER 115, ARTICLES I, XXV AND XXVIII §115-4 “DEFINITIONS AND WORD USAGE” AND §115-221 “FINAL SITE PLAN REQUIREMENTS” AND BY ADDING NEW §115-194.8 “FOREST PRESERVATION’ AND 115-194.9 “TREE PLANTING REQUIREMENTS”.

WHEREAS, Pursuant to the provisions of Title 9, Chapters 68 and 69 of the Delaware Code, the Sussex County Government has the power and authority to regulate the use of land; and

WHEREAS, Pursuant to Chapters 99 and 115 of the Code of Sussex County, the Sussex County Government has undertaken to regulate the use of land; and

WHEREAS, The Sussex County Comprehensive Land Use Plan includes a Future Land Use Map that designates portions of the County as being within a “Rural Area” and portions of the County being within a “Growth Area”; and

WHEREAS, the 2019 Sussex County Comprehensive Plan contemplates the review and improvement of the protection forested areas in Sussex County; and

WHEREAS, Goal 5.1 of the Conservation Element of the 2019 Sussex County Comprehensive Plan states that Sussex County should “Encourage development practices and regulations that support natural resource protection” and this Ordinance carries out that Goal; and

WHEREAS, Sussex County Council commissioned a Land Use Reform Working Group that developed multiple recommendations for improvements to the Sussex County Code including the protection of existing forest on land to be developed and planting requirements for new development; and

WHEREAS, this Ordinance is in furtherance of the recommendations of the Land Use Reform Working Group regarding forest preservation and tree planting; and

WHEREAS: Forests and woodland resources within Sussex County provide essential ecological, economic, and public health benefits to the residents of the County, including watershed protection, stormwater management, carbon sequestration, air quality improvement, habitat for native wildlife, and contribution to the rural character and scenic quality of the County; and

WHEREAS: The watersheds, water bodies, and tidal waters of Sussex County, depend significantly on riparian and upland forest cover for water quality protection, nutrient and sediment filtration, and stream bank stabilization; and

WHEREAS: Mature forest and forest interior habitat support native biodiversity, including

migratory birds, native pollinators, and other wildlife dependent on connected forest landscapes; and

WHEREAS, The establishment of clear, predictable standards for forest preservation and tree replacement serve the public interest by providing certainty to property owners, developers and the public regarding the Sussex County's expectations for land disturbing activities; and

WHEREAS, it has been determined that this Ordinance promotes and protects the health, safety, convenience, orderly growth and welfare of the inhabitants of Sussex County.

NOW, THEREFORE, THE COUNTY OF SUSSEX HEREBY ORDAINS:

Section 1. The Code of Sussex County, Chapter 99, Article I, §99-5 "Definitions" is hereby amended by deleting the language in brackets and inserting the italicized and underlined language as follows:

§ 99-5 Definitions.

For the purpose of this chapter, certain terms and words are hereby defined:

...

FOREST – A vegetative community dominated by trees and other woody plants: (i) covering a land area of one acre or greater; and (ii) having a width of at least 120 feet at any point (measured from the canopy drip line); and (iii) having at least 100 trees per acre (excluding invasive species) with at least 50% of those having a four inch or greater diameter at 4.5 feet above the ground; (iv) or larger areas with trees meeting the foregoing requirements that have been cut but neither stumps were removed nor land regraded. Active tree nurseries or orchards shall not be considered a Forest.

FOREST ASSESSMENT - A method or process, to include a forest inventory/tree survey, for determining the area or areas within a parcel that contain high habitat value and groupings of trees or individual trees to be preserved within the Perimeter Buffer and Perimeter Buffer Protection Area.

FOREST ASSESSMENT REPORT -A report detailing the findings of a Forest Assessment prepared and certified by a licensed landscape architect, certified arborist, or licensed forester or a forester designated by the Society of American Foresters as a "certified forester."

FOREST COVER – The area of a site meeting the definition of forest.

FOREST STAND DELINEATION (FSD) – A plan and narrative report that identifies existing

forest cover, vegetation, and environmental features on a proposed development site. A Forest Stand Delineation plan includes an accurate depiction of the forest species, composition, age, condition, location, acreage, and the location of the 100-year floodplain existing on a property. A Forest Stand Delineation shall be prepared by a licensed landscape architect, certified arborist, or licensed forester or forester designated by the Society of American Foresters as a "certified forester."

FOREST PRESERVATION – The retention of existing forest or the creation of new forest.

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Section 2. The Code of Sussex County, Chapter 99, Article III, §99-21A "Perimeter Buffers" is hereby amended by deleting the language in brackets and by inserting the italicized and underlined language as follows:

§ 99-21.A Perimeter buffers.

