MCPB
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Item # 12

MONTGOMERY COUNTY PLANNING DEPARTMENT
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

March 5, 2007

MEMORANDUM

TO: Montgomery County Planning Board

VIA: John A. Carter, Chief JAC
Community-Based Planning Division

FROM: Callum Murray, Team Leader, Potomac and Rural Area West (301/495-4733) CM
Community-Based Planning Division

SUBJECT: Report and Recommendations of the Ad Hoc Agricultural Policy Working Group – Continuation of March 1, 2007 Work Session

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This work session is a continuation of the Planning Board's work session of March 1, 2007 on the Report and Recommendations of the Ad Hoc Agricultural Policy Working Group. This memorandum summarizes the Planning Board's position from March 1, 2007, on the four main themes identified by the Working Group - the Building Lot Termination (BLT) program, the improved Transferable Development Rights (TDR) program, sand mounds, and child lots. On the issue of child lots, this memorandum outlines three options for the Planning Board and provides an expansion and clarification of planning staff's recommendation of March 1, 2007. Where possible, amendments to specific policy instruments are recommended.

Attachment 2 is a summary of all testimony received. Testimony received since completion of planning staff's memorandum for the March 1, 2007 work session is Attachment 3. A Planning, Housing and Economic Development (PHED) Committee meeting to discuss the Report, including the Planning Board's comments, is scheduled for March 12, at 2:00 P.M.

CHILD LOTS

The Numbers

Since 1981, 95 child lots have been created within 46 subdivisions in the RDT Zone. This is an average of approximately two child lots per plan when a subdivision plan contains child lots. Child lots represent 18 percent of the total number of lots created in the zone. The best available information suggests that there are 99 RDT zoned properties of at least 10 acres[1] that have not transferred ownership since January 6, 1981.[2] Based upon the experience of the program to date, and under the previous interpretation of the Zoning Ordinance, approximately 198 *additional* child lots could be created in the Agricultural Reserve.

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[1] A property smaller than 10 acres is not entitled to create a child lot.
[2] On January 6, 1981, a sectional map amendment was adopted that down-zoned land in the Agricultural Reserve from one house per five acres to one house per 25 acres.

Option One – Working Group Recommendation
The Working Group recommended that:

1. The maximum density of subdivisions with child lots be one lot per child *in addition* to the base density allowed in the RDT zone.[3] For example, a property owner with 100 acres and two children would be allowed six lots (two child lots and four base density lots.)
   (This has been the way the Zoning Ordinance has been construed for many years.)
2. Additional written documentation and recordation at different steps in the planning process be used to limit the use of child lots for improper purposes.
3. Substantial monetary penalties be imposed for violation of child lot requirements.

Option Two – Planning Board "Straw" Vote
On March 1, 2007, the Planning Board agreed that the total number of residences on a parcel should in no case exceed one per 25 acres, whether developed with child lots or market lots. Staff has two concerns regarding this. The thrust of the staff comments in the staff report of February 26, 2007, was that property owners were entitled to either the full development density, or the full child density, but not both. (See Option Three for a full explanation.) Page 13 of the memorandum had typographical errors in the third paragraph, for which planning staff take full responsibility, and should have read as follows:

"Staff concurs with the Working Group that the County Council should amend the Zoning Ordinance to clarify and make crystal clear the density provisions for child lots, but recommends that only child lots be in addition to base density. While the number of child lots permitted may exceed the base density, in no case should the creation of market lots be allowed to exceed the base density."

Staff is concerned that the Planning Board may have taken a position entirely due to planning staff not clearly articulating the recommendation. Our second concern is that if the County Council rejects the position adopted by the Planning Board, there is no fallback position, and the current unjustified practices contrary to the intent of the Zone may continue. Staff therefore recommends that the Planning Board consider Option Three before taking a final vote.

If the Planning Board elects to confirm their current position, and the County Council agrees, a zoning text amendment to the RDT Zone will be necessary. The text amendment would include a similar provision to that provided in the Rural Zone whereby the total number of lots created from a parcel, including child lots, must not exceed the density limitations of the Zone.

Sec. 59-C-9.74. (4) (iii) would be deleted. *(Any lots created for use for one-family residence by children of the property owner must not exceed the number of development rights for the property.)*

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[3] See Comment 1 by Margaret Chasson, Nancy Dacek, Bob Goldberg, and Tom Hoffmann and endorsed by Jim O'Connell and Comment 6 by Scott Fosler, paragraph C in Appendix II.

The following language would be substituted: *(The overall density of the property does not exceed one dwelling unit per 25 acres in any subdivision recorded as of (insert date of enactment.)*

Option Three – Staff Recommendation

Option three is a less radical than Option Two and is favored by a large number of organizations and citizens who provided testimony to the Planning Board. Under the existing ordinance, a 100-acre parcel of property could theoretically yield 20 child lots if vacant, or 19 with an existing farmhouse. (One per Development Right or every 5 acres.)

The following table illustrates the full range of possibilities and compares net lots under how the ordinance has been construed in the past with the current staff recommendation. In essence, for this size of farm, and if there are more than two children, there will be no market lots (i.e. no longer would child lots be excluded from maximum density calculations in reviewing plans of subdivision which include other lots for development and sale). The base density can only be increased with the use of child lots if all market lots are eliminated.

Sketch graphics are attached to illustrate examples of a 100-acre farm with 20 TDRs and farmers with two and five children respectively. The sketches depict for each example how the ordinance has been construed in the past and how staff recommends it should be construed in future. For illustrative purposes, market lots are assumed to be 25 acres or larger (except where a cluster is depicted) and child lots are assumed to be 2 acres. In the example of a farmer with 5 children, where staff recommends no new market lots, the cluster option is the only option depicted.

Child Lot Policy Comparison

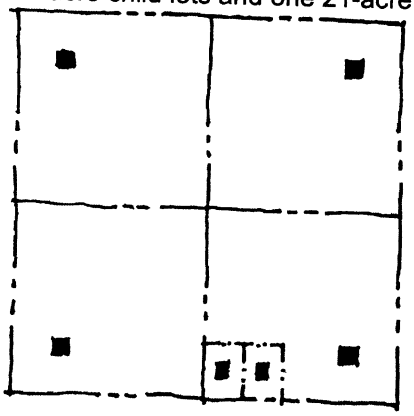
Example of a 100-acre farm (with existing farmhouse) and with 20 TDRs.

Family Members	Maximum Child Lots	Maximum Market Lots	Net Lots Under Historic Interpretation	Description	Net Lots Under Staff Recommended Policy	Description
Farmer and 1 child	1	4	**5**	Farm house 1 child lot 3 market lots	**4**	Farm house 1 child lot 2 market lots
Farmer and 2 children	2	4	**6**	Farm house 2 child lots 3 market lots	**4**	Farm house 2 child lots 1 market lot
Farmer and 3 children	3	4	**7**	Farm house 3 child lots 3 market lots	**4**	Farm house 3 child lots
Farmer and 4 children	4	4	**8**	Farm house 4 child lots 3 market lots	**5**	Farm house 4 child lots
Farmer and 5 children	5	4	**9**	Farm house 5 child lots 3 market lots	**6**	Farm house 5 child lots

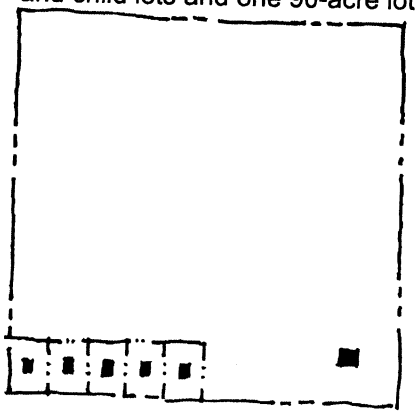
Example: A 100-acre farm with 20 TDRs and a farmer with two children

Historic Interpretation - six lots

A: Three 25-acre market lots, two 2-acre child lots and one 21-acre lot

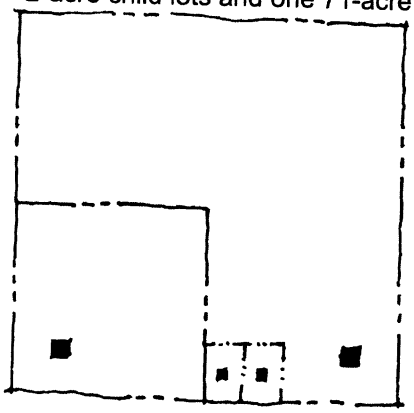


B: Clustered. Five 2-acre market and child lots and one 90-acre lot

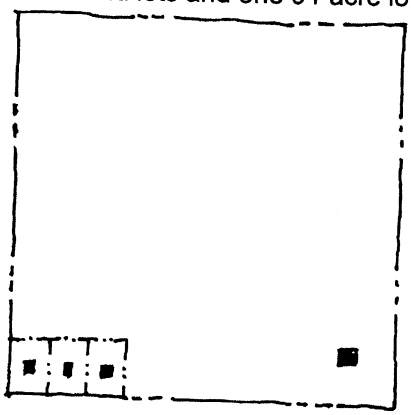


Recommended Policy - four lots

C: One 25-acre market lot, two 2-acre child lots and one 71-acre lot



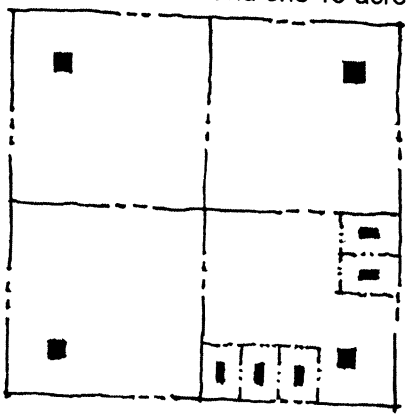
D: Clustered. Three 2-acre market and child lots and one 94-acre lot.



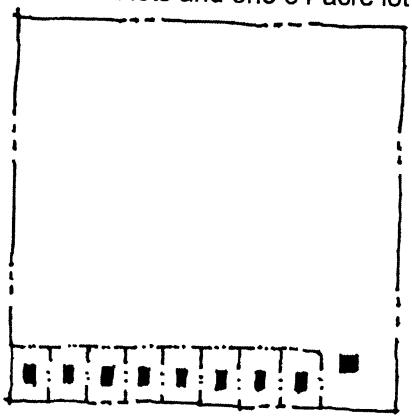
Example: A 100-acre farm with 20 TDRs and a farmer with five children

Historic Interpretation - nine lots

A: Three 25-acre market lots, five 2-acre child lots and one 15-acre lot

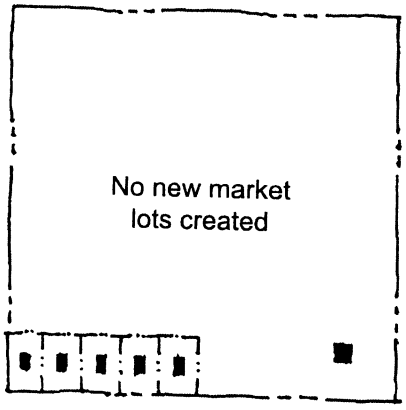


B: Clustered. Eight 2-acre market and child lots and one 84-acre lot

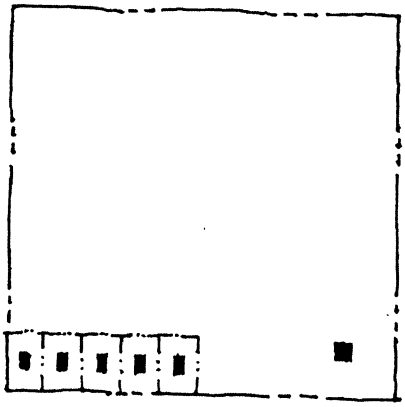


Recommended Policy - six lots

C: One 90-acre market lot and five 2-acre child lots



D: Clustered. Five 2-acre child lots and a 90-acre lot



Discussion

The existing exemption for child lots involves only the dimensional requirements of the RDT Zone. The purpose of the exemption was to permit a child that would participate in the farming enterprise to reside on the land with the owner-parent without having to subdivide off a full 25-acre tract, thus unnecessarily fragmenting the farm. The child lot exemption was intended as a means of supporting agriculture, rather than a means of subverting it.

Staff believes that it was never the intent of the framers of the language in the Zoning Ordinance to allow one lot per child, regardless of the number of children, in addition to market lots at full density. As the above table illustrates, this interpretation would permit an owner with 5 children to have 9 lots with a density of one dwelling per 11 acres. This is clearly contrary to the intent of the Zone with regard to density, fosters fragmentation of agricultural land, and fosters development rather than farming. A recent subdivision proposal before the Planning Board would have placed five child lots on 42 acres, and retained the right to sell one additional market lot, all at a density of one dwelling per 7 acres. Another subdivision application, deferred indefinitely, would have created five child lots in addition to a permitted three market lots on 80+ acres, with an average density of one unit per 10 acres.

Precedent of misplaced administrative interpretation is not a justification for continuing this practice, which discriminates against those with lesser procreative proclivity. This issue should not be confined to which way to interpret the existing language, but how fairly to address it in a way that ensures maintenance of a critical mass of farmland, and in a manner that ensures that houses built in the Reserve are supportive of agriculture rather than inimical to its sustainability. As originally intended, the child lot provisions serve a worthy purpose, and it is truly unfortunate that they have been subject to abuse. Planning staff believes that the restrictions recommended by the Working Group will severely limit improper use and recommends Option Three with the following comments:

In order to limit the use of child lots for improper purposes, the Working Group has recommended a series of limitations as follows:

- A child must own the child lot dwelling for five years; however exceptions should be allowed for hardship cases such as those used in the Maryland Agricultural Land Preservation Foundation (MALPF) easement program.
  Staff recommends that the minimum duration of ownership be 10 years.

- A child must not lease the child lot dwelling or enter into a contract for sale for five years, except the child may lease the child lot home to an immediate family member.
  Staff concurs, but recommends that 'immediate family member' be defined and that subleases to non-family members not be permitted.

- A landowner may create only one child lot for each child regardless of the number of properties owned.
  Staff concurs.

- Each child lot should require the use of one TDR.
  Staff concurs.

- A child lot may be created after the death of the landowner if the landowner's intent was to create the lot and is established in writing through a will or other document admissible in probate.
  Staff believes that after 25 years, child lots should be created, or at least applied for, before the death of a landowner. Staff does not recommend that a significant land use decision hinge on the decision of a judge at probate.

- A majority of the land on parcels with child lots must be reserved for agriculture.
  Staff concurs with the Working Group that this limitation requires follow-up work, including the definition of 'majority,' and the minimum or maximum acreage requirement for child lots. This requirement would limit the size or location of child lots on existing small properties. Under the RDT Zone, the minimum acreage for any lot is 40,000 square feet. Design standards are not typically applied to Euclidean Zones such as the RDT Zone, although staff notes that they exist for the Rural Neighborhood Cluster Zone in Sec. 59-C-9.574 (h). They could be included in the Zoning Ordinance, in an updated Master Plan for Preservation of Agriculture, or in a separate stand-alone document similar to the Planning Board's Environmental Guidelines.

- The record plat must indicate that the property contains a child lot. To this end, the Planning Department must require a covenant to be recorded in the land records at the same time the plat is recorded. The covenant should contain a provision indicating that the house must be owned by the child for five years after construction and may not be leased during that time. Violation of the covenant should have penalties.
  Staff recommends ownership for 10 years after construction.

