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Still, Vaughn, Winslow; Reps.  
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DELAWARE STATE SENATE

141st GENERAL ASSEMBLY

SENATE BILL NO. 324

AN ACT TO AMEND TITLE 17 OF THE DELAWARE CODE RELATING TO TRANSPORTATION  
CONSTRUCTION PROJECTS REQUIRING LANDSCAPING AND REFORESTATION ACTIVITIES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

1 Section 1. Amend Chapter 1, Title 17 of the Delaware Code, by striking §132(h) thereof in its entirety.

2 Section 2. Amend Chapter 1, Title 17 of the Delaware Code, by adding thereto a new subchapter as follows:

3 "Subchapter VII. Projects requiring landscape and reforestation activities.

4 Part I. General Provisions.

5 §201. Legislative intent

6 It is declared that increases in forested land in the State, together with landscape features such as trees, shrubs and  
7 ground covers other than or in addition to grass, not only to improve the aesthetic value of our State, but carry with them  
8 valuable benefits to the health and welfare of our citizens and our environment. It is likewise declared that the  
9 Department of Transportation is a leader in replacing forestlands that are required to be cleared for such projects and in  
10 providing travelers throughout the State with scenic vistas along its roadways while maintaining safe design and  
11 construction standards.

12 Therefore, this subchapter is intended to more precisely reflect a policy requiring the incorporation of landscaping  
13 and reforestation in the projects developed by the Department of Transportation for road construction and improvements  
14 in the State. This subchapter is intended to provide minimum standards for the volume of landscaping or reforestation  
15 that must take place, for how those activities must be planned, and for how much must be allocated to ensure those

16 activities can take place. The Department of Transportation bears the responsibility for providing specific standards that  
17 are needed through regulations developed pursuant to this subchapter.

18 §202. Definitions

19 For the purposes of this subchapter:

20 (a) 'An acre of trees' means a contiguous acre of land on which there are situated at least 50 trees or woody plants  
21 with a trunk measuring at least 4 inches in diameter at four feet above the ground. Partial acres and individual  
22 parcels will be added together to determine the total acreage within the project scope.

23 (b) 'Canopy tree' means any tree or other woody plant that, when fully grown, will provide shade and/or shelter for  
24 the land beneath while allowing passage of people, animals, and/or vehicles upon the land beneath. Canopy trees  
25 are classified in one of three categories: 'lower canopy', 'medium canopy,' and 'upper canopy.' 'Lower canopy  
26 trees' include all species of trees and woody plants that, when fully grown, reach an average height of not more  
27 than 30 feet when measured vertically in a straight line from the upper most branches to the ground immediately  
28 below. 'Medium canopy trees' include all species of trees and woody plants that, when fully grown, reach an  
29 average heights of not less than 30 feet nor more that 50 feet when measured vertically in a straight line from the  
30 upper most branches to the ground immediately below. 'Upper canopy trees' include all species of trees and  
31 woody plants that, when fully grown, reach an average height of not less than 50 feet when measured vertically  
32 in a straight line from the upper most branches to the ground immediately below.

33 (c) 'Construction project' means any activity undertaken, authorized, or required by the Department of  
34 Transportation through which any expressway, arterial, or collector road is:

35 (1) constructed on a new alignment; or

36 (2) widened by adding one or more through travel lanes or turning lanes.

37 (d) 'Forest' means a biological community dominated by trees covering a contiguous area of land and includes any  
38 definition thereof developed by the Department of Agriculture, Forest Service. A 'forest' may be identified by  
39 the diversity of the tree species composing it or by its Type. A 'forest type' is a forest composed of associations  
40 of tree species that have similar ecological requirements.

41 (e) 'Landscape improvements' means living trees and shrubs planted for the purpose of enhancing the aesthetic value  
42 or wildlife habitat of the land including, but no limited to, organized or planned arrangements of living plants as  
43 well as naturally occurring or wild growth of living plants. These improvements shall be made in a manner

44 prescribed by the Department of Transportation's landscape policies, as amended from time to time. In establishing  
45 and modifying these policies, the Department of Transportation shall seek the advice of the Delaware  
46 Departments of Agriculture, Natural Resources and Environmental Control, and such other public or private  
47 agencies as may be deemed appropriate by the Department.