A. Perimeter buffer general standards.

- (1) There shall be a Perimeter Buffer established along the boundary of every major subdivision or residential planned community. A Perimeter Buffer shall not be required along internal boundaries within a subdivision or residential planned community, such as internal phasing lines.
- (2) The Perimeter Buffer shall be planted with a variety of trees and shrubs so as to create a visual landscaped screening. All trees and shrubs shall be local and native species. All planting activities shall **[adhere to ANSI A300, Planting Standards]** comply with the American National Standard Institute (ANSI) A300 Standards.
- (3) The Perimeter Buffer shall include a mix of 70% deciduous shade trees and 30% evergreen trees as well as shrubs. The Perimeter Buffer shall include at least 15 trees within every 100 linear feet of the Buffer. All deciduous and evergreen trees that are planted shall have a minimum height of six feet above ground when planted, shall be a species that typically achieves a height of at least 10 feet, and arranged in a staggered natural manner throughout the entire width of the Perimeter Buffer to effectively achieve a visual landscaped screening which will filter views from and into the subdivision. The Perimeter Buffer may include existing Woodlands and planted trees to achieve these planting standards.
- (4) In the event that a Resource Buffer (§ 115-193) is required in the location of a Perimeter Buffer or Perimeter Buffer Protection Area, the Resource Buffer standards shall take precedence over, and shall not be in addition to, the Perimeter Buffer and/or Perimeter Buffer Protection Area requirements for that same location.
- (5) The Perimeter Buffer shall be marked with permanent, in-ground signage located at 100-foot intervals along the edge of the Perimeter Buffer to confirm the existence and non-disturbance of the Perimeter Buffer. This signage shall be at least five inches by seven inches in size and shall identify the existence of the Perimeter

Buffer, the fact that it is a non-disturbance Area and a reference to penalties and/or remediation required if unauthorized disturbance occurs.

B. Perimeter buffer standards —Woodlands requirements. Where a Perimeter Buffer contains existing Woodlands at the time of application, the following requirements shall apply:

- (1) Any major subdivision or residential planned community where Woodlands exist at the time of application shall require a [Forest Assessment Report] Forest Stand Delineation. The [Forest Assessment Report] Forest Stand Delineation must be submitted as part of the application.
- (2) The Woodlands retained within the Perimeter Buffer shall be depicted generally on the Preliminary Site Plan and with detail on the Perimeter Buffer Landscape Plan.
- (3) Unless otherwise provided for herein, the Woodlands within the Perimeter Buffer shall remain in its natural state.
- (4) The Area of the Perimeter Buffer containing Woodlands shall be bordered by a Perimeter Buffer Protection Area.
- (5) There shall be protective tree fencing, staking, or continuous ribbon installed along the entire edge of the Perimeter Buffer Protection Area adjacent to the interior of the development to protect the integrity of existing trees within the Perimeter Buffer.
- (6) Selective clearing of the Woodlands retained for the use of the Perimeter Buffer may be permitted but at no time shall trees of six-inch diameter at breast height be damaged, removed, or otherwise adversely affected. Dead, dying or unstable live trees that present an imminent danger to persons or property may be removed.
- (7) Walking trails within the Woodlands for the purpose of providing access to the Perimeter Buffer may be permitted and shall be depicted on the Perimeter Buffer Landscape Plan.
- (8) Access points to the Woodlands for the purpose of Perimeter Buffer maintenance may be permitted and shall be depicted on the Perimeter Buffer Landscape Plan.
- (9) Any removal or damage of trees within the Woodlands, the Perimeter Buffer or the Perimeter Buffer Protection Area (with the exception of the removal of invasive species) shall be subject to the mitigation requirements as well as the violations and penalties located in this Chapter.
- (10) At no time shall the ground within Woodlands area of a Perimeter Buffer and Perimeter Buffer Protection Area be cleared, graded, regraded, or grubbed. Permitted stump removal shall only occur by stump grinding that does not disturb the surrounding area or vegetation.
- (11) If Woodlands on the land where the Perimeter Buffer is to be located have

been cleared for a timber harvest within five years prior to the date of application, the following additional planting requirements shall apply:

- (a) The cleared area along the Perimeter Buffer shall be measured and known as the "Cleared Area."
- (b) The Perimeter Buffer shall be planted back with at least 15 trees every 50 linear feet of the Buffer.
- (c) In addition to the Perimeter Buffer, a new Woodlands shall be planted that is 2.0 times the size of the Cleared Area and a rate of at least 50 trees per acre.
- (d) The new Woodlands may border the area of the Perimeter Buffer or be in a separate area, but at no times shall the Perimeter Buffer be less than 30' in width measured from the property boundary.
- (e) The planted Perimeter Buffer and new Woodlands comply with the sizes and percentages required by § 99-21A.A(2) and (3).
- (f) If the applicant chooses to provide replacement plantings on any property other than the one on which the timber harvest occurred or protect an off-site Woodlands area, the mitigation plan must be reviewed and approved by the Director, and:

[1] The replacement plantings or off-site Woodlands area must be located within the same twelve-digit hydrologic unit code as defined by the United States Geological Survey as the proposed development.