- The building permit must be issued only in the child's name. The building permit should not be approved until DPS has determined that the child has signed an affidavit noting the limitations on ownership and leasing and knowledge of the covenant.
  Staff concurs.

- There should be substantial monetary penalties to discourage violation of these requirements.
  Staff concurs, with the caveat that monitoring and enforcement may be problematic, particularly for occupancy.

- The Working Group supports confirmation of the provision in the Water and Sewerage Plan allowing public water service to be provided but with amendments to limit the applicability so that this provision would only be used in limited circumstance. They further recommend amending the language of the Water and Sewerage Plan to allow public water to child lots in the following circumstances:

  - When the child lot can be served from an existing, abutting water main and service to the property would not provide the opportunity for service to other RDT properties.

  - When public water service can be provided in a manner that would not prevent the future application for a State or County easement for farmland preservation. Properties receiving public water are not eligible for State easement programs or the BLT program as described in Chapter 4. This could increase the appeal of residential development (at one house per 25 acres) over preservation through an easement program.

  - We make this recommendation based on the assumption that there are only a small number of potential child lots that would qualify for public water under our recommendation. Once implemented, we recommend the County monitor how many lots use this provision. If it appears that a significant number of lots are being provided with public water, we would urge the County reconsider this policy.

  - We recommend the County Council approve any request for public water to a child lot in the RDT zone by a majority vote. As the Council gains experience with such approvals, it might consider permitting them to be made administratively in accordance with clear criteria stipulated by the Council.

Staff Comment

A conflict exists on this issue between the Ten-Year Comprehensive Water and Sewerage Systems Plan and the 1980 Functional Master Plan for the Preservation of Agriculture and Rural Open Space. The Master Plan recommends denying "public water and sewer service to areas designated for agricultural preservation that utilize the RDT zone."[4] The Water and Sewerage Plan provides, "community [public] water service may be provided to support the subdivision of lots for the children of the owners of qualifying properties." Further, the Water and Sewerage Plan notes that "water service in these cases is generally intended to be provided from abutting water mains, although water main extensions can be considered where those extensions are consistent with the requirements for large lot development..."[5]

[4] Functional Master Plan for Preservation of Agriculture, page 59.
[5] Montgomery County, "Ten-Year Comprehensive Water Supply and Sewerage Systems Plan", Chapter 1, § II.E.9 (2003).

Although this situation is a comparative rarity, staff does not concur with the Working Group's recommendation. The conflict between the two documents was noted in 2006 when Planning staff, using the 1980 Master Plan as a guide, recommended denial of a water category change for approved child lots, while Department of Environmental Protection (DEP) staff recommended the opposite, based on the Water and Sewerage Plan and the existence of a pre-1980 water main in the street abutting the lots.

The number of child lots that would qualify for public water under the Working Group's recommendation is likely to be small. The Working Group also recommended that the County Council reconsider the policy if it appeared that a significant number of lots were being serviced by public water. Staff believes that following this recommendation could set up future policy conflicts, as could the Water and Sewerage Plan statement that "water main extensions can be considered where those extensions are consistent with the requirements for large lot development..." Staff recommends following the language of the 1980 Master Plan denying public water service to areas designated for agricultural preservation.

Work Program Implications:
The County Council should authorize the Planning Board to update the 1980 Master Plan, in consultation with major stakeholders. The Plan's purpose would be to preserve agricultural land and enhance farming viability, taking into account new agricultural trends.

Option One or Three –

- A zoning text amendment should be drafted that would clarify the Zoning Ordinance and impose limitations on the use of child lots in the RDT Zone, including examining follow-up questions of whether there should be a minimum acreage or a maximum size, what specific circumstances should constitute a hardship, and who should determine whether the hardship requirements are satisfied.

- Explore requiring a covenant to be recorded in the land records when a child lot is created specifying that a house on the child lot must be owned by the child for ten years and must not be leased except to immediate family (to be defined).

- Research the potential number of child lots that could theoretically abut existing water mains that pre-date the 1980 Master Plan.

SAND MOUNDS

Both the majority and the minority on the Working Group have recommended varying degrees of limiting density by restricting the unfettered use of sand mounds. The Working Group's majority proposal would allow one sand mound per 25 acres for the first 75 acres, then one for each 50 acres thereafter. The minority recommended one mound per 50 acres. The issue, therefore, is not whether to restrict their use, but to what degree.

On March 1, 2007, the Planning Board recommended sand mounds be allowed under the circumstances listed below, for a parcel existing as of December 1, 2006.

- Where there is an existing house and the sand mound would not result in the development of an additional house.
- When it enables a property owner with approved deep trench system percs to better locate potential houses to preserve agriculture.
- For child lots, if the Working Group recommendations related to child lots are also adopted (e.g., ownership requirement). Sand Mounds will be approved for child lots where they are approved under the zoning provision or approved under the Agricultural Easement Program MALPF/AEP.
- For bona fide tenant housing. Sand Mounds will be approved for bona fide tenant housing wherein the dwelling can never be conveyed from the parent parcel.
- For any pre-existing parcel that is defined as an exempted lot or parcel in the zoning regulations.
- For any permitted agricultural use under the zoning regulations (e.g., farm market).
- For the purpose of qualifying for a State or County easement program (including a Building Lot Termination program).

The Planning Board also recommended sand mounds in situations where sites met the perc tests and dimensional requirements for conventional septic systems, but only to serve agricultural housing and related commercial activities.

The Planning Board did not recommend sand mounds for properties where there has been a significant investment in testing for sand mounds prior to the adoption of these new restrictions.

On March 1, 2007, several Working Group members informed planning staff that the first bullet above was intended to forestall splitting of parcels by deed to gain an improper advantage in terms of numbers of sand mounds. As staff reads it, the above is a list of special circumstances in addition to, and separate from, the Working Group's main recommendation, which is as follows:

"We recommend one sand mound per 25 acres be permitted for the first 75 acres. Beyond that, one sand mound should be allowed for every 50 acres of land. We further recommend that these numerical standards apply to any future new technology for on-site sewerage disposal. For any subdivision involving sand mounds, we recommend Planning Department staff be required to determine whether the subdivision minimizes fragmentation of agricultural land by locating buildings to preserve viable farmland."

Planning staff suggests that, in the event that this recommendation is approved by the County Council, applications for sand mounds be based on the legal status of the property at the date of the County Council's resolution.

The limited circumstances above constitute legitimate uses for sand mounds, but staff has broader concerns, as follows:

The ability to use sand mounds or other alternatives to trench septic systems has had a deleterious effect on the Agricultural Reserve. If implemented, the recommendations of either the majority or minority of the Working Group would exacerbate the situation by facilitating residential development. The whole thesis of the Master Plan and RDT Zone is to protect agricultural land for present and future farming. Simply put, the RDT is an agricultural zone, and not a residential zone. The proliferation of sand mounds has reduced the willingness to sell development rights for land that will not perc, and has inflated speculative land values, raising expectations that every acre should be valued at its development rather than agricultural value. This impedes the ability of new farmers to purchase farmland and thus works against sustaining farming in the Reserve. Real agricultural property values (in 2005 dollars) rose from just under $100 million in 1986 to approximately $450 million in 2005. These augmented market values offer farmers significant incentives to dispose of their farms for development and put additional strain on the purchase of agricultural easements.

The source of the problem is paragraph 2 of the Action section of Council Resolution 12-1503 of February 22, 1994, (Attachment 1) which, in part:

".....encourages the Department of Health to exercise flexibility provided for in the regulation, and to explore with applicants ways in which particular site restrictions may be dealt with to allow development allowed by zoning to be constructed."

The same paragraph also requested that a statement attached to the resolution on the regulation of sand mounds be considered when applications for sand mounds were being reviewed. That statement of the Health Department Policy (attached) concluded that:

"It is the purpose and intent of the Health Department to render friendly and helpful assistance to citizen landowners to the end that they may use their property as permitted by zoning laws provided there is no significant health risk."

Staff recommends that Council Resolution 12-1503 of February 22, 1994, be amended to remove paragraph 2 and the attachment. Determining the density of a subdivision is not a function of the Department of Health or the Department of Permitting Services. It is the responsibility of the Planning Board in the approval of subdivisions to ensure that they are consistent with the Master Plan. While a subdivision must conform to the zone in which it is located, the density limitations of the zone are not an entitlement, but an upper limit, and each subdivision must conform to the Master Plan and meet any other applicable regulations. While the resolution was probably not interpreted to amend the Master Plan, that has been the net effect, and it presents an inconsistency in County policy towards development in the Agricultural Reserve. To remove that inconsistency, the resolution should be amended to conform with, and to be consistent with, the Master Plan.

Work Program Implications:
The County Council should authorize the Planning Board to update the 1980 Master Plan, in consultation with major stakeholders. The Plan's purpose would be to preserve agricultural land and enhance farming viability, taking into account new agricultural trends.

Work with DEP staff on amendments to the Ten-Year Comprehensive Water Supply and Sewerage Systems Plan to bring it into alignment with the 1980 Master Plan for Preservation of Agriculture, and to include the limited circumstances for the provision of sand mounds.

Coordinate with County and Executive legal staff to research and determine changes in laws or regulations needed to accomplish the report recommendations.

BUILDING LOT TERMINATION (BLT) EASEMENT PROGRAM

The goals and purpose of a BLT program are to reduce potential development and prevent fragmentation of farmland in the Agricultural Reserve and to provide financial incentives that offer an attractive alternative to development.

After discussion with several members of the Working Group and County and County Council staff regarding criteria for eligibility, priority, compensation, funding and procedures, the Planning Board concurred with all of the Working Group's recommendations regarding the proposed Building Lot Termination (BLT) easement program.

Work Program Implications:
Explore potential for increasing commercial densities via TDRs in all future Master Plans.

Create a new TDR program whereby owners of non-residential properties would need to purchase buildable TDRs to increase density.

TRANSFERABLE DEVELOPMENT RIGHTS

On March 1, 2007, the Planning Board agreed that the identification of TDR receiving areas would be studied in the context of the Annual Growth Policy as well as individual Master Plans.

The Working Group recommended that the County Council enact the following changes to the current TDR program:

- Distinguish between excess and buildable TDRs.
- Require TDR utilization for residential development in floating zone applications/local map amendments.

- Designate buildable TDRs for use in floating zones as well as in commercial and industrial zones, central business district and research and development zones with an equivalency to floor area ratio or square footage for their use.
- Clarify limitations on non-agricultural, non-residential uses (such as private institutional facilities) where land is covered by a TDR easement.
- Reintroduce legislation to prevent property owners from selling all TDR easements and subsequently developing a non-residential, non-agricultural use on the property.

The Working Group also endorsed the following recommendations of the 2002 TDR Task Force:

- Master plans should more aggressively seek to maximize the number of receiving areas.
- If additional density is considered via rezoning not recommended in the Master Plan, the use of TDRs should be part of the change.
- The County should work with local municipalities to establish inter-jurisdictional TDRs to create receiving areas in municipalities.
- Eliminate the requirement in single-family zones and subdivision regulations that receiving areas use 2/3 of the possible TDRs.

Staff Comment

The County has placed more than 48,000 acres of land in the Agricultural Reserve under TDR easement, yet the largest threat to the success of the TDR program is the looming possibility that 1,850 additional residences will be constructed at a density of one per 25 acres, using the 5th TDR typically withheld from the TDR market. At an estimated value of between $175,000 and $500,000 in 2005, depending on septic capacity, it is unlikely that these 5th TDRs will be sold for use outside of the RDT Zone.

The Working Group has endorsed several recommendations made by the 2002 TDR Task Force, and has recommended several changes to the current TDR program. Planning staff concurs with all of these recommendations and has the following comments:

The fundamental concept underlying the most successful TDR program in the nation is that TDRs have sufficient value to buyers and sellers to sustain an active market to accomplish preservation goals. The market should set the value of TDRs, and the market should be made competitive by providing a sufficient number of receiving areas. There is little or no market at present for TDRs, and considerable efforts need to be made to bring supply and demand into balance for its eventual return.

TDRs are allowed in the following zones: RE-2, RE-2C, RE-1, R-200, R-150, R-90, R-60, R-30, R-20, R-10, Residential Mixed Use Development (RMX-1, 2, and 3), Planned Development (PD) and the Transit Oriented Mixed Use (TOMX-2/TDR) Zone.

To accomplish the goal of more receiving areas, TDRs would need to be designated as either a residential receiving area or a non-residential receiving area in the applicable master plan. For residential receiving areas, it would be appropriate to permit TDRs in

the following selected commercial and industrial zones, such as C-1, C-2, C-3, C-4, C-5 and C- 6 and H-M (Hotel & Motel), R&D (Research & Development) and in the Industrial I-1, I-3 and I-4 Zones. These zones would also be appropriate for TDR non-residential receiving areas with appropriate FAR or square footage criteria specified in either the applicable Master Plan or Zoning Ordinance or both.

The Country Inn Zone and the Commercial Transition (C-T) Zone are not appropriate as TDR receiving areas. The C-T Zone serves as a transition between low-density residential areas and general commercial areas such as C-2 zoned land. The Country Inn Zone is a specialized zone limited in location and is not appropriate as a TDR receiving area.

Central Business District (CBD) Zones could also be included as either residential or non-residential TDR receiving areas as these zones are served by mass transit, in urban sections of the County and may be able to absorb additional development capacity. Townhouse zones, (RT-6, 8, 10 and 12.5) would also be appropriate for residential TDR receiving areas.

TDR requirements should be de-coupled from MPDU requirements where they are in competition. For example, in certain mixed use zones, there are requirements for both TDRs and MPDUs, and one can be maximized at the expense of the other. In the past, some property owners have gained approval of subdivision plans which minimized TDRs and maximized MPDUs, only to subsequently appeal to the Department of Housing and Community Development for a reduction in MPDUs based on criteria such as high condominium fees. Where these appeals are successful, there should be a mechanism to proportionately increase the TDR requirement.

In the future, it may be necessary to adjust the allocation rate of one TDR per single-family unit or two multi-family units to make transaction beneficial to both buyers and sellers.

Work Program Implications:
The County Council should authorize the Planning Board to update the 1980 Master Plan for Preservation of Agriculture & Rural Open Space, in consultation with major stakeholders. The Plan's purpose would be to preserve agricultural land and enhance farming viability, taking into account new agricultural trends.

Amend the Zoning Ordinance and Subdivision Regulations as follows:

1. Amend the TDR program to require excess TDR receiving capacity in floating zones;
2. Define an exchange rate for buildable TDRs in the research and development zone, and certain commercial, industrial and mixed-use zones; and
3. Eliminate the requirement that receiving areas use 2/3 of the possible TDRs.

Work with municipalities to develop an inter-jurisdictional TDR program.

Complete implementation of a tracking system to track use of all TDRs.

Submit an annual TDR report to the County Council.

Maximize the number of receiving areas identified in master plans (i.e. if a master plan recommends additional density it should come from TDRs unless there is a compelling reason not to use TDRs).

PENDING LEGISLATION

On December 13, 2005, ZTA 05-23 was introduced to require TDR easements to limit future development of non-residential and non-agricultural uses ("non-agricultural" is hereafter referred to mean all uses except residential and agricultural uses). In addition, ZTA 05-23 would prohibit a property developed with a non-agricultural use from participating in the TDR program. ZTA 05-23 has now lapsed.