48 (f) 'Landscaping and planting activities' means the placement of landscape improvements. Landscaping and  
49 planting activities do not include the erection of fences, structures, or other non-living barriers or borders.

50 (g) 'Reforestation activities' means landscaping and planting activities according to advice provided by the  
51 Department of Agriculture, Forest Service on lands within rights of way owned or controlled by the Department  
52 of Transportation on which no forest currently exists, or on which a forest exists that is less dense than  
53 recommended by the Department of Agriculture, Forest Service, to a density that will reasonably ensure the  
54 establishment of a mature forest of a particular type once fully grown.

55 §203. Duty to incorporate cost of landscaping, planting, and reforestation activities.

56 Whenever the Department of Transportation undertakes any construction project in this state covered by this  
57 subchapter, it shall incorporate into the cost of such project sufficient funds to complete all landscaping, planting, and/or  
58 reforestation activities required by this subchapter.

59 §204 Reclamation of dedicated funds.

60 If, upon the completion of all landscaping, planting, and/or reforestation activities required by this subchapter, and  
61 upon the completion of any funds transfers authorized by this subchapter, there remains funds in the budget of a  
62 construction project that had been designated specifically for landscaping, planting, and/or reforestation activities, the  
63 Department shall use the remaining unobligated funds to perform or pay for other landscaping, planting, and/or  
64 reforestation activities in the State.

65 §205. Duty to minimize removal, cutting, or clearing of landscape improvements.

66 Whenever the Department of Transportation undertakes any construction project in this State, it shall make every  
67 reasonable effort to preserve large, mature trees. Additionally, it shall make every reasonable effort to remove, cut, or  
68 clear only the minimum number of trees and shrubs that are necessary to complete the project and remain consistent with  
69 safe design practices.

70 §206. Duty to complete landscaping, planting, and reforestation activities; modification of project plans.

71 (a) The Department of Transportation shall complete all landscaping, planting, and reforestation activities required  
72 by this subchapter, or cause the same to be completed, and shall complete all funds transfers authorized by this  
73 subchapter, within one year of the expiration of any guarantee or warranty period.

74 (b) Wherever practicable, the Department of Transportation shall modify or alter construction projects and plans to  
75 include landscaping, planting, or reforestation activities within median areas and along roadside affected thereby.  
76 This includes, but is not limited to modifications resulting in the increased use of earthen berms, or if necessary,  
77 metal or cement roadside barriers without compromising safety.

78 §207. Lands held for duration of construction project and thereafter; limitation upon transfer and development.

79 (a) Any other provision of law notwithstanding, all lands, and all rights therein, on which landscaping, planting, or  
80 reforestation activities take place pursuant to this subchapter shall remain in the possession and control of the  
81 Department of Transportation for the duration of the construction project and shall remain so thereafter until such  
82 time as the Department of Transportation determines that such lands no longer meet its existing or projected  
83 needs. At such time, the Department of Transportation may transfer any or all of said lands to any agency,  
84 instrumentality, or political subdivision of the State of Delaware, for the purposes of preserving them for the  
85 public good.

86 (b) At no time may the Department of Transportation, or any other agency, instrumentality, or political subdivision  
87 of the State transfer any right in or to lands on which reforestation activities take place that would in any way  
88 change the nature of the lands from forestland or that would permit development of any kind on said lands other  
89 than for the purposes of establishing or expanding a local, state or federal park, natural area, or preserve.

90 (c) The Department of Transportation may perform maintenance activities such as pruning or the selective removal  
91 of diseased or dead trees as it deems necessary for the safe operation of the transportation system.

92 §208. Regulations.

93 (a) The Department of Transportation shall promulgate such rules and regulations as it deems necessary for  
94 implementing this subchapter.