[2] The replacement plantings or Woodlands area located off-site must be protected under a perpetual conservation easement for the benefit of a conservation organization approved by Sussex County.

[3] At no time shall the area of the replacement plantings be less than 2.0 times the area of Woodlands to be the Perimeter Buffer that was cleared and a rate of at least 50 trees per acre and shall meet the tree and shrub requirements of this Chapter.

(12) Removal of any invasive species from the Woodlands is permitted.

C. Perimeter buffer standards — non-Woodlands requirements. Where a Perimeter Buffer does not contain existing Woodlands at the time of application, the following requirements shall apply:

- (1) Any major subdivision or residential planned community where Woodlands do not exist within the Perimeter Buffer shall comply with the planting requirements of the Perimeter Buffer Standards and Perimeter Buffer Landscape Plan.
- (2) There shall be protective fencing, staking, or continuous ribbon installed along the entire edge of the Perimeter Buffer adjacent to the interior of the development to protect the integrity of the Perimeter Buffer.

(3) There shall be a final grade that contains a minimum of four inches of topsoil and a suitable grass mix or wildflowers planted as sacrificial cover between the buffer trees for soil stabilization until the newly planted trees become larger. Woodchips may substitute for planted grass between the buffer trees around both newly planted and existing trees.

(4) Walking trails within the Perimeter Buffer may be permitted and shall be depicted on the Perimeter Buffer Landscape Plan.

(5) Access points to the Perimeter Buffer and Perimeter Buffer Protection Area for the purpose of Perimeter Buffer maintenance shall be depicted on the Perimeter Buffer Landscape Plan.

(6) The Perimeter Buffer shall have a two-year guarantee secured by bonding from the date that substantial completion is issued for the phase where the Perimeter Buffer is located.

D. Perimeter buffer landscape plan.

(1) The Perimeter Buffer shall be depicted generally on the Preliminary Site Plan and in detail on a Perimeter Buffer Landscape Plan that is included within a Final Site Plan.

(2) The Perimeter Buffer Landscape Plan shall provide sufficient information and detail to clearly demonstrate that all applicable requirements and standards for Perimeter Buffers and Perimeter Buffer Protection Areas are satisfied. The Perimeter Buffer Landscape Plan shall contain, at a minimum, the following:

(a) Approximate location and description of the protective tree fencing, staking, or continuous ribbon.

(b) The location, spacing, height, and species of existing and new trees and shrubs proposed to meet tree planting requirements.

(c) The design and location of the required Perimeter Buffer signage.

(d) Measures to be taken to avoid sedimentation intrusions and erosion in the Perimeter Buffer.

(e) A summary table of the number of new trees to be planted and minimum number of existing trees to be retained (if any) to meet the tree specification and density requirements with calculations confirming that these requirements have been achieved. The summary table may include example groupings of trees to be planted instead of each new tree labeled on the Perimeter Buffer Landscape Plan.

(f) A note confirming that the developer guarantees the full cost of replacement Woodlands of the Perimeter Buffer for two years after the determination of substantial completion in accordance with § 99-31.

(g) A planting schedule for the Perimeter Buffer. The planting schedule shall demonstrate the installation of the Perimeter Buffer prior to the issuance

of the first residential building permits in the phase where it is located. The Perimeter Buffer shall be planted and inspected prior to the issuance of the first residential building permit within the phase where the Buffer is located. Each phase of the development must include the Perimeter Buffer and Perimeter Buffer Protection Area (as applicable) that is adjacent to that Phase.

(h) Notwithstanding any other provisions of this chapter, the Planning and Zoning Commission shall be authorized, as part of the site plan review process, to grant final approval of a Plan for the roadway frontage of a major subdivision which may include landscape and design features, such as ornamental fences that are not used as screens, berms, landscape plantings of shrubs, non-invasive ornamental grasses and/or trees, multimodal paths required by DelDOT, or a combination of such features which is designed and certified to by a licensed Landscape architect, licensed Forester or Forester designated by the Society of American Foresters as a "Certified Forester," for the purpose of making the subdivision more attractive, more in keeping with the surrounding area and less visible from the roadway, provided said plan will not cause the landscape features contained in the plan to be placed in an area adjacent to the entrance in such a manner as to restrict the view of motorists entering or exiting from the subdivision or restricting the sight lines of motorists in such a manner as to create a potential safety or traffic hazard. This authorization shall only apply to a subdivision's roadway frontage where its entrance is located. All other roadway frontages shall comply with the requirements of Subsections A., B. and C above, as applicable.