The Working Group recommended that the Council introduce and enact legislation to clarify in clear and direct terms the long-standing legislative intent that the development of RDT-zoned parcels encumbered by TDR easements should be limited to single family, and agricultural and agricultural-related uses only.

Staff concurs.

ADDITIONAL ISSUES

The Council's resolution establishing the Ad Hoc Agricultural Working Group called for a comprehensive review while also intentionally limiting the scope of the Group's work to the issues discussed above. The Working Group considered that a broader comprehensive review of policies and laws related to the Agricultural Reserve was necessary and suggested a range of issues that should be considered, including some preliminary thoughts on right-to-farm legislation, education strategies, and design standards.

The Working Group recommended that:

1. The County Council enact legislation that requires potential homebuyers of homes in agricultural zones to be notified of laws that protect farmers from certain nuisance claims.
2. The Council explore whether additional action is necessary if the number of nuisance complaints increases.
3. In addition to disclosure, the County explore options to educate residents about the importance of the Agricultural Reserve.
4. The Planning Department explore ways to prevent the fragmentation of agricultural land by locating buildings to preserve viable farmland. Any strategy must maintain owner equity and achieve the goal of preserving farmland. The Working Group understands that there is tension between the Planning Department and property owners on the issue of design standards and efforts to identify solutions must be mindful of these tensions.

5. The Planning Department should use the existing agricultural advisory groups to help develop these strategies.

The Working Group concluded their Report with an expanded list of other issues regarding zoning, tenant homes, rustic roads, and economic viability to be addressed in any comprehensive consideration of the sustainability and vibrancy of Montgomery County's Agricultural Reserve.

Staff Comment
Staff concurs that each and every one of the above issues should be addressed in a comprehensive study of the Agricultural Reserve, and recommends that the most appropriate instrument be an update of the 1980 Master Plan for the Preservation of Agriculture & Rural Open Space.

CM:ha: E:\Murray\AgPolRec3.mcpb

Attachments:
1. Resolution 12-1503, February 22, 1994, and Health Department Policy attachment (pages A-1 – A-3)
2. Summary of Public Testimony (pages A-4 – A-18)
3. Public Testimony received since 3/1/07 (pages A-19 – A-37)
4. Final Report (page A-38)

ATTACHMENT 1

Resolution No. 12-1503
Introduced: February 22, 1994
Adopted: February 22, 1994

COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND

By: County Council

Subject: Executive Regulation 28-93AM, On-Site Water and On-Site Sewage Disposal Systems

Background

1. On January 21, 1994, the County Executive submitted Executive Regulation 28-93AM, On-Site Water and On-Site Sewage Disposal Systems to the County Council.

2. Executive Regulation is processed under method 2 of the executive regulation process.

3. This regulation sets minimum standards for utilization of on-site water systems and on-site sewage disposal systems for detached and semi-detached residences, multi-use facilities and other establishments in Montgomery County where community water and sewerage systems are not available.,

4. The standards of State of Maryland regulations for On-Site Sewage Disposal Systems (COMAR 26.04.02), and Water Supply and Sewerage Systems in the Subdivision of Land in Maryland (COMAR 26.04.03), are met by these regulations. COMAR 26.04.04, which pre-empts local regulations for well construction, governs the construction of new wells; these regulations set standards for existing wells to the extent that COMAR 26.04.04, Well Construction does not.

5. The intent of these Regulations is to protect the public health and the ground water of Montgomery County by providing adequate on-site potable water supply and sewage treatment and disposal systems. Violation of these standards can result in issuance of citations and civil or criminal penalties.

6. The Transportation and Environment Committee reviewed this regulation on February 7, 1994, and recommends approval.

Action

1. The Council considers that the prime purpose of this regulation is to control the construction and operation of on-site water supply and sewage disposal systems in a way that does not endanger public health or unacceptably impact the environment.

2. Within the framework established by this regulation the Council encourages the Department of Health to exercise flexiblity provided for in the regulation and explore with applicants ways in which particular site restrictions may be dealt with to allow development allowed by zoning to be constructed. In particular the Council encourages the Department of Health to consider requests for waivers from the requirement of a third septic absorbtion reserve field in the Rural Density Transfer zone and to grant such waivers when site conditions indicate that this can safely be done and minimum mandated absorbtion field areas are met. The Council also requests that the statement attached to this resolution on the regulation of mound systems be considered when applications for such systems are being reviewed.

3. The County Council for Montgomery County, Maryland, approves the following resolution:

Executive Regulation 28-93AM, On-Site Water and On-Site Sewage Disposal Systems, is approved.

This is a correct copy of Council action.

Kathleen A. Freedman, CMC
Secretary of the Council

#485/pl

Attachment to Resolution 12-1503

HEALTH DEPARTMENT POLICY

Mound Systems

The Health Department realizes that in the agricultural zones of the County many property owners are not able to develop their land as permitted by current zoning, because the soils range from marginal to unsuitable for on-site, individual waste water treatment systems. Such land will not accept liquids at a rate which makes it permissible to construct septic systems under existing conventional tests and procedures.

In view of the foregoing, the Health Department has proposed amendments to its Executive Regulations for on-site systems, which among other things, include "Mound" septic systems, as approved by the State of Maryland as conventional systems.

Procedures for "Mound" testing must be as simple and economical as is feasible. To this end, a survey site plat for a proposed site must be submitted by a registered land surveyor. The landowner (or his agent) has the option to first try to obtain satisfactory percolation tests in the locations shown on the plat site submitted to and approved by the Health Department. This is the same process followed for conventional testing.

In the event a favorable test result is not obtained, the landowner (or the agent) may try other areas in the vicinity of the approved plan layout and in the event such new test areas appear promising or satisfactory, the Health department would be requested to conduct formal testing, which the Health department will attempt to schedule as quickly as possible. An appropriate site plan would be needed for the conduct of the tests, but an engineered and surveyed plan is not required until testing is complete. The plan would be submitted to the Health Department for approval.

The purpose and intent of this provision is identical to the purpose of the present practice as to conventional testing, that is, to eliminate the need to have repeated and costly surveys for site plat layouts for each percolation test attempt after an original failure, and to require only one additional final survey and certified plat after further testing has confirmed an acceptable location.

It is the purpose and intent of the Health department to render friendly and helpful assistance to citizen landowners to the end that they may use their property as permitted by zoning laws provided there is no significant health risk.

SMCK/cab
#475/p20

SUMMARY OF PUBLIC TESTIMONY RECEIVED BY MARCH 3, 2007, ON FINAL REPORT OF THE AD HOC AGRICULTURAL POLICY WORKING GROUP

ORGANIZATION REPRESENTATIVES

Speaker/Organization	Comments
Andrea Arnold Campaign Director Montgomery Countryside Alliance	Building Lot Termination (BLT) Program – Supports program and strict eligibility criteria; funding is critical and requests economic analysis to determine funding question. Transfer Development Rights (TDR's) – Supports expansion of receiving areas in commercial, industrial, Central Business District (CBD) and mixed use zones; additional TDR density should not exceed carrying capacity of public infrastructure. TDRs - Supports expansion of TDR program to municipalities. TDRs - Supports only single-family, agricultural or agricultural related uses on land with TDR easement. TDRs - Supports developing a tracking system. Child Lots – Supports 5 year minimum for ownership. Child Lots – Supports creation after parents death if specified in will Child Lots – Opposes exceeding base density with market lots. Sand Mounds - Opposes except for failed septic systems or legitimate child lots per 1980 Master Plan recommendations. Education – Supports expansion of initiatives in Ag Reserve; recommends county technical & marketing support for alternative and specialty farming. Private Institutional Facilities (PIFs) – Supports 8-10% limit on imperviousness for PIFs and exemption of this limit for agricultural uses. Conservation Design Standards -Supports need for standards and recommends existing agricultural advisory groups assist in developing. Nuisance claims - Supports legislation that protects farmers from these claims. 1980 Master Plan – Supports document that continues preservation of agriculture and integrity of Ag Reserve.

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ATTACHMENT 2

Ginny Barnes Environmental Chair West Montgomery County Citizens Association	Sand Mounds - Opposes use except for failed septic systems and legitimate child lots as per 1980 Master Plan recommendations. Sand Mounds – Believes intent of 1980 Master Plan to preserve family farming in Ag Reserve is endangered with sand mounds and agrees with 1980 Master Plan position on alternative septic technologies. Child Lots – Supports residency requirement and placing a cap on number of child lots allowed.
Jim Brown President Sugarloaf Citizens Association	TDRs - supports increasing receiving areas in industrial, R&D and CBD and commercial zones; tightening tracking policies and procedures. Child Lots- Supports current law as written. Child Lots - Opposes bonus density on top of child lots and requests appeal process for awarding additional child lots. Child Lots – Supports residency requirement longer than 5 years. Child Lots – Supports creation of lots after parents death if executed through will/other document accepted by court during probate. Sand Mounds – Supports recommendations in 1980 Master Plan that limits usage in RDT zoned land. BLT- Questions program's impact on potential farmers and farming sustainability. BLT - Recommends county adopt funding mechanisms based on Legacy Open Space and MALFP standards. Pending Legislation - Supports 15% impervious limit in RDT zone and additional review of PIFs is needed. Air Quality Issues – Supports ban on burning refuse or plant life or cutting vegetation for purpose of residential construction. Recommends that clear cutting of hedgerows and forests be subject of review process. Recommends educational programs to support traditional and alternative farming. Recommends county develop a comprehensive policy for diversified farming in Ag Reserve. Supports signage in Ag Reserve. Design Standards – Supports creation of standards.

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	Tenant Houses – Supports requirement that ownership stays with individuals employed on farms. Supports limiting number of tenant houses depending on type of agricultural uses.
Tina T. Brown Board Member Montgomery County Alliance	BLT program - Supports program and economic analysis to determine if feasible in commercial and industrial zones. Sand Mounds – Opposes except for failed septic systems or legitimate child lots per 1980 Master Plan recommendation. Child Lots – Supports longer child residency requirements. 1980 Master Plan - Supports plan language on equity issue of landowners through TDR program. Supports BLT program to protect equity.
Wade Butler Chairman Agricultural Advisory Committee	BLT program – Supports establishing program to preserve landowner equity as it provides another preservation tool for farmers and places perpetual easements on Ag Reserve land. 1980 Master Plan policies and assumptions are in conflict with current state and county laws.
Ann Cinkue Sugarloaf's Citizen's Association	Supports TDR program, longer residency requirements for child lots, 15 percent impervious limits, site-specific design standards, education program for traditional and non-nontraditional farming, and economic plan for diversified farming. Agrees with 1980 Master Plan position on alternative septic technologies.
Julius J Cinque President Peachtree Ridge Civic	BLT program – Supports program and efforts to create additional receiving areas in commercial and industrial zones. Sand Mounds - Opposes except for failing septic systems and legitimate child lots as per 1980 Master Plan recommendations. Child Lots – Supports residency requirement longer than 5 years Ag Reserve – Supports efforts to protect and preserve it.
Kim Coble Maryland Executive Director Chesapeake Bay Foundation	Ag Reserve – Supports as nationwide model preserving farmland and enhancing land's natural water filtering capacity. Child Lots – Supports limit on numbers. Supports longer residency requirement. PIF- Opposes in Ag Reserve. Should only be allowed if permitted by special exception and with extensive review. PIF- Supports water and sewer extensions/connections only for

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	existing PIFs and not for PIF expansion. Impervious Limits – Supports a limit not to exceed 8% and lower in special protection and environmentally sensitive areas. Sand Mounds – Opposes on RDT zoned land for new development. Sand Mounds - Supports only if conventional system could not work and only if serves legitimate housing/commercial needs of farmers and workers.
Lynn DeWitt Chesapeake Bay Foundation	See comments by Lee Epstein.
Steve Dryden Friends of Rock Creek Stormwater Partner Coalition	BLT – Supports program and requests a fiscal/economic analysis to create feasible way to fund program. Ag Reserve – Supports its continued existence. Undermining the Ag Reserve undermines commitment to protect the Bay.
Cynthia Eeg Boyds Civic Association	BLT Program – Supports establishing program and funding for it. Sand Mounds – Opposes expanded use except for failed septic systems and legitimate child lots. Child Lots - Supports residency requirement longer than 5 years. Child Lots – Opposes bonus density for market lots and child lots that exceed 1 dwelling unit/25 acres. Supports diversity in farming; marketing, placement and presentation of farmers markets should be enhanced. Supports educational recommendation of report.
Lee Epstein Director, Lands Program Chesapeake Bay Foundation	Ag Reserve – Supports as nationwide model preserving farmland and enhancing land's natural water filtering capacity. Child Lots – Supports limit on numbers. Supports longer residency requirement. PIF - Opposes in Ag Reserve. Should only be allowed if permitted by special exception and with extensive review. PIF - Supports water and sewer extensions/connections only for existing PIFs and not for PIF expansion. Impervious Limits – Supports a limit not to exceed 8% and lower in special protection and environmentally sensitive areas. Sand Mounds – Opposes on RDT zoned land for new development. Sand Mounds - Supports only if conventional system could not work,

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	and only if they serve legitimate housing/commercial needs of farmers and workers.
Amy Hart Manager, Well & Septic Programs Montgomery County Department of Permitting Services	Sand Mounds – Used commonly in Maryland since 1986. Montgomery County's Executive Regulations were revised in 1985 to include sand mounds. Sand Mounds - They cannot be approved for all sites,. as requirements for slope, permeability and other design features must be met. Sand mounds have excellent track record. Sand Mounds – Cites no documented failures among tested approved and constructed ones and provides a better level of treatment for septic tank effluent over traditional trench type systems Sand Mounds - Represents an important step environmentally in treatment of septic effluent but they can be costly and aesthetically unpleasing. Sand Mounds – Notes that installation is highly regulated by state and county and maintenance is similar to traditional septic system as tank should be pumped every 2-5 years and pump system repaired/replaced every 5-10 years.
Neal Fitzpatrick Executive Director, Audubon Naturalist Society Board Member Montgomery Countryside Alliance	Supports Agricultural Preserve and encourages Planning Board to support only recommendations that continue to protect it.
David Hauck Chair Sierra Club, Montgomery County Group	1980 Master Plan – Supports document that continues preservation of agricultural/open space and enhances the agricultural community to remain economically viable in Ag Reserve. TDRs – Supports report recommendations and 2002 TDR Task Force recommendations. TDRs - Supports additional receiving areas in floating, mixed use, and appropriate commercial industrial and R&D zones. Pending Legislation – Supports ZTA 05-23. BLT Program – Supports establishing program with public funding Sand Mounds and Alternative Use Systems – Permit in Ag Reserve only for replacement of failing systems or construction of home on

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	child lot; determine a detailed estimate of potential rooftops. Child Lots - Supports residency requirement longer than 5 years. Child Lots – All density should be used for child lots and additional market lots cannot be created. Supports County Council actions to deny water and sewer to PIFs and to limit the size of multi-use systems.
John Hughes President Green Industry Association	Ag Reserve - Supports agricultural viability through additional county support of farmers markets, direct sales to restaurants, farm tours. RDT Zone - Encourages land uses in this zone which use the land for agricultural purposes. Rural Service Zone – Supports expansion of zone for more agricultural, commercial and industrial uses.
Chris Kendrick President Dad's Gourmet LLC	Supports changes to Rural Legacy Program (interest free loans, grant monies) which will assist individuals wishing to farm. Requests that Planning Board adopt land use recommendations of Sugarloaf Citizens Association and For A Rural Montgomery (F.A.R.M.)
Del Lamiman Boyds Civic Association	States original purpose of child lots has been distorted, as has original intent of 1980 Master Plan re alternative septic systems. Crucial to deter fragmentation of agriculture.
Sewall E. Lee President Citizens to Preserve the Reserve	BLT Program – Supports establishing program and report recommendations for market based funding of program. TDR - Supports increasing number of receiving areas in non-residential zones. Pending Legislation - Supports recommendation that RDT zoned land with easements be limited to residential agricultural and agricultural uses only.
Dolores Milmoe Audubon Naturalist Society	BLT – Supports establishing program and requests fiscal analysis to determine mechanisms of funding. BLT's - Supports increasing number of receiving areas in commercial, business and research zones. Sand Mounds - Opposes expanded use except for failed septic systems and legitimate child lots as per 1980 Master Plan recommendations. Child Lots – Opposes exceeding base density with market lots.