95 (b) All policies, standards, and general specification relating to landscaping, planting, and reforestation activities, as  
96 well as the planting and placement of trees, shrubs, groundcover, sod, and grass, must appear within the  
97 Department of Transportation's design standards and/or regulations and must be developed in conjunction with

98 the Delaware Departments of agriculture, Natural Resources and Environmental Control or such other public or  
99 private agencies as may be deemed appropriate by the Department.

100 (c) All rules and regulations promulgated pursuant to this section shall meet the requirements of the Administrative  
101 Procedure Act (29 Del. C. Chapter 101).

102 Part II. Mitigation Needs Analysis and Planting or Reforestation Activities.

103 §209. Mitigation needs analysis.

104 (a) Before the Department of Transportation removes, cuts, or clears any landscape improvement, tree, or forest  
105 from the site of a construction project, it shall conduct an analysis, or cause the same to be conducted, to  
106 determine the total area of landscape improvements, individual trees up to 50, or if more than 50, the total acres  
107 of trees that will be removed, cut, or cleared in order to complete the project.

108 (b) Whenever the Department of Transportation widens, constructs, or reconstructs any major arterial, interstate  
109 connector, minor arterial, collector road, or proposed road in an urbanized area of this State, the Department shall  
110 incorporate in the plans therefore provision for all costs incurred in replacing, wherever possible, shade trees to  
111 be removed in order to execute the plan. Replacement shade trees shall be a minimum height of 16 feet, balled  
112 and burlapped nursery-grown stock, and all planting work shall be done in accordance with § 728 of the  
113 Delaware Department of Transportation Standard Specifications (January 1, 1974, or latest revised edition). The  
114 place of planting trees shall be in compliance with federal law and regulations relating to the distance such trees  
115 must be planted from the edge of the roadway.

116 (c) If the Department of Transportation determines that it will not remove, cut, or clear any trees in order to  
117 complete the construction project, it shall incorporate into the construction plans landscape improvements to  
118 improve the rights of way within the project area only, in accordance with the Department's standards as set forth  
119 herein.

120 (d) If the Department of Transportation determines that it will remove, cut, or clear landscape improvements, or ten  
121 (10) or fewer trees in order to complete the construction project, it shall incorporate into the construction plans  
122 requirements for landscape mitigation through the performance of landscaping and planting activities to improve  
123 the rights of way within the project area at a ratio of at least one (1) new tree or shrub for every tree or shrub  
124 removed.

125 (e) If the Department of Transportation determines that it will remove more than ten (10) but fewer than fifty (50)  
126 trees in order to complete the construction project, regardless of the number of acres on which those tree are  
127 situated, it shall incorporate into the construction plans requirements for landscaping and planting activities in  
128 Part II of this subchapter that will result in the planting of at least 2 trees for every tree to be removed, cut, or  
129 cleared in order to complete the construction project.

130 (f) If the Department of Transportation determines that it will remove fifty (50) or more trees in order to complete  
131 the construction project, it shall incorporate into the construction plans requirements for activities that will result  
132 in the reforestation of at least one acre of land for every acre of trees to be removed, cut, or cleared in order to  
133 complete the construction project. The ratio of land on which reforestation activities occur to land from which  
134 fifty (50) or more trees have been removed, cut, or cleared shall apply equally to complete acres as well as  
135 fractions thereof.

136 (g) The Department of Transportation shall itself undertake the reforestation activities required pursuant to this  
137 section, or shall cause the same to be undertaken.

138 §210. Inability to meet minimum requirements; alternate landscaping and planting activities.

139 (a) If the Department of Transportation is unable to meet the minimum requirements for landscaping and planting  
140 activities set forth in Part II within the rights of way of the construction project with which the landscaping and  
141 planting activities are associated, it must first complete the balance of those landscaping and planting activities  
142 within other rights of way it owns or controls, beginning with rights of way which are along the same road and  
143 geographically closest to the construction project requiring landscaping and planting activities and thereafter  
144 moving outward in all directions until it has met the minimum requirements for landscaping and planting  
145 activities set forth in this part.