E. Timing; bonds and guarantees.

(1) The Perimeter Buffer Landscape Plan shall include the planting schedule for the entire Perimeter Buffer. The planting schedule shall demonstrate the installation of the Perimeter Buffer prior to the issuance of any residential building permits within the phase. The Perimeter Buffer shall be planted and inspected prior to the issuance of the first residential building permit within the phase where the Perimeter Buffer is located. Each phase of the development must include the Perimeter Buffer and Perimeter Buffer Protection Area (as applicable) that is adjacent to that phase. The Perimeter Buffer for each phase must be planted and inspected before County approvals or permits will be granted to construct the next phase. The portion of any non-Woodlands Perimeter Buffer within the entirety of the development that is adjacent to other existing or approved dwellings or lots shall be planted in accordance with the requirements of § 99-21.A.A and C within 12 months of the issuance a Notice to Proceed for the first phase of the development.

(2) Where Woodlands exist in the Perimeter Buffer, the Perimeter Buffer and Perimeter Buffer Protection Area shall be protected and marked as provided herein for the entire development (subject to inspection and approval by Sussex County) prior to the issuance of any notice to proceed for site work. For subdivisions that are to be constructed in phases, the protection and marking of existing Woodlands shall be maintained and inspected prior to the issuance of any notice to proceed for site work or construction within a subsequent phase.

(3) The developer shall be responsible for the removal and replacement of any dead, dying or diseased trees and for the removal from the site of all stakes, guy wires, protective tree fencing, staking, or continuous ribbon upon the conclusion of the two-year guaranty period.

(4) The developer shall post a performance bond or other guaranty for the Perimeter Buffer in an amount sufficient to install the Perimeter Buffer and the Perimeter Buffer Protection Area (as applicable) in a form acceptable to the County Attorney. The amount of such bond shall be 125% of the cost of the installation the Perimeter Buffer (including all plantings) and the Perimeter Buffer Protection Area (as applicable) or \$50,000, whichever is greater. The Perimeter Buffer shown on the Perimeter Buffer Landscape Plan may be bonded as a separate phase or phases of the subdivision, provided that all Perimeter Buffers containing Woodlands must be bonded before a Notice to Proceed is issued for any phase of the development.

(5) Bonds posted to ensure the completion and non-disturbance of the Perimeter Buffers shall be posted with the Director of Planning and Zoning.

(6) The trees and shrubs located within the Perimeter Buffer shall be in good health prior to the issuance of substantial completion in accordance with § 99-31 of the Code. The Bonds for the Perimeter Buffer shall thereafter remain in place until two years after the determination of substantial completion in accordance with § 99-31.

(7) A party may not alter the Perimeter Buffer Area of the development (or any phase thereof) unless an amended Perimeter Buffer Landscaping Plan is approved by Sussex County and a new bond or other guaranty is provided for the alteration.

F. Perimeter buffer maintenance.

(1) The developer shall be responsible for the health and survival of the Perimeter Buffer, including regular necessary watering until the determination of substantial completion in accordance with § 99-31. This shall include the obligation to replace any trees and shrubs within the Perimeter Buffer that do not survive during this time period.

(2) The Perimeter Buffer shall be maintained in perpetuity. The perpetual maintenance of the Perimeter Buffer by a homeowners' association shall be confirmed in the recorded declaration or restrictive covenants for the development with the requirement that any trees or shrubs that do not survive must be replanted with trees or shrubs of the same type and species in accordance with the original Landscape Plan approved by Sussex County. The Perimeter Buffer shall be maintained (and any replacement trees or shrubs planted) according to **[best management practices in the Forestry industry (ANSI A300)]** the American National Standard Institute (ANSI) A300 Standards. The applicant and/or developer must provide the Commission with satisfactory proof that the declaration or restrictive covenants include a perpetual maintenance plan which shall be binding upon the applicant and/or developer and thereafter by the homeowners' association. The Commission and its attorney shall review and approve the perpetual maintenance

plan prior to the restrictive covenants being recorded and prior to granting final site plan approval.

G. Perimeter buffer tree mitigation.

(1) In the event that trees, shrubs, Woodlands, Perimeter Buffer or the Perimeter Buffer Protection Area are removed or damaged without authorization, tree mitigation shall be required. In addition, violations and penalties may be assessed.