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	Child Lots – Supports a cap on child lots. Child Lots – Supports residency requirement longer than 5 years. Child Lots – Opposes creation after death of owner. Child Lots - Opposes water and sewer service connections. Design Standards – Supports developing standards. Education – Supports outreach for Ag Reserve signs, promotion of alternative forms of agriculture, and placement and marketing of farmers markets. Rustic Roads & Forest Conservation – Supports greater protection of forests and hedgerows and policies that require authority and authority governing clear cutting. Impervious Limits - Supports 15% limitation. Tenant Houses - Supports stronger language. Right to Farm – Supports strategies on this issue.
Carol Oberdorfer President Dickerson Community Association, Inc	BLT program - Supports establishing program. Sand Mounds – Opposes except for failed septic systems and legitimate child lots as per 1980 Master Plan recommendations. Child Lots – Supports longer residency requirement than 5 years.
Alyce Ortuzar Resource Preservation Chair Sandy Spring – Ashton Civic Association	Echoes comments from Carol Oberdorfer and Boyds Civic Association. Poor economic policy to fragment agriculture with residences due to cost of services. Sand Mounds – Opposes use because they allow agricultural land to be developed that could not perc. Ag Reserve – Supports legislation to eliminate non-agricultural uses in the Ag Reserve; permitted services supported by Ag community should have impervious limits. Community recommendations on preservation of agriculture and natural resources often ignored.
Rabbi David Shneyer & Kehila Chadasha Am Kolel Retreat and Renewal Center	Sand Mounds – Opposes except for failing septic systems and legitimate child lots as per 1980 Master Plan recommendations. Child Lots – Supports residency requirement longer than 5 years. BLT Program – Supports and requests program to address equity issues. 1980 Master Plan – supports document as it preserves agriculture and land.

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Larry and Jo-Ann Schaudies Surmont Limited Partnership	Ag Reserve- Believes spirit and stated densities of 1980 Master Plan have been violated through use of sand mounds in Ag Reserve BLT Program – Supports program to address landowner equity.
Nancy Soreng League of Women Voters, Montgomery County	Supports preservation of Ag Reserve. TDRs Supports identifying receiving areas through master plan process and in CBD, transit station areas and town centers and in rezoning of floating zones for increased residential density. TDRs - Supports limiting use of TDR's for increased density of non-residential use in commercial, office and R&D development. Child Lots – Supports density be exceeded for child lots but not market lots. Child Lots – Supports 5 year residency requirement. Sand Mounds – supports limits on use in agricultural zones and requests county requirement that land purchasers be notified of sand mound presence and maintenance needs. TDR- Supports language to clarify TDR easement to limit land uses to agricultural and singe-family uses. BLT – Supports program if funds are available, and recommends non-residential use of 5th TDR to complement program.
Caroline Taylor For A Rural Montgomery	Viability of farming should be balanced with environmental sustainability. Child Lots should not exceed base density and water and sewer should not be extended into Reserve. Echoes Sugarloaf Citizens Association testimony.

INDIVIDUALS

Speaker	Comments
Krista Abbaticchio	Sand Mounds – Opposes if they increase residences and requests stronger guidelines on ability to use. Child Lots - Opposes bonus density for market lots and child lots to exceed 1 d.u./ 25 acres.
Kate Anderson	BLT program - Supports program and requests economic analysis to determine if feasible for receiving areas in commercial and industrial zones. Sand Mounds – Opposes except for failed septic systems or legitimate child lots per

	1980 Master Plan recommendation. Child Lots – Supports longer child residency requirements. 1980 Master Plan -Supports plan language on equity issue of landowners through TDR program, and preservation of agricultural land.
Roswitha Augusta	Supports protection of farmland and green space from fragmentation.
Maggie Bartlett	Supports stronger restrictions on child lots and sand mounds Supports protection of the Ag Reserve.
Krisna Becker	Sand Mounds - Opposes report recommendation except for failed septic systems and legitimate child lots as per 1980 Master Plan. Child Lots - Supports residency requirement longer than 5 years. Child Lots – Opposes bonus density for market lots and child lots that exceed 1 dwelling unit/25 acres. Child Lots – Requests a cap on number of child lots.
Mary Ann Chandler	Sand Mounds – Supports minority opinion limiting systems to 1unit/50 acres. Child Lots - Supports minority opinion lots for children only, not bonus density for additional market lots.
James S & Margaret M Coleman	Supports strengthening policies on sand mounds and child lots.
Diana E. Conway	BLT Program – Supports program. TDRs – Supports expanding receiving areas. Sand Mounds – Opposes use in Ag Reserve. Child Lots - Supports residency requirement. Child Lots –Opposes extra density for market lots in addition lot child lots .
Brenda and Tom Corbin	BLT- Supports program that will eliminate rooftops in Ag Reserve, and economic analysis of program if feasible. BLT - Program should address landowners' equity issue. Sand Mounds –Opposes except for failed septic systems and legitimate child lots Child Lots – Supports longer child residency requirement.
Teresa Cummings	BLT Program – Supports program. Sand Mounds – Opposes except for failed septic systems and legitimate child lots as per 1980 Master Plan. Child Lots – Supports a residency requirement longer than 5 years. Equity issue for farmers was addressed through TDR program. 1980 Master Plan – Continues to support document.

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Daniel Dean	BLT – Supports program and requests economic analysis to determine if feasible Sand Mounds –Opposes continued use except for legitimate child lots and failing septic systems. Child Lots – Supports a residency requirement longer than 5 years. TDR program should address landowners' equity issues.
Marilyn Emery	1980 Master Plan – Supports it and recommends closing of loopholes that undermine the Ag Reserve.
Cynthia Fain	Sand Mounds – Opposes continued use except for legitimate child lots and failing septic systems as per 1980 Master Plan recommendations. Child Lots – Supports cap on number of child lots in Ag Reserve. Child Lots – Supports a residency requirement longer than 5 years. BLT- supports program and requests further fiscal analysis.
Claude G. Fecteau & Family	BLT Program – Supports program. Sand Mounds – Opposes use of sand mounds or any non-proven alternative septic system in Ag Reserve. Child Lots – Supports only if resident is child of farmer. Ag Reserve – Supports its protection and conservation.
Lizou Fenyvesi	Child Lot – Requests longer residency requirement. Child Lots - Opposes bonus density for market lots in addition to child lots that exceed density of 1 dwelling unit/25 acres. Sand Mounds - Opposes use in Ag Reserve except for failing septic systems and legitimate child lots as per 1980 Master Plan recommendations. BLT program- Supports as method to preserve agricultural land.
Jim Fremont	BLT Program – Supports program that will eliminate potential for development and compensate landowners. TDRs - Supports maximizing number of receiving areas and using TDR's in commercial and mixed-use zones. Child Lots - Opposes market lots in addition to child lots that exceed base density. Sand Mounds – Supports stronger limitations. Ag Reserve – Supports preservation and protection of agriculture, associated jobs, open space and natural resources.
George French & Marcia Stickle	Child Lots – Increase the residency requirement above 5 years Child Lots - Opposes bonus density in addition to child lots that exceed 1 for 25 acres

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	BLT- Supports program and requests fiscal/economic analysis to determine if feasible for receiving areas in other zones. Sand Mounds – Opposes except for failing septic systems and legitimate child lots as per 1980 Master Plan recommendations. 1980 Master Plan – Supports plan as it prevents fragmentation and erosion of Ag Reserve.
Rudolph Gole	Sand Mounds - Opposes use in Ag Reserve. Ag Reserve – Supports continued protection and preservation.
Ellen Gordon	Sand Mounds – Opposes except for failing septic systems and legitimate child lots as per 1980 Master Plan recommendations. Child Lots – Supports a residency requirement longer than 5 years. Child Lots – Opposes bonus density for market lots in addition to child lots. Supports preservation and protection of farms and farmland.
Stephen G. Gunnulfsen	Sand Mounds – Opposes use in Ag Reserve, except for failed septic systems. Child Lots – Supports a 10-year residency requirement.
Thomas Gutierrez	Child Lots – Supports a 10 year residency requirement. Sand Mounds – Opposes use in Ag Reserve except for failing septic systems and legitimate child lots as per 1980 Master Plan recommendations.
Robert R. Harris	Sand Mounds- Supports use and notes alleged concerns about their usage are unjustified as few have been approved and those that are built work effectively. Sand Mounds – Cites Task Force on Septic Regulations and previous correspondence of Planning Board Chairman and Planning Director that supports sand mounds in protecting rural open space and farmland.
Linda France Hartge	BLT program - Supports and requests economic analysis to determine if feasible for receiving areas in other zones. Sand Mounds - Opposes report recommendation except for failed septic systems and legitimate child lots. Child Lots – Supports residency requirement longer than 5 years. BLT Program – Should address landowners' equity issue.
Melanie Kinney Hoffman	BLT program _ Supports creation of program as it neutralizes financial incentive to sell farmland. Sand Mounds – Opposes in Ag Reserve, seeks restrictions on their use.

	Child Lots – Opposes allowing market lots in addition to child lots that exceed 1 for 25 acres. Child Lots – Seeks residency requirement longer than 5 years.
Claire Howard	Ag Reserve - Supports strong protection. Sand Mounds – Opposes use unless needed for failing septic systems. Child Lots – Opposes increased density and seeks expanded residency requirement
Jane S. Hunter	Ad Hoc group did not address issues with viability of agriculture. Supports comprehensive economic development plan for diversified farming. Park & Planning – Questions Commission's authority to promote different standards for different property sizes. Ag Reserve- Believes addressing density issue through sand mound technology is dishonest. BLT Program – Believes program is flawed. Child Lots – Supports strongly monitoring child lots and recommends enforcement of safeguards specified when Ag Reserve was created. Ag Reserve – Supports preservation and promotion.
Eskin Huff	Child Lots – Supports stronger restrictions and longer residency requirement. BLT Program – Supports program and requests a fiscal/economic analysis to determine feasible way to fund the program.
Robert Jamison	Characterized issues as denial of property rights without just compensation and unjustified uses of police powers. Argued that 25 acres was sufficient critical mass to sustain agriculture and that child lots were partial compensation for previous downzoning. Stated that there was no necessity for design standards or "Ownership by Committee". "It's my scenic vista and not these dilettantes'." "I need to sell some dirt from time to time to buy stuff, such as a $300,000 combine, purchased recently". Stated that sand mounds were vastly superior to outflows of raw effluent as used to be experienced in Poolesville.
George Kephart	Ag Reserve – Supports preservation. Child Lots - Supports residency requirement longer than 5 years. Sand Mounds – Opposes use except for emergency situations or child lots. Sand Mounds – Opposes allocation of sand mounds based on acreage.
Jerome Klobukowski	BLT Program – Supports and requests economic analysis to determine if feasible for receiving areas in other zones. BLT Program –Requests program address landowners' equity issues. Sand Mounds – Opposes report recommendation except for failed septic systems.

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	and legitimate child lots as per 1980 Master Plan recommendations. Child Lots – Supports residency requirement longer than 5 years. Child Lots – Opposes allowing market lots in addition to child lots that exceed density of 1 dwelling unit/25 acres. 1980 Master Plan Supports document as it preserves agriculture and land.
Denise Jacklin	Child Lots – Supports longer residency requirement, limits on number of legitimate lots (per owner and reserve wide) and monitoring if child is living on the lot. Child Lots - Opposes bonus density as it is in violation of 1980 Master Plan. Sand Mounds - Opposes use of sand mounds except for farmers with failed septic system. Seeks limit on number sand mounds in Ag Reserve. Sand Mounds - Supports prohibition for new construction. BLT program – Supports and requests an economic analysis to determine if feasible in commercial and industrial receiving area zones. 1980 Master Plan - Supports document as bible of preservation for Ag Reserve.
Thomas and Katherine Leedy	Sand Mounds – Opposes except for failed septic systems and legitimate child lots as per 1980 Master Plan recommendations. Child Lots - Supports residency requirement longer than 5 years. Ag Reserve – Supports strong and continued protection.
Michael Mesa	Sand Mounds - Opposes except for failed septic systems and legitimate child lots as per 1980 Master Plan recommendations. Child Lot – Supports residency requirement longer than 5 years. 1980 Master Plan - Supports preservation of Ag Reserve as stated in Plan.
Emily Mintz	Ag Reserve – Supports preservation as critical to county's future. Sand Mounds – Opposes use except for failed septic systems. Child Lots – Supports cap on number of lots. Child Lots - Opposes market lots in addition to child lots that exceed the density. Child Lots – Supports longer residency requirement than 5 years.
Glen Pearcy	Ag Reserve- Supports preservation and protection. Sand Mounds - Opposes expanded use except for failed septic systems and legitimate child lots as per 1980 Master Plan recommendations. Child Lots - Supports longer residency requirement than 5 years. TDR Program -Supports 1980 Master Plan language on equity issue of landowners through TDR program and supports BLT program as next step to address equity.
Ellen Pearl	Supports limited sand mounds and strict child lot provisions.

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	Ag Reserve – Supports 1980 Master Plan that preserves and protects agriculture.
John Pentecost	BLT Program- Supports and requests economic analysis to determine if feasible for receiving areas in commercial and industrial zones. Sand Mounds - Opposes expanded use except for failed septic systems and legitimate child lots as per 1980 Master Plan recommendations. Child Lots - Supports longer residency requirement than 5 years. BLT program should address landowners' equity issues.
Heather Powers	Supports strongest restrictions on density of development related to sand mounds and child lots. Supports more farms and nature preserves, parks and other non-commercial or residential uses in Ag Reserve.
Mary Reardon	Sand Mounds – Opposes except for failed septic systems and legitimate child lots as per 1980 Master Plan recommendations. Child Lots – Supports longer residency requirement than 5 years. Child Lots – Opposes market lots in addition to child lots that exceed the density TDRs - Supports to address equity issues. Ag Reserve - Supports highest priority in protecting it.
William J. Roberts Esq	Child Lots – Opposes report recommendation for additional density of market lots. BLT Program – Opposes program, believes issues could be addressed through existing programs. RDT properties – opposes different standards for RDT properties based on total property acreage. Sand Mounds – Supports use of sand mounds.
William F Sheehan	Child Lots and Sand Mounds – Opposes report recommendations for both and sees each as way to "chip away" and develop Ag Reserve. Ag Reserve – Support and maintain principles which created it.
Douglas R. Sherwood	Ad Hoc Policy Group Final Report - Supports report recommendations in entirety and urges its approval.
Mary Anne Sonnenschein	BLT - Supports Program. Sand Mounds – Should only be allowed for legitimate child lots and failing septic systems. Child Lots – Supports residency requirement of more than 5 years.
Randall Sorenson	Sand Mounds and Child Lots – Opposes both and views as tools to fully develop land in Ag Reserve.