146 (b) If thereafter, the Department of Transportation remains unable to meet the minimum requirements for  
147 landscaping and planting activities set forth above within any rights of way it owns or controls in the State, it  
148 shall determine the number of acres of landscaping and planting activities it has been unable to mitigate and:

149 (1) perform landscaping and planting activities in the State (or cause the same to be performed) at locations  
150 recommended by the Department of Agriculture, Forest Service, or the Department of Natural Resources  
151 and Environmental Control; or

152 (2) if the Departments of Agriculture or Natural Resources and Environmental Control are unable to identify  
153 any locations in the State for the performance of landscaping and planting activities, transfer to either the  
154 Department of Agriculture, Forest Service, or the Department of Natural Resources and Environmental  
155 Control an amount equal to the dollar value per square yard necessary to plant seedlings in the area it has  
156 been unable to mitigate to be used by either Department for conducting landscaping and planting activities  
157 in the State under programs administered by those Departments.

158 §211 Planting standards

159 (a) All landscaping and planting activities undertaken as part of the Department of Transportation's obligation to  
160 mitigate the removal, cutting, or clearing of landscape improvements pursuant to this part, must be conducted  
161 pursuant to a signed and sealed landscape plan prepared by the Delaware licensed and registered landscape  
162 design professional approved by the Department of Transportation, and must be conducted:

- 163 (1) to promote transplant survival;
- 164 (2) in compliance with federal law and regulation;
- 165 (3) in compliance with any Department of Transportation design specifications relating to obstructions in the  
166 right-of-way, distance that landscape improvements must be planted from the travel lanes of the roadway for  
167 safety purposes, and corresponding to any policies related to context sensitive design; and
- 168 (4) in compliance with the Department of Transportation's landscape and reforestation policies developed in  
169 conjunction with the Delaware Departments of Agriculture, Natural Resources and Environmental Control  
170 or other such public or private agencies as the Department may deem appropriate.

171 (b) A signed and sealed landscape plan prepared for use in completing the minimum landscaping and planting  
172 activities required by this part, may include whatever components the Department of Transportation determines  
173 are necessary or appropriate for the area in which the activities will take place, but must at a minimum:

- 174 (1) Screen, while maintaining transportation safety standards, at least fifty percent (50%) of the frontage of  
175 industrial properties and the back sides of non-agricultural, commercial properties;
- 176 (2) Use an appropriate combination of trees, shrubs, groundcovers, and grass or sod, both within median areas  
177 and along all roads, for aesthetic and screen purposes; and
- 178 (3) Select from upper, medium, and lower canopy trees, both within median areas and along all roads where  
179 space is safely available, that:

- 180           a. are no less than 1 inch in diameter as measured 6 inches above the established ground level when  
181           planted;
- 182           b. are planted in sufficient quantities to achieve an aesthetically pleasing view, and/or if outside the right-  
183           of-way, wildlife habitat when fully grown.
- 184       (c) All landscaping and screening shall be in conformance with any Context Sensitive Design and vegetative  
185           policies that are in effect at the time of the project.
- 186       (d) No landscape improvement determined to be an invasive species shall ever be knowingly planted, authorized, or  
187           required by the Department of Transportation."

188       Section 3. If any provisions of this Act, or the application thereof to any person or circumstance, is held to be invalid  
189       by any court of competent jurisdiction, such invalidity shall not affect the other provisions of this Act which shall be  
190       given full force and effect without said invalid provision or application, and to that end the provisions of this Act shall be  
191       declared to be severable.

#### SYNOPSIS

This Act replaces outdated legislation with language that more precisely reflects current policy shifts toward incorporating landscaping, reforestation, and other planting activities into the plans developed by the Department of Transportation for road construction and improvement projects in the State. Under this Act, minimum standards are provided for the volume of landscaping or reforestation that must take place, and the Department of Transportation is directed to provide more specific standards through its regulations developed in conjunction with Department of Agriculture, Natural Resources and Environmental Control and other public or private agencies. All such activities must be spelled out on a formal landscaping or reforestation plan. As a result of this Act, the Department of Transportation construction plans should not only reflect the physical structure of the transportation improvements they will be used to install, but should also reflect the various landscaping and reforestation activities it will perform.

AUTHOR: Sen. Cloutier