(2) If trees within a Perimeter Buffer (whether Woodlands or planted) have been damaged or removed (unless such damage or removal is the result of Act of God or natural causes and are therefore subject to the Perimeter Buffer Maintenance Requirements), tree mitigation must occur as follows:

(a) A mitigation plan shall be prepared by a licensed Landscape architect, certified arborist, or licensed Forester or Forester designated by the Society of American Foresters as a "Certified Forester."

(b) New Woodlands shall be created for the area of Woodlands in the Perimeter Buffer that was illegally accessed or damaged with at least three replacement trees planted for every tree removed or damaged.

(c) The replacement plantings shall meet the tree and shrub requirements of this Section.

(d) The developer, property owner and/or party who violates this section shall be responsible for the health and survival of the replacement in accordance with this Section.

(e) All tree mitigation plantings must be on the same lot, parcel, or tract on which the illegal activity occurred, except as noted herein.

H. Violations and penalties.

(1) The developer, owner of the land and any person or corporation who shall violate any provisions of this Section shall be subject to the following penalties in addition to other requirements set forth in this Section. Separate violations or a series of violations may be combined to determine the total area where the violation occurred:

(a) A fine of \$10,000 per quarter acre, pro rata, of disturbance within the Perimeter Buffer and Perimeter Buffer Protection Area, as applicable, shall be imposed; and

(b) A tree mitigation plan in accordance with the requirements of this Section shall be approved by the Planning and Zoning Commission.

(2) Where the developer is the party who has violated the provisions of this Section, no building or zoning permits shall be issued nor shall any inspections occur within the phase where the violation occurred (including, but not limited to building code and utility inspections) until the tree mitigation plan is complete and approved by the Commission.

Section 3. The Code of Sussex County, Chapter 99, Article V, §99-26 “Information To Be Shown” is hereby amended by inserting the italicized and underlined language as follows:

§99-26 Information To Be Shown.

The final plat shall be legibly and accurately drawn and shall show the following information:

...

(23) Protective tree fencing, staking, or continuous ribbon shall be installed along the entire edge of any Forest being protected pursuant to §115-194.8 and trees planted pursuant to §115-194.9. All work conducted pursuant to this subsection shall comply with the American National Standard Institute (ANSI) A300 Standards.

(24) A Landscape Plan showing all vegetation to be preserved or planted throughout the subdivision. This Landscape Plan may incorporate the information required by (16) and (21) as well as the Perimeter Buffer Landscape Plan.

Section 4. The Code of Sussex County, Chapter 115, Article I, §115-4 “Definitions and Word usage” is hereby amended by inserting the italicized and underlined language as follows:

§ 115-4 Definitions and word usage.

...

B. General definitions. For the purpose of this chapter, certain terms and words are hereby defined as follows:

...

FOREST – A vegetative community dominated by trees and other woody plants: (i) covering a land area of one acre or greater; and (ii) having a width of at least 120 feet at any point (measured from the canopy drip line); and (iii) having at least 100 trees per acre (excluding invasive species) with at least 50% of those having a four inch or greater diameter at 4.5 feet above the ground; (iv) or larger areas with trees meeting the foregoing requirements that have been cut but neither stumps were removed nor land regraded. Active tree nurseries or orchards shall not be considered a Forest.

FOREST COVER – The area of a site meeting the definition of forest.

FOREST STAND DELINEATION (FSD) – A plan and narrative report that identifies existing forest cover, vegetation, and environmental features on a proposed development site. A Forest Stand Delineation plan includes an accurate depiction of the forest species, composition, age, condition, location, acreage, and the location of the 100-year floodplain existing on a property. A Forest Stand Delineation shall be prepared by a licensed landscape architect, certified arborist, or licensed forester or forester designated by the Society of American Foresters as a “certified forester.”

FOREST PRESERVATION – The retention of existing forest or the creation of new forest.

....

Section 5. The Code of Sussex County, Chapter 115, Article XXV, is hereby amended by inserting a new Section 115-194.8 “Forest Preservation” and by adding the italicized and underlined language as follows:

§ 115-194.8. Forest Preservation

The purpose of this Section is to protect, preserve, and enhance the forest resources of Sussex County in recognition of the substantial public benefits that forested land provides — including stormwater management, groundwater recharge, flood mitigation, wildlife habitat, air and water quality protection, and scenic and recreational value — and to ensure that land development activities minimize the unnecessary loss of forest cover.

All residential development including mixed use development (with the exception of minor subdivisions, projects governed by Chapter 72 of this Code and Accessory Dwelling Units) shall be subject to the following requirements related to forest preservation. This section shall not apply to land which is actively managed and used for silviculture or other logging or forestry activities for a commercial purpose which shall remain in forest.