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	Supports protection of green space.
Anne T Sturm	Child Lots – Opposes exceeding base density. Child Lots – Supports cap on number of lots. Child Lots – Supports creation of lots if mentioned in parents' will. Sand Mounds – Opposes except for failed septic systems and legitimate child lots as per 1980 Master Plan recommendations. Clustering – Urges a fiscal policy that will encourage new development to placed out of agriculture land vistas. BLT Programs - BLT program - Supports program and requests economic analysis to determine if feasible for receiving areas in commercial and industrial zones. Density – Questions whether county is already too dense. TDR replacement policy may be necessary.
Richard W. Thoms	BLT Program – Supports establishing program. Child Lots – Supports minority opinion and maximum density limited to 25 acres. Sand Mounds – Supports strong limitations on use of this technology. Cluster Development – Supports only if all adjoining neighboring properties agree.
Carol Van Dam Falk	Sand Mounds – Opposes use in Ag Reserve. Child Lots – Opposes exceeding base density. Child Lots - Supports longer residency requirement than 5 years. TDRs – Supports increasing number of receiving areas.
Christopher Weaver	Supports - Protection of the Ag Reserve at all costs.
James Wilbur	Child Lots - Supports one lot per child per parent over all properties. Child Lots - Opposes exceeding base density with market lots and wants longer residency requirement than 5 years. RDT Zone - Opposes public water in zone. Sand Mounds – Opposes use for new development, use of sand mounds is only acceptable as emergency measure for existing housing.

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MCP-Chairman

#12

From: Larry Schaudies [LTS@surmont.com]
Sent: March 01, 2007 7:22 AM
To: MCP-Chairman
Subject: Concerning the Ag Reserver Task Force Report

21600 W. Offutt Rd.
Poolesville, MD. 20837
301-972-8800

Surmont Limited Partnership

February 28, 2007

mcp-chairman@mncppc.org

Dear Chairman Hanson and Commissioners:

My name is Larry Schaudies and I along with my wife Jo-Ann are Surmont Limited Partnership. A partnership we created here at 21600 W. Offutt Rd. in the Montgomery County Ag Reserve to train and board horses. We purchased this property in 1984 because it was in the Ag Reserve. The horse business v operate here as Surmont LTD is our primary source of income.

I was surprised when the Winchester Homes development "Stoney Springs" was able to get approval for development of an entire subdivision of McMansions based entirely upon sand mound technology. My acres will be entirely surrounded by this development. I firmly believe that we must consider the *spirit* o the master plan while interpreting it. Acknowledging that we all interpret things often to our own advant it is my opinion that the spirit of the Master Plan regarding the Ag Reserve was to limit density through t mechanism of disallowing building when a traditional perc was not obtainable. My interpretation of the Master Plan reference to *alternative septic technology* system is that alternative is being used as a noun defining a choice between two mutually exclusive possibilities. It is not being used as an adjective describing its proximity to traditional or established procedures. I do not support the position that the wo alternative is meant to be interpreted simply as meaning that once any septic technology becomes established and proven technology it can be used to develop in the Ag Reserve.

The bottom line is that we must decide in all honesty whether or not we want to keep the Ag Reserve. It seems dishonest to make up all these distortions to get around what the Master Plan clearly intended. So, we want the Ag Reserve or not? If not, then change the Master Plan. If we do want the Ag Reserve then must follow the master plan and limit density. We are free to explore new mechanisms such as the BLT proposal to address landowner equity. Let's be honest with ourselves, cluster developments of McMansi do not make sense in the Ag Reserve unless you truly do not care about the Ag Reserve and the Master P which defines it. If that is your position, then work to change the Master Plan. Let's not pretend we hav while conveniently ignoring it.

Sincerely,

Larry and Jo-Ann Schaudies

MCP-Chairman

From: dorothy.titman@hklaw.com on behalf of robert.harris@hklaw.com
Sent: February 28, 2007 2:45 PM
To: MCP-Chairman; MCP-Chairman
Cc: Carter, John; Murray, Callum
Subject: ON BEHALF OF ROBERT HARRIS/Ad Hoc Agricultural Working Group - Planning Board Discussion - March 1, 2007

I apologize for the lateness of this e-mail, and for the fact that I was unable to testify at the hearing on this matter last week, but I have a few comments regarding the sand mound issue that I hope you will consider. First, although I am aware that some activists in the Agricultural Reserve are opposed to the use of sand mounds, and to the recommendations of the Ad Hoc Working Group, there are many others who favor their use. I am aware that the vast majority of people speaking at the hearing last week came out in opposition for the discussions but the Working Group shows that there are many others, including many long-time land owners and farmers, who support the use of sand mounds. The Working Group fairly considered all perspectives and recommended an approach intended to address the various perspectives.

Second, the data reviewed by the Working Group show that the alleged concerns about the use of sand mounds are unjustified. Relatively few have been approved, those that have been have had little impact on the Agricultural Reserve and those that have been built have worked effectively.

Finally, and perhaps most importantly, there is an important missing component from the Working Group report. Just a few years ago, the County reviewed this same issue. In 1999, the County Executive, at the request of Councilmember Dacek, established a Task Force on Septic Regulations. The Planning Board also participated in those discussions. The Task Force, the Planning Board Chairman and the Planning Director at that time, all recommended the use of sand mound septic systems in the Agricultural Reserve because of their role in helping to preserve agricultural lands. The March 24, 2000 memorandum to the Planning Board, for example, recommends mound systems as a "first choice" septic disposal system in the Agricultural Reserve because they allow "for more creatively designed subdivisions which would be far more protective of both Rural Open Space and our most fertile farm field" (i.e. to enable clustering and the avoidance of development in prime agricultural areas where all the normal percs may lie). In his July 8, 1999 letter to the County Council, Chairman Hussman also indicated "the Planning Board supports the effort to achieve greater flexibility in septic regulations for these property owners" [property owners who have problems achieving their allowed density of 1 dwelling unit per 25 acres] and requested that septic policies be changed to provide more flexibility. Although some individuals may now be working hard to prevent the use of sand mounds, I do not believe their comments justify a complete reversal of documented positions from just a few years ago or of the recommendations of the new Working Group.

#12

MCP-Chairman

From: Ginny Barnes [ginnybarnes@juno.com]
Sent: March 01, 2007 7:10 AM
To: MCP-Chairman
Cc: ocemail@montgomerycountymd.gov; councilmember.andrews@montgomerycountymd.gov; councilmember.berliner@montgomerycountymd.gov; councilmember.elrich@montgomerycountymd.gov; councilmember.ervin@montgomerycountymd.gov; councilmember.floreen@montgomerycountymd.gov; councilmember.knapp@montgomerycountymd.gov; councilmember.leventhal@montgomerycountymd.gov; councilmember.praisner@montgomerycountymd.gov; councilmember.trachtenberg@montgomerycountymd.gov; ginnybarnes@juno.com
Subject: Ag Policy Task Force Report

West Montgomery County Citizens Association

Dear Mr. Hanson and Members of the Planning Board;

The Potomac Subregion is the western residential "green wedge" zoned as such to protect the public drinking water supply and buffer the Agricultural Reserve, creating a transition between the urban down county and our rural conservation lands. We know that development incursions into the Agricultural Reserve have a domino effect that starts with sewer and water policy and the number and type of lots allowed on any given parcel.

While sand mounds may be an approved septic use in residential zones, we know from experience they boost the capacity to develop where there is an intention to limit development as has happened here in the Potomac Subregion. They become a far more dangerous precedent when applied to the Agricultural Reserve. We support strictly limiting the use of sand mounds to legitimate child lots or failed septic systems. The 1980 Master Plan recommended against using alternative septic technology such as sand mounds and the firm intent of that Master Plan to preserve family farming is endangered by allowing such a use on Agricultural Reserve lands.

Further, we believe the use of child lots holds the constant potential for abuse and must have parameters placed on such use to insure they function as intended. We support the establishment of a residency requirement for child lots and placing caps on the number of such lots allowed. We commend the hard work of the Ag Policy Report members but we cannot support their recommendations on these issues.

Sincerely,

Ginny Barnes, Environmental Chair
West Montgomery County Citizens Association
10311 Glen Road
Potomac, Md. 20854
(301) 762-6423 -phone /(301) 762-9287 - fax

Good afternoon Chairman Hanson and members of the Board and staff. My name is Anne Cinque and I am here today to represent the Sugarloaf Citizens Association, a large and diverse group of up-county residents. The Association very much appreciates the work of the Ad Hoc Group and of the Planning Board for its time and concern for the Agricultural Reserve.

The Association's Board addressed and voted on the Final Report of the Ad Hoc Working Group. I present today the results of the Board's votes on the various issues. All of the opinions I express were explicitly endorsed by the Board's votes.

TRANSFERABLE DEVELOPMENT RIGHTS PROGRAM

The Board agrees with the recommendation for increasing TDR receiving areas to include industrial, R&D, central business districts and commercial zones. It recognizes that this issue is difficult and complex and will need research by the County to determine the impact on down county receiving areas where adding density may become an issue.

The Board recommends that the County tighten up tracking policies and procedures.

The Board strongly supports efforts to implement the recommendations in the report.

CHILD LOTS

The Board supports the current law as written and thinks it should be enforced as to the law's original intent. BONUS DENSITY ON TOP OF CHILD LOTS SHOULD NOT BE ALLOWED.

The five-year residency requirement should be longer. There should be other regulations imposed to prevent "flipping" of the property.

The Board supports the stand that the County must put into place an ENFORCABLE MONITORING MECHANISM that is not complaint based.

The Board supports the stand that child lots could be created after death as long as the intent to create the child lot is clearly documented in a will or other document accepted by the Court during probate.

SAND MOUNDS

The Board endorses the remarks and rationale outlined in "Comment 2" (page A-8-A-9) of the report. The comment states that the Functional Master Plan speaks strongly AGAINST ALTERNATIVE INDIVIDUAL SEWAGE DISPOSAL SYSTEMS USAGE IN THE RDT ZONE. The intent of the Master Plan is clear in its effort to use sanitation management tools to limit growth in the RDT zone and this intent should be maintained.

BUILDING LOT TERMINATION EASEMENT PROGRAM

The Board maintains that, if the program is adopted, the County needs to develop standards similar to existing State and County programs for use in considering landowner applications. These standards should be based on those in existing programs such as the Legacy Open Space.

PENDING LEGISLATION

The Board feels strongly that the issue of impervious surfaces and PIF need to be reviewed and new legislation drafted to address these issues in order to protect the Agricultural Reserve. The Board supports the 15% limitation on impervious surfaces in the RDT zone. The Board is AGAINST the adoption of the Ad Hoc Committee's recommendation on this matter.

ADITIONAL ISSUES

AIR QUALITY

The Board is very concerned about the air quality issues. The Board recommends that the burning of refuse or plant life or cutting of vegetation for purposes of building residences should not be allowed. The Board also recommends that clear cutting of mature hedgerows or forests should be subject to a review process, and that this requirement be well publicized and an agency assigned to have full enforcement powers. The Board questions why this issue is not part of Rustic Roads.

EDUCATION

The Board strongly believes that there need to be education programs in place to support and encourage both traditional and alternative farming in the Agricultural Reserve. The Board strongly recommends that the County be tasked with developing a comprehensive economic development plan for diversified farming in the Agricultural Reserve. Virginia has a program, which could serve as a model for the type of diversity needed in the training of the agricultural extension agents.

DESIGN STANDARDS

The Board believes that site-specific design standards should be in place as a means of maintaining the viability of the land for agriculture. It is recognized that these cannot be "one size fits all" standards.

TENANT HOMES

The Board believes that there should be new requirements to ensure that the ownership of tenant homes is not transferred to individuals not employed on the farm. The Board recommends that there should be a limit imposed on the number of tenant homes allowed and that this limit should be dependent on the type of agricultural use.

MCP-Chairman

From: Glen Pearcy [gpearcy@comcast.net]
Sent: February 20, 2007 2:31 PM
To: MCP-Chairman
Subject: Agricultural Policy Task Force Report

#12

Dear Chairman Hanson and Members of the Task Force:

I live in Barnesville, in the heart of the Agricultural Reserve. I am writing as one who firmly believes in the importance of this nationally recognized effort to preserve farming in Montgomery County. While I grew up a city boy, I enjoy living in this rural part of the county, and am thankful every day for the foresight our government had in creating the Agricultural Reserve and preserving farming and open space in Montgomery County.

The Ag Policy Task Force is to be commended for their hard work. The report is a good first step in addressing the issues which threaten the integrity of the Reserve. But in trying to structure compromises, the task force sacrificed some fundamental principles that were established over 25 years ago in the Master Plan, especially on child lots and on sand mounds.

I do not support the Task Force recommendation for continued use of sand mounds. Instead, we should adhere to the language and intent of the 1980 Master Plan which allowed alternative septic systems only for legitimate child lots or failed septic systems. Sand mounds have resulted in even more fragmentation of the land, contrary to the intent of the Master Plan. Without contiguous swaths of farm land, there will be no Ag Reserve.

I also believe in a residency requirement for legitimate child lots in the Reserve to preserve farming or the family core, but a 5 year residency requirement is not long enough to ensure that these lots are not simply investment mechanisms. I understand there is a need for balance between the landowners' equity and the intent of the zone to preserve farm land and open space. According to the Master Plan, the equity issue was to be addressed by the TDR (Transfer of Development Rights) program. It makes sense to explore the BLT proposal as a next step to address equity. However, the sand mound and child lots recommendations made by the Task Force give undue priority to development over preserving agriculture and are contrary to the 1980 Master Plan.

I appreciate your hard work and know you want the same as I do, the preservation of farm land and open space in Montgomery County. May you have the wisdom to meet those goals.

Sincerely,

—

Glen Pearcy
21900 Beallsville Road
P.O. Box 63
Barnesville, MD 20838
gpearcy@comcast.net

MCP-Chairman

From: Leedyt@aol.com
Sent: February 28, 2007 4:56 PM
To: MCP-Chairman
Subject: Urge Longer Child-Lot Holding and Stricter Sand Mound Policy

#12

February 28, 2007

The Maryland-National Capital Park & Planning Commission
Montgomery County Planning Board
8787 Georgia Avenue
Silver Spring, MD 20910
Via e-mail to: mcp-chairman@mncppc.org

Subject: Urge Longer Child-Lot Holding and Stricter Sand Mound Policy

Dr. Hanson and Members of the Planning Board:

The Policy Working Group is to be commended on the *Final Report Of The Ad Hoc Agricultural Policy Working Group* – it contains thoughtful and insightful recommendations. However, I believe that the report strays from the intent of the 1980 Master Plan on the issue of sand mound technology ("alternative septic systems"). As it stands, land in the Agricultural Reserve will be lost to development through the use of sand mounds as described in the *Report*. As I understand it, the Master Plan made provision for sand mounds only for legitimate child lots or those systems that were in place and failed in use. This should continue to be the policy of the Board.

In addition, the Report recommends a child must own the child lot dwelling for five years. This is not a long enough period of time to discourage the use of the land as a simple investment for the future. A time period of at least 10 years would be more appropriate to help preserve the land for agricultural use. I would recommend that the Board consider a longer time frame for the ownership of child lot.