A. *Forest Stand Delineation*

- (1) *Where Forest exists at the time of application, the applicant shall develop A Forest Stand Delineation which shall be submitted as part of the application and used to determine the most suitable and practical areas for forest preservation.*

B. *Minimum Protection Standards of existing Forest.*

- (1) *Where an existing Forest will be impacted or disturbed within a development, that Forest shall be protected and preserved as follows:*

- (a) *Developments located in the Growth Area as described within the Land Use Element and as shown on the Future Land Use Map of the adopted Sussex County Comprehensive Plan, shall protect and preserve 30% of the pre-existing Forest as shown on the Forest Stand Delineation (not including the Perimeter Buffer required by Section 99-21A). Pre-existing Woodlands located in the Perimeter Buffer shall be included in this percentage.*
- (b) *Developments located in the Rural Areas as described within the Land Use Element and as shown on the Future Land Use Map of the adopted Sussex County Comprehensive Plan, shall protect and*

preserve 50% of the pre-existing Forest as shown on the Forest Stand Delineation (not including the Perimeter Buffer required by Section 99-21A). Pre-existing Woodlands located in the Perimeter Buffer shall not be included in this percentage.

(2) The areas of Forest that are contiguous with existing off-site forest, are located in sensitive areas such as the 100-year floodplain, or are located near or adjacent to perennial nontidal rivers and streams or intermittent streams and their buffers, shall be considered a priority for retention and protection as part of the percentages set forth in subsections B(1)(a) and (b) above. Developments that seek to disturb or remove these areas of Forest must comply with the waiver requirements of Section C below.

(3) There shall be protective tree fencing, staking, or continuous ribbon installed along the entire edge of any Forest being protected hereunder to protect the integrity of the existing Forest within the site. All work conducted pursuant to this subsection shall comply with the American National Standard Institute (ANSI) A300 Standards.

(4) Any Forest and limit of disturbance areas designated to be protected shall not be cleared, graded, regraded or grubbed. All work conducted pursuant to this subsection shall comply with the American National Standard Institute (ANSI) A300 Standards.

C. Mitigation of Forest Removal

The Commission shall be authorized, as part of the site plan review process, to allow the removal of Forest in excess of the amounts permitted under § 115-194.8B, but only upon the satisfaction of all of the following conditions by the Commission:

(1) That special conditions or circumstances exist that are peculiar to the land and that a literal enforcement of a specific requirement of this section would result in unwarranted hardship.

(2) That the request to remove Forest is not based upon conditions or circumstances which are: (a) the result of actions by the applicant, (b) the number of housing units on the property, (c) financial or economic considerations, nor (d) any condition relating to land or building use, either permitted or nonconforming, on any neighboring property.

(3) That the removal of the excess Forest and the mitigation set forth below are in harmony with the general spirit and intent of this section and any subsequent regulations.

Upon satisfaction of the foregoing conditions, an applicant shall be entitled to mitigate the removal of excess forest through on-site or off-site means and methods as follows:

On-Site Mitigation. An applicant may mitigate the approved removal of Forest in excess of the

amounts permitted under § 115-194.8B by complying with the following requirements:

(a) A mitigation plan shall be prepared by a licensed landscape architect, certified arborist, licensed forester or forester designated by the Society of American Foresters as a "certified forester". The mitigation plan shall include the following information and shall also comply with the requirements of subparagraph (d) below:

i. A table that lists the proposed values of the following, in square feet:

- a. The gross Forest area on the entire property prior to an application for development being filed with the Department.
- b. The area of Forest to be protected and preserved on the entire property.
- c. The area of Forest that the applicant proposes to remove.

ii. A site plan with clear graphic indication of the Forest, drawn to scale, showing the Forest to be protected and the Forest to be removed.

(b) If the application is located in a Growth Area as described within the Land Use Element and as shown on the Future Land Use Map of the adopted Sussex County Comprehensive Plan then the Forest area cleared in excess of the amounts permitted under § 115-194.8B shall be reforested in accordance with the mitigation plan in an amount equal to 2.0 times the Forest area cleared in excess of the amount required to be preserved under §115-194.8B (measured to the nearest square foot). Pre-existing Woodlands located in the Perimeter Buffer shall be included in this percentage.

(c) If the application is located in a Rural Area as described within the Land Use Element and as shown on the Future Land Use Map of the adopted Sussex County Comprehensive Plan then the Forest area cleared in excess of the amounts permitted under § 115-194.8B shall be reforested in accordance with the mitigation plan in an amount equal to 2.5 times the Forest area cleared in excess of the amount required to be preserved under §115-194.8B (measured to the nearest square foot). Pre-existing Woodlands located in the Perimeter Buffer shall not be included in this percentage.

- (d) The mitigation plan shall demonstrate reforestation that creates a biological community dominated by native trees and other woody plants that should be planted at a minimum caliper of 2.5" for shade trees, 1.5" for ornamental trees, and six-foot height for multi-stem and evergreen trees and containing at least 100 live trees per acre with a least 50 percent of those trees having the potential of attaining a 2-inch or greater diameter measured at 4.5 feet above the ground within 7 years. The mitigation plan shall demonstrate the location, spacing, height, and species of existing and new trees proposed to meet Forest mitigation requirements.
- (e) The mitigation plan shall provide the location protective tree fencing, staking, or continuous ribbon installed along the entire edge of any reforested area, which shall also be installed on the site itself. All work conducted pursuant to this subsection shall comply with the American National Standard Institute (ANSI) A300 Standards.

Off-site Mitigation. An applicant may mitigate the approved removal of Forest in excess of the amounts permitted under § 115-194.8B by complying with the following requirements:

- (a) The preserved or replanted Forest shall be located in the same twelve-digit hydrologic unit code as defined by the United States Geological Survey as the development.
- (b) Any off-site preserved Forest shall be assessed by a licensed landscape architect, certified arborist, licensed forester or forester designated by the Society of American Foresters as a "certified forester" to determine the condition and quality of the off-site forest area that is proposed to be protected.
- (c) Any off-site replanted Forest shall require a Mitigation Plan as described above.
- (d) The preserved or replanted Forest shall be protected in perpetuity by a conservation easement in favor of Sussex County or a conservation organization approved by the Director, and the preserved or replanted Forest shall not be used to satisfy these requirements for future preservation or if the off-site property is developed in the future.

D. In the event that any area of Forest within the property to be subdivided was removed, harvested, cleared or grubbed within five years prior to the date of application to the Commission as determined by the Director or his or her designee, the applicant shall comply with the On-Site Mitigation or Off-Site Mitigation requirements of subsection C herein for the Forest that was removed, harvested, cleared or grubbed and the

subdivision shall not be issued a Notice To Proceed for a period of five years from the date that the Forest on the property was cleared, harvested, or grubbed. It shall be the applicant's responsibility to submit evidence such as a Forest Stand Delineation as of the date the Forest was removed, demonstrating the condition of the property at the time of removal.

E. Timing, bonds and guarantees.

(1) The Forest must be preserved and inspected and any mitigation areas planted and inspected before County approvals or permits will be granted to construct the next phase of the development.

(2) Any mitigation plan shall include the planting schedule for the entire mitigation area. The planting schedule shall demonstrate the installation of the trees or vegetation in the mitigation area prior to the issuance of any residential building permits within the phase where the mitigation area is located. The trees and vegetation in the mitigation area shall be planted and inspected prior to the issuance of the first residential building permit within the phase where the mitigation area is located.

(3) The trees and vegetation located within any Forest or mitigation area shall be free of defects and in good health prior to the issuance of substantial completion in accordance with § 99-31 of the Code for subdivisions and prior to the issuance of individual certificates of occupancy for other residential development.

(4) The developer shall post a bond or other guarantee for any mitigation area in an amount sufficient to install the plantings in the mitigation area(s) in a form acceptable to the County Attorney. The amount of such bond shall be 125% of the cost of the installation of all plantings in the mitigation area or \$50,000, whichever is greater. The mitigation areas shown on the mitigation plan may be bonded as a separate phase or phases of the development. Such bonds shall be posted with the Director of Planning and Zoning. The bonds shall remain in place until two years after the determination of substantial completion in accordance with § 99-31 of the Code for subdivisions and prior to the issuance of individual certificates of occupancy for other residential development.

F. Violation and Penalties

(1) In the event a developer, owner of the land or any person or corporation removes or damages Forests in excess of the amount required to be retained pursuant to § 115-194.8B hereof and as specified in the approved plans for such development, such party shall be responsible for mitigation pursuant to § 115-194.8C at a rate of 2 times the Forest area (measured to the nearest square foot) removed (which may require a reconfiguration of the approved site plan for the development to accommodate the additional planting) and shall pay a fine equal to the Forest area (measured to the nearest square foot) damaged or disturbed multiplied by \$1.00 per square foot. Such fine shall be authorized and approved in the Sussex County's annual budget and

deposited in the County's open space fund to be used for land and easement acquisitions.

(2) Where the developer or their agents or contractors are the party who has violated the provisions of this Section, no building or zoning permits shall be issued nor shall any development-related inspections occur (including, but not limited to, Building Code and/or utility inspections) until the mitigation plan set forth in § 115-194.8C is completed, submitted to, and approved by the Commission.