I hope that you will take these comments to heart. The Agricultural Reserve continues to be a successful experiment in striking a balance between public benefits by the use of private markets. We must continue to protect the approximately 40,000 acres of Reserve if future generations are to benefit from this experiment.

Thank you for your attention to this matter.

Thomas and Kathryn Leedy

/s/

15720 Comus Road
Clarksburg, MD 20871

A-26

MCP-Chairman

From: Annets1@aol.com
Sent: February 28, 2007 10:25 AM
To: MCP-Chairman
Subject: Ag. Policy Task Force Report

#12 RECEIVED
FEB 28 2007
OFFICE OF THE CHAIRMAN
THE MARYLAND NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

Dear Chairman Hanson and Planing Board Members'

My name is Anne Sturm and I have lived on Peach Tree Road near Barnesville since 1969. I am writing to thank you and the Ag. Policy Task Force for all your hard work in reviewing the development policies for the Agriculture Preserve and to express my thoughts on some of the proposals.

I urge you to not change the child lot provision using the "bonus density" recommendation. There should be a cap on the number of child lots. If a farmer has 5 children, then he gets 5 child lots regardless of his acreage. If a farm family owns multiple parcels of land, they should only get one child lot per child period.

I do support the idea of having child lots be still in effect after death, providing the owner mentions it in their will. I personally felt a great pressure to decide what to do about my three child lots. You never know what paths your children will follow. In this area, I can picture a child having a full career in the government and then deciding they want to "come home" and start a truck farm. By having the child lot die with the original owner, one prevents this type of second or third career plan. And then one might ask, well the child can live in the original farm house. But, if one has three children and only one wants to farm, there is the equity issue. By letting the owner place intent in the will, one is able to work out what individually satisfies each farmers unique family situation.

Please keep the sand mound policy faithful to the 1980 Master Plan. The only time I would like to see Sand Mounds used is when another one of my pet hopes could be put into practice. I dream of the Ag. Preserve always "looking" like an area where farming is going on. The VISTA would be CROPS as the vista in Hilton Head is still LIVE OAKS. We are losing the vista because of clustering. A development on farm land will put five houses on the front-road side of a farming parcel. The rest of the land (out of view) is kept in farming. This is a terrible loss. Please consider doing some kind of fiscal policy that would encourage (even require) that where possible the "development" will be out of site and the vista will be the agricultural land. This is more expensive for the developer (a tax break should help here) but the end result is better for privacy for the development and scenic soul food for the people passing by. If the "out of sight" land does not perc- and the road side land does perk, this is the one time that I would like to see Sand Mounds permitted. Otherwise, we lose completely. Development will take place where it "percs"-- and the vista is destroyed by houses blocking the view of the open land.

I would urge you to explore the BLT proposal to address the equity issue. There should be more study to determine if this is feasible for receiving areas in commercial, industrial zones. The question must be asked -- is the county too densely built as it is? Study must go into answering this question. If infrastructure cannot support the existing development, one cannot pile on more. If the answer is that we have too much density in all receiving areas, another solution must be found to replace the TDR policy.

Thank you for your consideration and time.

Sincerely,

Anne T. Sturm
P.O. Box 341
Barnesvillle, Md. 20838

MCP-Chairman

From: George Kephart [daboat36@hotmail.com]
Sent: February 27, 2007 12:03 PM
To: MCP-Chairman
Cc: Perry2845@aol.com
Subject: Ag Policy Task Force Report

#12

Dear Chairman Hanson and Commissioners,

My name is George O. Kephart. I live at 18200 Beallsville Road, Poolesville, Md. on a 135 Acre farm. When the Ag Reserve was adopted in 1979, I was the Commissioner who cast the deciding 3 to 2 vote in favor much to the displeasure of the real estate and some farm interest who were present. Actually because I lived on a farm and was affected by the vote, I had to get a ruling from the Generasl Counsel before I could vote. Happily he said I could vote.

I have been very proud of that vote ever since. The Ag Reserve has become to have national significance and to be a treasure for Montgomery County. The Ag Policy Task Force is to be commended for their excellent report. They have obviously worked very hard and carefuilly.

Unfortunately there are several items where they have gotten away from the intent of the Board when we adopted the plan. Child lots were clearly intended to be for the purpose of preserving farming in to future generations. We wanted to make it possible for children to stay on the farm. We did not provide for child lots so that they could be exploited as additioonal development in the Reserve as some land owners have done. I think the Task Force recognized this but they have not put enough restriction on their use. Five years is too short time to require ownership before selling.

At the time we adopted the plan sand mounds and other alternative sewage systems were still being studied by the County and had not been approved for use. I well remember the battle we had to get sewage at Little Bennet Park. But I am sure the intent of the Board was that alternative syatems were only to be used in emergency situations and for child lots. We were certainly not intending for them to be used to provide for development of the Reserve. I do not think the Task Forces plan to allocate sand mounds on an acreage basis is a good idea and should not be adopted.

One of the most important coniderations in any planning for the Reserve is Item 5 of the Task Force General Principles - Fragmentation of farmland should be avoided. Contiguous areas of farmland are desirable [I would say essential] for traditional agriculture. Please keep this in mind when thinking of sand mounds or other alternative systems.

Thank you for your time.

Sincerely,

George O> Kephart

With tax season right around the corner, make sure to follow these few simple tips.
http://articles.moneycentral.msn.com/Taxes/PreparationTips/PreparationTips.aspx?icid=HMFebtagline

MCP-Chairman

From: Emily Mintz [mintz@cavtel.net]
Sent: February 27, 2007 11:10 AM
To: MCP-Chairman
Subject: Make sure the Agricultural Reserve rules will protect it

#12

Dr. Hanson,

I am a realtor with Long & Foster Real Estate, and, although I am writing as a citizen resident of Montgomery County, I am also familiar with the economic growth and development pressure on our county. The preservation of the Agricultural Reserve is a critical issue for the future of this county.

As you review the recommendations for the future of the Ag Reserve, please continue to bear in mind its original purpose. From its inception, the Reserve was to promote family farming, reduce development, and contain sprawl in the parts of the county that have infrastructure to support it. It is critical to guarantee that any new policies or regulations do not have "back door" loopholes that can be used to undermine those goals.

Two of the proposals from the Task Force may have that undesired effect.

1. Sand mound septic fields have been used (and would be in the future) to create development in areas that were not intended to support it. This methodology must be prohibited in the Ag Reserve unless it is used to replace an existing failing system.
2. Child lots are intended to maintain family units on family farms, with long-term use as the goal. Five years is not, in any real estate sense, considered long-term. The child lot exceptions must require true long-term residency for the family member. There should be a limit on the number of child lots permitted, and there is no rationale for granting any kind of additional density or marketable subdivision as part of the child lot exception.

It is well known that, given an opportunity, development will follow any opening provided. Please ensure that loopholes are not available to the development community or to the owners of acreage (who have the TDR program to compensate them for their economic issues) so that our valuable open space can be preserved.

Emily Mintz
6712 Sulky Lane
North Bethesda, MD 20852
(301) 468-8818

A-30

TO: Chairman Royce Hanson and the Planning Board
RE: Loss of Agriculture and Other Problems with the Master Plan Process
FROM: Alyce Ortuzar, Ashton/Sandy Spring Civic Association

In my February 22 testimony before the Planning Board, I alluded to problems the Ashton/Sandy Spring Civic Association encountered during the Ashton/Sandy Spring 1998 Master Plan that really represent most of what is wrong with the master plan process. I would like to elaborate on those problems and how they relate to preserving agriculture, vital natural resources, and affordable housing in the county.

Our 1998 Master Plan includes most of what a consensus of the community did not want and little of what the community said were important quality of life factors. Developers, who are land speculators, had many seats at the table and disproportionate influence, when is it questionable whether these land speculators should be at the table at all. Speculators who invest in stocks receive no such privileges or preferential treatment in relation to the entity/company/product they have invested in.

Community testimony submitted to Park and Planning documents opposition to most of what is in that 1998 master plan. P&P staff, especially Margaret Rifkin, were especially accommodating to developers, and displayed no appreciation for affordable housing, local agriculture, and vital natural resources such as roadway trees, open space, rural attributes, and natural vistas.

Older affordable housing in Ashton and Sandy Spring continues to be rezoned commercial or torn down, and so many trees the community fought to preserve have been removed along Route 108 and New Hampshire Avenue. We are losing trees throughout the County at an alarming rate. These P&P policies reflect an arrogance and ignorance that are unacceptable. The so-called Ashton Mall is completely inappropriate for that community and site, and represents battles residents should never have to engage in and certainly not lose.

Currently, there is a rezoning request for an older beautiful home on Route 108 near Bentley Road in Sandy Spring, certainly more affordable than building a new home. The request is to replace the home with a school. That is an inappropriate use for that property, and the permission from P&P to rezone and destroy these older homes needs to stop.

Alyce Ortuzar
P.O. Box 312
Ashton, MD 20861-0312
(301)774-6617
farmparity@starpower.net

TO: Chairman Royce Hanson and the Planning Board

Testimony Presented to the Planning Board on February 22, Opposing Sand Mound Recommendations in the Agricultural Policy Working Group Recommendations

My name is Alyce Ortuzar. I have lived in the Ashton/Sandy Spring area for eighteen years. I am a medical and social science researcher, writer, and editor. My comments focus on opposition to sand mounds in the Ag Reserve and elsewhere in the County.

As Resource Preservation Chair of the Ashton/Sandy Spring Civic Association, the use of sand mounds in Ashton directly eliminated agriculture, despite efforts by a majority of residents during our last master plan (1998) to preserve the agriculture that remained. The evidence is irrefutable. Sand mounds permitted residential development on ag land that did not perc and that would have remained agricultural, but for the permitted use of sand mounds, which resulted in rezoning the ag land residential and developing it.

Research documents that agriculture, especially sustainable agriculture, is a revenue enhancer to local and state coffers and generates tertiary economic spin-offs, such as small scale slaughtering and processing opportunities that create decent paying jobs. Expanded on-farm processing opportunities also dramatically increase profits to farmers that then strengthen communities and government revenue streams. Agriculture returns more in revenue than it requires in infrastructure. Residential development does not pay for itself and drains resources, requiring enormous infrastructure expenditures.

County Council supporters of the sand mound legislation characterized it as beneficial to agriculture. Yet I could not find the word agriculture anywhere in the legislation. What were they thinking? The legislation is a blank check for developers and should be repealed. Sand mounds eliminate natural mechanisms that balance the preservation of natural resources and agriculture. Anyone who really values the contributions and importance of agriculture should oppose sand mounds. There are superior alternatives to failing septics that do not accommodate increased density or development. One such company is in Westminster. As a Board Member of the Maryland Organic Food and Farming Association, I have spent a significant amount of time studying and participating in on-site visits to view many of these twenty-first century technological innovations. The EPA Web site has numerous examples of these options.

I was also stunned to find so many permitted nonagricultural uses in the legislation creating the Ag Reserve. What were the policy makers thinking? That legislation should be rewritten to eliminate nonagricultural uses. Any services a consensus of the ag community agrees should be permitted, should have serious restrictions, such as the size of impervious surfaces.

I urge the Planning Board to take into consideration all of these important criteria when arriving at final recommendations for the ag reserve and for agriculture elsewhere in the County. Thank you.

Alyce Ortuzar
P.O. Box 312

MCP-Chairman

From: Hart, Amy [Amy.Hart@montgomerycountymd.gov]
Sent: February 28, 2007 2:01 PM
To: MCP-Chairman
Cc: Conlon, Catherine; Wong, Stan
Subject: FW: Ag Policy Task Force

#12

Dear Chairman Hanson,

I would like to provide you with some additional background information regarding the use of sand mounds from the County's experiences. Sand mounds have been studied and used across the nation since the 1970's and there are no documented sand mound failures in Montgomery County. In addition, the State of Maryland Annotated Code of Regulations and the County Executive Regulations recognize sand mounds as conventional technology.

Please see the attached document that outlines some general information on sand mounds for your use.

Amy Hart, Manager
Montgomery County Department of Permitting Services
Well & Septic Program

SAND MOUND SEWAGE DISPOSAL SYSTEMS

A sand mound is an on-site sewage disposal system that is elevated above the natural soil surface in a suitable sand fill material. A gravel filled bed is constructed in the sand fill and effluent from a dual compartment septic tank is pumped into the gravel bed through a pipe distribution network. The effluent then trickles down thru the sand. The sand serves to filter the effluent very effectively. A grassed soil covering is then placed over the sand. The result is low, flat, rectangular "mound" on the property. The average size mound is 33 ft. wide x 90 ft. long x 4.5 ft. in height.

Sand mounds are used commonly throughout the state and the nation. Maryland began to explore the use of mound systems in the early 1980's. Some previous experiments with mounds, including several systems built in Montgomery County in the late 1970's, showed promise over older, traditional, underground "trench" systems. These mound systems could be placed on properties with adverse soil conditions, such as shallow bedrock or perched water tables, and still function satisfactorily. By 1985 the Maryland Department of the Environment was publishing guidelines for sand mound construction. Formal inclusion in the State of Maryland Regulations (COMAR) as a conventional sewage treatment method, was accomplished in 1986.

Sand mound use in Montgomery County began in the very late 1980's with a few established properties as repairs for failing existing systems. Initially, there were no proposals to subdivide properties using sand mounds. In 1994, the County's Executive Regulation, dealing with sewage disposal, was revised and sand mound requirements were included. The State protocol for testing, design, and construction was adopted with little change.

The mound system can sometimes be used to overcome site limitations which would preclude the use of other traditional, underground trench type sewage disposal systems. Such site limitations include high water tables and shallow soils over bedrock. Sand mound systems cannot be approved for all sites, the requirements for slope, permeability, and other design features have to be satisfied. However, there are properties that can develop using mound systems that could not be developed using conventional underground "trench" systems.

The "track record" with mounds has been excellent. The success rate for mounds is at least as high as it is with underground systems. Among those properties that have been tested, approved, and constructed in accordance with the current requirements there are no documented failures. This includes approximately 40 mound systems constructed for new dwellings.

Further, it is widely accepted that mound systems provide a better level of treatment for the septic tank effluent over traditional trench type systems. This occurs primarily by virtue of the filtration effect of the sand above the soil. The sand provides a medium where millions of aerobic bacteria grow which have the ability to digest sewage effluent very effectively. In addition, the application of the treated effluent at the level of the topsoil makes maximum use of the available soil for further renovation. Sand mounds represent a valuable and important step forward, environmentally, in the treatment of septic effluent.

The disadvantages of the mound system include costs and aesthetics. The average cost of mound systems constructed in the county is $20,000-$25,000. Some owners my find this system aesthetically objectionable due to the construction of the mounded area in the yard.

Sand mound installation is a highly regulated activity. Sand mound engineering plans are detailed and site specific. Sand mound systems are reviewed and permitted and inspected by the local County government agencies throughout the State. Sand mound contractors must pass a State approved course on their installation. A good reference on sand mounds is the "Design and Construction Manual for Sand Mound Systems" published by the Maryland Dept. of the Environment.

Maintenance of sand mound systems is very similar to that of traditional septic systems. The septic tank should be pumped every two to five years depending on use. The pump system will need repair and/or replacement approximately every 5-10 years.

MCP-Chairman

From: RUDOLPH GOLE [rudygole@msn.com]
Sent: February 27, 2007 8:13 PM
To: MCP-Chairman
Subject: AG RESERVE

#12 RECEIVED
FEB 28 2007
OFFICE OF THE CHAIRMAN
THE MARYLAND NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

I am a retiree of the M-NCPPC. I live in the heart of the Ag. Reserve. Please continue to protect this vital open-space area. In particular, you must not allow the sand mound septics to provide development in the Ag Reserve.
Rudy Gole, Poolesville

MCP-Chairman

From: Ellen Pearl [pearljam@erols.com]
Sent: February 27, 2007 5:58 PM
To: MCP-Chairman
Subject: Task Force Report Comment

#12

Dear Mr. Hanson,

The sand mound and child lots recommendations made by the Task Force give undue priority to development over preserving agriculture and are contrary to the 1980 Master Plan. I am against any further developments that would impact your original intention of the conservation and preservation of our Sacred Places. Thank you.

Yours sincerely,

Ellen Pearl
15500 Comus Road
Clarksburg, MD
301-972-4554

ATTACHMENT 4

FINAL REPORT

OF THE

AD HOC AGRICULTURAL POLICY WORKING GROUP

MONTGOMERY COUNTY, MARYLAND

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AD HOC AGRICULTURAL POLICY WORKING GROUP

Members

Elizabeth Tolbert, Chair

R. Scott Fosler, Vice Chair

Wade Butler

Bo Carlisle

Margaret Chasson

Jim Clifford

Nancy Dacek

Jane Evans

Robert Goldberg

R. Thomas Hoffmann

Jim O'Connell

Wendy Perdue*

Michael Rubin

Pam Saul

Drew Stabler

William Willard

* *Member until August 2006*

Montgomery County Council Staff

Marlene L. Michaelson, Senior Legislative Analyst

Amanda Mihill, Legislative Analyst

Jeff Zyontz, Legislative Attorney

Shondell Foster, Research Associate

Carol Edwards, Legislative Services Coordinator

County and State Staff

Jeremy Criss, Montgomery County Department of Economic Development

John Zawitoski, Montgomery County Department of Economic Development

Alan Soukup, Montgomery County Department of Environmental Protection

Karl Moritz, Montgomery County Department of Planning

Callum Murray, Montgomery County Department of Planning

Doug Tregoning, Montgomery County Cooperative Extension

Jay Beatty, Montgomery County Department of Permitting Services

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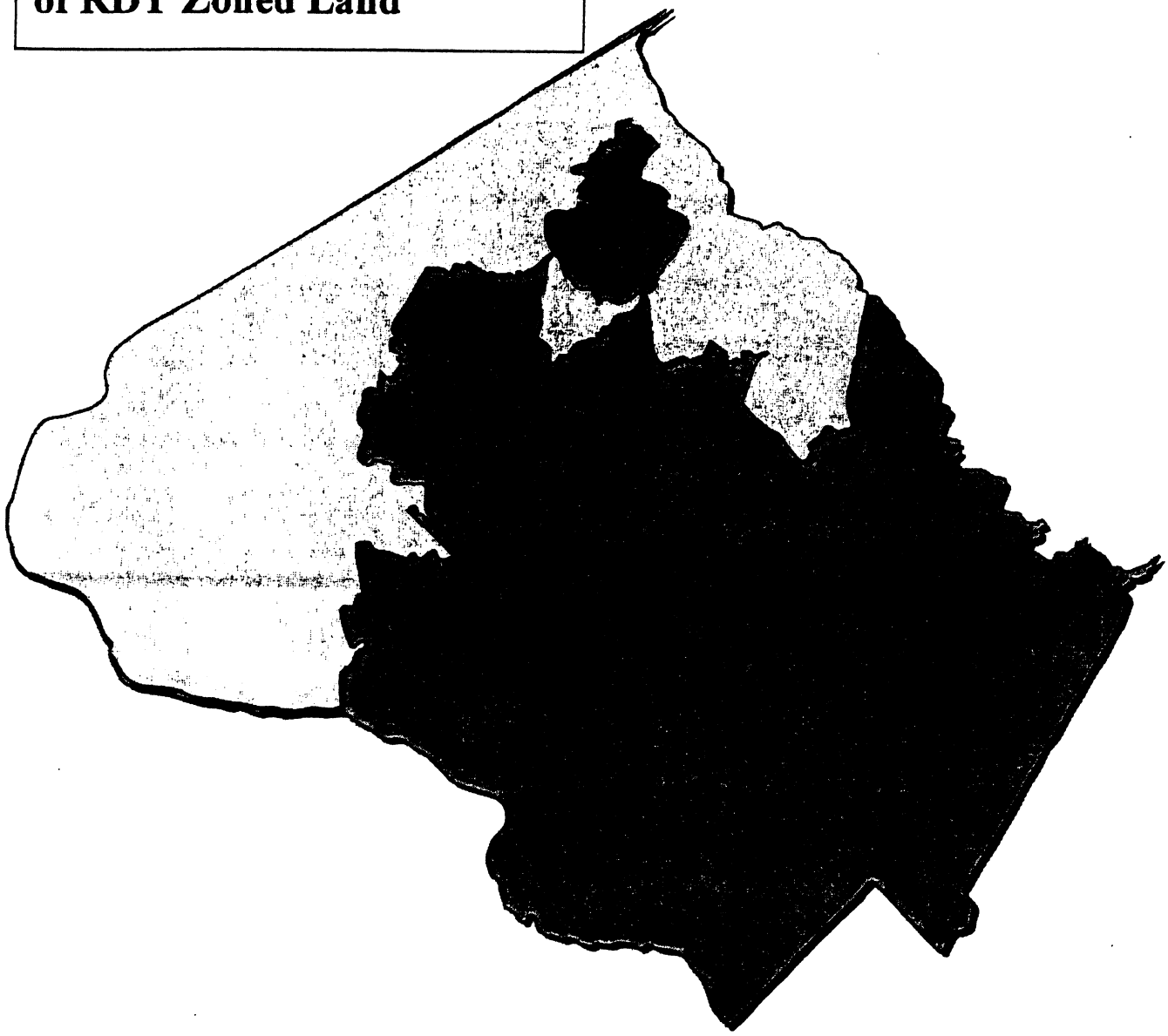

INTRODUCTION AND SUMMARY OF RECOMMENDATIONS

I. INTRODUCTION

In 1981 the County Council established Montgomery County's Agricultural Reserve to preserve farming, provide open space, and protect the environment. The County's Functional Master Plan for the Preservation of Agriculture and Rural Open Space limited residential development in nearly one-third of the County in order to achieve these goals. The Agricultural Reserve was visionary and bold at that time, and we believe that the Council's goals behind establishing the Agricultural Reserve remain entirely valid today. The Agricultural Reserve is regularly cited throughout the United States as the country's leading model for agricultural, open space, and environmental preservation.

Over the ensuing quarter century, Montgomery County has changed enormously, in population size and diversity, economic activity, and land use. The Agriculture Reserve, meanwhile, has succeeded in preserving agriculture in the County. The mix of agriculture, to be sure, has evolved. For example, dairy farming has dwindled while specialty farms have increased in number and value. This evolution has only confirmed that agriculture can be preserved as an integral part of a modern, vibrant, and diverse metropolitan region. Over this same period, public awareness of environmental issues and threats to natural resources has grown exponentially, so that today the Agricultural Reserve is widely viewed as an environmental oasis in a sprawling metropolitan area. Citizens not only recognize the intrinsic value of agriculture, but the extraordinary benefit of preserving open countryside for every citizen to enjoy and experience, and of an environmental asset that helps preserve the healthfulness of our water supply and of the air we breathe. There seems to be a broad consensus throughout Montgomery County that the Agricultural Reserve is worth preserving and sustaining.

At the same time, the Agricultural Reserve is under stress. Especially since the turn of the century, pressure for residential development in the Reserve has increased. This is not surprising, given the amount of open acreage it encompasses and its uniqueness in the metropolitan area. The viability of the Agricultural Reserve, and perhaps its very survival, is threatened by extreme development pressures, proposals for new interstate highways, and increasing land values in the greater Washington metropolitan area. While public support appears to remain favorable, there are concerns that many citizens of the County, especially those who live in more distant urban areas, are not fully aware of the importance of the Agricultural Reserve to the life and character of Montgomery County. These mounting stresses are reflected in the increasing number, complexity, and emotional intensity of debates before the Council and Planning Board regarding appropriate public policies for agricultural preservation. For example, sanitation policy (including whether and when to permit sand mounds in lieu of traditional trench sanitation systems), the viability of the Transferable Development Rights (TDR) program, and the ambiguity of the child lot zoning exception, have all recently come before the Planning Board or Council.

In response to these trends, the County Council appointed the Ad Hoc Agricultural Policy Working Group in April 2006 to "provide comprehensive advice on ways to ensure the long-term protection of the Agricultural Reserve and preservation of our agricultural industry." In particular, the Council charged the Group with addressing a cluster of specific and inter-related issues by performing the following tasks:

- Undertake a thorough review of pending and potential legislation concerning the Rural Density Transfer (RDT) zone, the child lot program, the proposed Building Lot Termination program (BLT), uses of sand mound technology, and technical tracking and use issues associated with the TDR program;
- Assure that this review provides a clear understanding of how the individual proposals interact with each other and considers the potential for unanticipated negative consequences;
- Proceed in a way that respects the concerns of all stakeholders; and
- Update the Council on its progress and submit a final report to the Council within calendar year 2006.

The 15 members of the Group represent very different backgrounds and philosophies about the Agricultural Reserve and property rights. We are farmers, property owners, representatives of organizations, former elected officials, and citizens. Even with these differences, however, we share both a belief that the Agricultural Reserve is valuable to all the County's citizens and a common interest in preserving agriculture in Montgomery County. This positive approach created a productive and conciliatory environment in which we sought consensus on creative and practical solutions to difficult problems. Part of the process of finding common ground led us to identify principles on which all members could agree, and which provided the underlying rationale for our recommendations.[1] These principles include the following:

GENERAL PRINCIPLES

1. The economic viability of the agricultural industry is critical to the preservation of the Agricultural Reserve.
2. The open space and environmental protection goals of the Master Plan are unlikely to be achieved unless we can sustain the health of agriculture.
3. Agriculture in the County has and will continue to evolve and requires an environment that recognizes that fact.
4. The equity farmers hold in their property is not only important to them personally but an important asset for their businesses, and consequently an important factor in the success of the agricultural industry in the County.
5. Fragmentation of farmland should be avoided. Contiguous areas of farmland are desirable for traditional agriculture.
6. If the Agricultural Reserve is to survive permanently, policies must protect both farming and farmland, while fostering a deep commitment to stewardship that looks beyond current generations and current landowners.

[1] See Comment 3 by Wade Butler, Pam Saul, Drew Stabler, William Willard, Bo Carlisle, and Jane Evans in Appendix II.

We applied these principles in developing our recommendations in a consistent manner. For example, in order to protect the equity and business viability of farmers, we concluded that any new program or policy to discourage development must be evaluated in terms of its impact on farmers' financial viability. This would mean that programs that provide equity in lieu of development (such as building lot terminations or transferring development rights in exchange for payment) are an important means of preserving this equity. To successfully implement such programs, the County government should identify options for funding them either through the public sector (e.g., farmland preservation tax, general obligation bonds) and/or through the private sector (e.g., through an enhanced TDR program).

While we focused on the specific cluster of tasks given us by the Council, we also examined a few additional issues, including whether there is a need for right-to-farm legislation, design guidelines, or educational programs. We took seriously the charge to look comprehensively at issues. We made every effort to understand the inter-relationship of issues raised by pending legislation and proposals. We also attempted to identify the full range of issues related to the Agricultural Reserve, both to understand comprehensively the specific and interrelated tasks the Council assigned us, and to build a checklist of issues that other entities will need to address if the Agricultural Reserve is to survive and flourish.

The Group worked hard to achieve consensus, which was possible on most issues we addressed. Our recommendations do not always reflect an ideal solution from any one member's perspective, but in all but one case offer proposals that are generally acceptable to the entire Group. Our intent was not to paper over important differences, but rather to acknowledge them and attempt to find a consensus position that respected each individual position while best addressing the goals of the Agricultural Reserve. For example, the issue of clarifying the acceptable uses of sand mounds proved to be especially challenging, as it brings into sharp relief the debate between different perspectives which are difficult to reconcile. Some Group members believe that sand mounds offer an alternative method of private sewage treatment that was not envisioned by the County Council when it created the Agricultural Reserve. Other Group members believe that sand mounds are an entirely legitimate form of sanitation technology whose use should not be restricted. Still others believe that the Master Plan intends to limit the use of alternative individual systems, such as sand mounds, to special circumstances and that sand mounds should not be allowed to increase residential development in the Agricultural Reserve. Our intent for each issue was to clearly define the factual background, the policy options, and the differences in perspective, as well as the position taken by the Group. Dissenting opinions and comments are indicated by footnotes in the text and are included at the end of the Report in Appendix II. Comments by Group members referencing specific recommendations or statements in the Report are indicated by footnotes in the relevant chapter while general comments are indicated by footnotes in this Introduction.

Notwithstanding our clear and acknowledged differences, we all strongly support the continued protection of the Agricultural Reserve and the future of farming in the County. Collectively, we believe the Group's recommendations will better protect the Agricultural Reserve, while not asking any single party – whether property owners in the Reserve or other County residents and taxpayers – to unduly bear the cost of this protection.

KEY THEMES

If implemented, we believe our recommendations will accomplish the following:

- Allow the continued use of child lots intended for the children of farmers (but with stricter assurance that those lots will be owned by the children of the property owner, and will not prevent future use of a significant portion of the property for farming);
- Limit the use of sand mounds, decreasing their potential use by as much as one-fourth;
- Create a BLT easement program to create an incentive to further reduce residential development in the Agricultural Reserve while providing an acceptable level of equity to property owners, giving them the resources that may be needed for farm investment; and
- Improve the TDR program, including expanding it to commercial and industrial zones (including Research and Development zones), mixed-use zones, and floating zones, and creating a non-residential use component to, among other things, help support the BLT easement program.

The Council asked for our advice on the interaction among the specific cluster of issues they asked us to address. We believe our recommendations on these issues form an integral package that needs to be viewed, and should be implemented, in its entirety. The recommendations attempt to strike a balance by reducing the total amount of development possible in the Agricultural Reserve, while at the same time creating new opportunities to compensate landowners for further limitations on development. For example, we strongly believe that funding of the BLT easement program, which would compensate property owners as an incentive to enhance agricultural preservation and prevent development, is critical as an offset to the restrictions we recommend for sand mounds. The BLT easement program, moreover, could significantly reduce the use of sand mounds.

We caution, however, that this important but limited cluster of issues also needs to be placed in an even broader context that accounts for still other critical issues that affect the viability of the Agricultural Reserve. We addressed some of these issues, and identified a range of others that we did not have time to address. However, we urge the Council, Executive, and Planning Board to carefully consider this broader range of issues, even as they act on the more narrow cluster of issues on which we focused. We especially urge an expanded education initiative for all County residents on the importance of the Agricultural Reserve to Montgomery County and the Washington Region in order that we not lose the critical public support throughout the County that provided the foundation for the Council to establish the Agricultural Reserve and to sustain it over the past 25 years.