Section 6. The Code of Sussex County, Chapter 115, Article XXV, is hereby amended by inserting a new Section 115-194.9 "Tree Planting Requirements" and by adding the italicized and underlined language as follows:

§ 115-194.9. Tree Planting Requirements.

All residential development including mixed use development (with the exception of minor subdivisions, projects governed by Chapter 72 of this Code and Accessory Dwelling Units) projects shall be subject to the following requirements related to tree planting.

A. Tree Planting

(1) Tree planting shall create a biological community dominated by native trees and other native woody plants free of defects containing at least 100 live, non-containerized, trees per acre. Replacement trees should be planted at a minimum caliper of 2.5" for shade trees, 1.5" for ornamental trees, and six-foot height for multi-stem and evergreen trees. At least fifty percent of all planted trees shall have the potential of attaining a 2-inch or greater diameter measured at 4.5 feet above the ground, within 7 years. The tree planting plan shall demonstrate the location, spacing, height, and species of existing and new trees and shrubs proposed and shall be incorporated in the Forest Stand Delineation.

(2) For development in the Growth Areas as described within the Land Use Element and as shown on the Future Land Use Map of the adopted Sussex County Comprehensive Plan, in addition to any preservation, reforestation, mitigation or other requirements found elsewhere in the Code, the developer shall plant, at a minimum:

(a) one (1) tree per 10,000 square feet of net developed area for residential development;

(b) one (1) tree per 5,000 square feet of net developed area for non-residential development.

(3) For development in the Rural Areas as described within the Land Use Element and as shown on the Future Land Use Map of the adopted Sussex County Comprehensive Plan, in addition to any preservation, reforestation, mitigation or other requirements found elsewhere in the Code, the developer shall plant, at a minimum:

(a) two (2) trees per 5,000 square feet of net developed area for residential

development;

(b) one (1) tree per 3,000 square feet of net developed area for non-residential development.

(4) The foregoing planting requirements set forth in subsections (1) and (2) hereof may be satisfied by the retention of existing Forest in excess of Forest required to be preserved pursuant to § 115-194.8 so long as the Forest Stand Delineation verifies that the remaining Forest demonstrates optimal health for retention.

(5) Timing; bonds and guarantees.

(a) The developer shall provide a planting schedule for the trees to be planted in accordance with this section. The planting schedule shall demonstrate the installation of the trees prior to the issuance of any residential building permits within the phase where the trees will be planted. The trees shall be planted and inspected prior to the issuance of the first residential building permit within the phase where the trees are located. The trees must be planted and inspected before County approvals or permits will be granted to construct the next phase.

(b) The trees shall be in good health prior to the issuance of substantial completion in accordance with § 99-31 of the Code for subdivisions and prior to the issuance of individual certificates of occupancy for other residential development..

(c) The developer shall post a performance bond or other guaranty for the trees to be planted in an amount sufficient to install the plantings in a form acceptable to the County Attorney. The amount of such bond shall be 125% of the cost of the installation of all trees or \$50,000, whichever is greater. These areas may be bonded as a separate phase or phases of the development. Such bonds shall be posted with the Director of Planning and Zoning. The Bonds shall remain in place until two years after the determination of substantial completion in accordance with § 99-31 of the Code for subdivisions and prior to the issuance of individual certificates of occupancy for other residential development.

Section 7. The Code of Sussex County, Chapter 115, Article XXVIII, §115-221 "Final Site Plan Requirements", is hereby amended by inserting the italicized and underlined language as a new Subsections B(19) and E. thereof:

§115-221 Final Site Plan Requirements

...

B. The final site plan shall show the following:

...

(20) Protective tree fencing, staking, or continuous ribbon shall be installed along the entire edge of any Forest being protected pursuant to §115-194.8 and trees planted pursuant to §115-

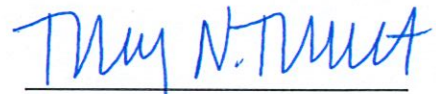
194.9. All work conducted pursuant to this subsection shall comply with the American National Standard Institute (ANSI) A300 Standards.

(21) The requirements pursuant to §115-194.8 including clear graphic indication of the Forest, drawn to scale, showing the Forest to be protected and the results of the mitigation plan.

Section 8. Effective Date.

This ordinance shall take effect upon three (3) months from the date of adoption by Sussex County Council. Provided, however, that it shall not apply to any completed applications on file with the Sussex County Office of Planning & Zoning.

I DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF ORDINANCE NO. 4085 ADOPTED BY THE SUSSEX COUNTY COUNCIL ON THE 1ST DAY OF SEPTEMBER 2026.



Tracy N. Torbert
Clerk of the Council