THE NEED FOR ACTION

We met biweekly between May and December 2006, including a tour of the Agricultural Reserve, in order to meet the Council's deadline to finish our work by the end of 2006.[2] Group members also met in smaller groups throughout the process in order to better understand one

[2] See Comment 7 by Pam Saul in Appendix II.

another's perspectives and develop new ideas and consensus. We trust that we have fulfilled the charges given us by the Council in the time allotted, even if we were not able to address every detail. We have identified important follow-up issues that will require further review and work, and urge the Council and Planning Board to give these matters your priority attention. In the course of our work, we came upon numerous recommendations from prior working groups that have not been addressed, and urge the County government to address the full range of issues that, taken together, will determine the future of the Agricultural Reserve.[3]

In particular, we urge the County Council to take decisive and rapid action in two key areas. First, provide incentives to current landowners to keep their land in agriculture, indirectly enabling new entrants to farming in Montgomery County. Second, provide additional disincentives to an increasing pace of residential development within the Agricultural Reserve. We need to protect the farming and the farmland we have, we need to encourage entry of more farmers and a new generation of farmers, and we need to limit or even reduce the pace of residential buildout in the Reserve. We believe our package of proposals can dramatically advance all these goals.

Montgomery County can take pride in the establishment and the success to date of its Agricultural Reserve, an unparalleled resource that benefits all the County's residents, and indeed the Washington metropolitan area as a whole. But we cannot take its future survival for granted. A tipping point approaches with the convergence of too much farmland given over to new housing and mini-subdivisions, too much fragmentation of farmland, and too many barriers to farming. We have no simple formula for determining when that tipping point is reached, and indeed encourage more deliberate attention to that very question. It is our strong sense that unless the County government acts soon and decisively, that tipping point could soon be upon us. Now is the time for a new commitment to the stewardship of our Agricultural Reserve so that it will endure for the remainder of this century and beyond, not just for our own children and grandchildren, but for theirs as well.

Following is a **summary of our principal recommendations.**

II. SUMMARY OF PRINCIPAL RECOMMENDATIONS

A. TRANSFERABLE DEVELOPMENT RIGHTS

When the County Council established the base density in the Rural Density Transfer (RDT) zone – the prevailing zone in the Agricultural Reserve – at one dwelling unit for 25 acres, it also created Transferable Development Rights (TDRs) that granted property owners one development right, or one "TDR," for each five acres of land owned. Landowners in the RDT zoned "sending areas" could then sell a TDR to landowners or developers in a "receiving area" in order to increase their development density. (A receiving area is a parcel designated as appropriate for development beyond its base density when the property owner purchases TDRs.) This

[3] A summary of the 2002 TDR Task Force recommendations is in Appendix III.

pioneering technique has generally been successful to date, but will require significant attention and adjustments if it is to fulfill its important role in the Agricultural Reserve.[4]

We recommend the County Council enact the following changes to the current TDR program:

- Distinguish between excess and buildable TDRs.
- Require TDR utilization for residential development in floating zone applications/local map amendments.
- Designate buildable TDRs for use in floating zones as well as in commercial and industrial zones, central business district and research and development zones with an equivalency to floor area ratio or square footage for their use.
- Clarify limitations on non-agricultural, non-residential uses (such as private institutional facilities) where land is covered by a TDR easement.
- Reintroduce legislation to prevent property owners from selling all TDR easements and subsequently developing a non-residential, non-agricultural use on the property.

We endorse the following recommendations of the 2002 TDR Task Force:

- Master plans should more aggressively seek to maximize the number of receiving areas.
- If additional density is considered via rezoning not recommended in the Master Plan, the use of TDRs should be part of the change.
- The County should work with local municipalities to establish inter-jurisdictional TDRs to create receiving areas in municipalities.
- Eliminate the requirement in single-family zones and subdivision regulations that receiving areas use 2/3 of the possible TDRs.

We have received briefings from the County Planning Department on the status of a system to track the use of TDRs and are satisfied that improved TDR tracking is under way and that the planned TDR tracking system should meet future TDR information needs.

B. CHILD LOTS

To encourage family continuity in farming, the RDT zone made allowance for landowners to build houses for their adult children at densities beyond one dwelling unit per 25 acres. This "child lot" program has been subject to differences in interpretation and to charges of abuse, and therefore requires both clarification and strict standards of implementation.

We recommend continuing to allow child lots in the RDT zone. We believe that the child lot provision is an important means to preserve and promote agriculture by allowing children to farm with their parents on the family farm. We recommend the County Council amend the

[4] See Comment 3 by Wade Butler, Pam Saul, Drew Stabler, William Willard, Bo Carlisle, and Jane Evans, paragraphs 7 and 8 in Appendix II.

Zoning Ordinance to clarify the density provisions for child lots, ensure ownership by the child, and protect farmland.

We recommend the maximum density of subdivisions with child lots be one lot per child *in addition* to the base density allowed in the RDT zone.[5] For example, a property owner with 100 acres and two children will be allowed six lots (two child lots and four base density lots). This has been the practice of the Planning Board since the RDT zone was established. To limit the use of child lots for improper purposes, we recommend the following limitations on child lots:

- A child must own the child lot dwelling for five years; however exceptions should be allowed for hardship cases such as those used in the Maryland Agricultural Land Preservation Foundation (MALPF) easement program.
- A child must not lease the child lot dwelling or enter into a contract for sale for five years, except the child may lease the child lot home to an immediate family member.
- A landowner may create only one child lot for each child regardless of the number of properties owned.
- A child lot may be created after the death of the landowner if the landowner's intent was to create the lot and is established in writing through a will or other document admissible in probate.
- A majority of the land on parcels with child lots must be reserved for agriculture.

To facilitate the implementation of the ownership requirement and leasing prohibition, we recommend additional written documentation and recordation at different steps in the planning process. We also recommend substantial monetary penalties for violation of child lot requirements.

We recommend limiting circumstances in which public water can be provided to child lots to the following:

- When the child lot can be served from an existing, abutting water main and will not allow service to others.
- When public water service can be provided in a manner that would not prevent the future application for a State or County easement to preserve agriculture.

We recommend the County Council be required to approve any request for public water to a child lot in the RDT zone rather than allowing administrative approval.

C. SAND MOUNDS

Agriculture is the preferred use for the Agricultural Reserve proposed by the Functional Plan for the Preservation of Agriculture and Rural Open Space, and this is clearly stated in the Zoning Ordinance. One of the key recommendations of the Master Plan was to "support a rural sanitation policy that does not encourage development within the critical mass of active

[5] See Comment 1 by Margaret Chasson, Nancy Dacek, Bob Goldberg, and Tom Hoffmann and endorsed by Jim O'Connell and Comment 6 by Scott Fosler, paragraph C in Appendix II.

farmland."[6] To accomplish its goal of preserving land for farming, the Master Plan recommended against the use of alternative individual and community sewerage systems in the Reserve.[7] There was debate about whether sand mounds were an alternative system. As we seek to accomplish the aims of the Master Plan we recognize that in some cases the use of sand mound technology may be appropriate. Therefore, we recommend the County continue to permit sand mounds, but limit their potential use.

We debated whether a quantitative, acreage-based limitation on sand mounds was the best solution available that might gain widespread support. The sand mound issue was the most controversial topic we discussed, as reflected by the extensive comments Group members submitted both in support and in opposition to the majority recommendation.[8] A majority of the Working Group supports a quantitative, acreage-based limitation on sand mounds (described below) that might reduce overall application of sand mounds by an estimated 25% over what would otherwise occur. A minority of the Working Group is not convinced of this approach, and would recommend limiting the use of sand mounds more aggressively or on some other basis. However, we all agree that there are a number of "special cases" where use of sand mounds is justified, as discussed below. One reason for this minority view is a deeply held concern that the impact of the majority's proposal is not well enough understood to be reliably predicted. We spent substantial time trying to achieve an acreage-based compromise that would satisfy all members, but in the end, concluded it would be appropriate to explain this difference of views in this Report.

Our recommendation recognizes the competing interests between retaining value in farmland for the purpose of sustaining farmers and retaining large tracts of land where agriculture can dominate activity. We recommend sand mounds be allowed as follows: One sand mound per 25 acres for the first 75 acres. Beyond that, one sand mound should be allowed for every 50 acres of land in the parcel. For example, a property owner with 125 acres but less than 175 acres would be allowed four sand mounds; one with 175 acres but less than 225 acres would be allowed five sand mounds, etc.

In addition, we recommend sand mounds be allowed under the circumstances listed below, for a parcel existing as of December 1, 2006.

- Where there is an existing house and the sand mound would not result in the development of an additional house.
- When it enables a property owner with approved deep trench system percs to better locate potential houses to preserve agriculture.
- For child lots, provided that our recommendations related to child lots are also adopted (e.g., ownership requirement). Sand Mounds will be approved for child lots

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[6] Maryland-National Capital Park and Planning Commission, "Approved and Adopted Functional Master Plan Preservation of Agriculture and Rural Open Space", page iv (October, 1980).

[7] *Id.*, at 62.

[8] See Comment 2 by Margaret Chasson, Nancy Dacek, Scott Fosler, Bob Goldberg, Tom Hoffmann, and Jim O'Connell; Comment 3 by Wade Butler, Pam Saul, Drew Stabler, William Willard, Bo Carlisle, and Jane Evans; Comment 5 by Jim Clifford; Comment 7 by Pam Saul; and Comment 8 by Elizabeth Tolbert in Appendix II.

where they are approved under the zoning provision or approved under the Agricultural Easement Program MALPF/AEP.

- For bona fide tenant housing, provided that recommendations related to tenant houses are also adopted. Sand Mounds will be approved for bona fide tenant housing wherein the dwelling can never be conveyed from the parent parcel.
- For any pre-existing parcel that is defined as an exempted lot or parcel in the zoning regulations.
- For properties where there has been a significant investment in testing for sand mounds prior to the adoption of these new restrictions (specific criteria for these grandfathering provisions are addressed below).
- For any permitted agricultural use under the zoning regulations (e.g., farm market).
- For the purpose of qualifying for a State or County easement program (including a Building Lot Termination program).

D. BUILDING LOT TERMINATION (BLT) EASEMENT PROGRAM

Even when landowners in the RDT zone sell TDRs, they typically retain one TDR for each 25 acres owned so that they will have a buildable lot. (This is why we refer to that single TDR retained for each 25 acres as a "buildable TDR," and the other four TDRs for each 25 acres as "excess TDRs," since the landowner cannot use these to build on RDT zoned property in "sending areas," but can only sell them to be used in "receiving areas.") The consequence is a higher probability than originally envisioned that the Agricultural Reserve will be "built out" at close to the full density of one dwelling unit per 25 acres, a result that could jeopardize agriculture, principally by fragmenting farmland. We believe that addressing this problem is central to the viability of the Agricultural Reserve.[9]

We recommend establishing a BLT easement program as a way to prevent fragmentation of farmland in the Agricultural Reserve. A BLT program is designed to compensate a landowner financially in exchange for an easement that eliminates future development of a lot shown to be viable for building through a soil percolation test.

There are two goals and purposes of a BLT program: (1) reduce the number of buildable lots in the Agricultural Reserve while providing equity to landowners; and (2) preserve by easement as much usable farmland as possible.

We recommend strict eligibility criteria for participation in the BLT program to ensure that a bona fide development lot is terminated and appropriate public benefit is derived.

As a basis for compensation, we recommend a landowner prove that the lot can support a house with a viable septic system before participating in the BLT program. Regarding funding, we recommend public funding of the BLT program initially using proceeds from the Agricultural Transfer Tax with compensation set at a percentage of the fair market value of a buildable lot in the RDT zone. Although some Group members have some reservations with publicly funding

[9] See Comment 6 by Scott Fosler, paragraph D, in Appendix II.

the BLT program, we recognize that public funding is the only way to get the BLT program started quickly. At the same time, we recommend the County create a buildable TDR program to provide private funding via the purchase of TDRs by developers of non-residential property.

E. PENDING LEGISLATION

Several pieces of legislation pending as of October 31, 2006 would affect the Agricultural Reserve and need to be reconciled with the Group's findings and recommendations.

We recommend the Council enact legislation similar to language in Zoning Text Amendment (ZTA) 05-23 that would require that the TDR easement, in addition to limiting the construction of one-family dwellings, prohibit the construction of any non-residential use, other than agriculture, on the affected property as defined in Section 59-A-2. However, the second part of ZTA 05-23 has unintended consequences that require further discussion and we are not recommending the current language in that part of this legislation. The second part discusses limiting the use of TDRs on property in the RDT zone that is developed with a non-residential use other than agriculture.

F. ADDITIONAL ISSUES

The Council's resolution establishing the Ad Hoc Agricultural Working Group called for a comprehensive review while also intentionally limiting the scope of the Group's work to the issues discussed above. We feel that a broader comprehensive review of policies and laws related to the Agricultural Reserve is necessary and suggest a range of issues that should be considered, including some preliminary thoughts on right-to-farm legislation, education strategies, and design standards.

We recommend the County Council enact legislation that requires potential homebuyers of homes in agricultural zones to be notified of laws that protect farmers from certain nuisance claims. If the number of nuisance complaints increases, we would recommend the Council explore whether additional action is necessary. In addition to disclosure, we recommend the County explore options to educate residents about the importance of the Agricultural Reserve.

We also recommend the Planning Department explore ways to prevent the fragmentation of agricultural land by locating buildings to preserve viable farmland. Any strategy must maintain owner equity and achieve the goal of preserving farmland. We understand that there is tension between the Planning Department and property owners on the issue of design standards and efforts to identify solutions must be mindful of these tensions. We recommend the Planning Department use the existing agricultural advisory groups to help develop these strategies.

We conclude this Report with an expanded list of other issues regarding zoning, tenant homes, rustic roads, and economic viability that we believe should be addressed in any comprehensive consideration of the sustainability and vibrancy of the Montgomery County's Agricultural Reserve.

CHAPTER 1:
TRANSFERABLE DEVELOPMENT RIGHTS PROGRAM, INCLUDING TRACKING

ISSUE: Should the Transferable Development Rights (TDR) program be modified? The lack of receiving areas to accommodate the number of TDRs available to be sent from land zoned Rural Density Transfer (RDT) has been an ongoing problem. We believe that the TDR program is essential to the preservation of the Agricultural Reserve and that changes are necessary to keep the program strong.[10]

I. RELEVANT LAWS AND REGULATIONS

The County established the TDR program to provide landowners compensation for the downzoning that reduced the density allowed for a property in the RDT zone from one house for every five acres to one house for every 25 acres.[11] The TDR program allows farmland owners to sell their development rights and still retain title to their land. When a landowner desires to sell a TDR, an easement identifying the TDR is recorded in the County land records. The easement stipulates the number of existing houses on the parcel, the number of TDRs being severed,[12] and the number of future houses that can be built on the parcel.

The maximum number of TDRs that can be created is one right for every five acres. A TDR must be retained for each dwelling unit existing on a parcel. The maximum number of houses on RDT zoned property with retained development rights is one house for every 25 acres. All TDRs that are not retained by the owner of RDT zoned property, may be sold for use in a designated receiving area. To make the difference in potential use and value of the TDRs clear, we refer to the TDR corresponding to an existing or potential house on an RDT parcel as a "buildable TDR". We refer to a TDR that cannot result in a house's being built on an RDT parcel (but may result in additional density in a receiving area) as an "excess TDR".

An open market system facilitates this exchange. Some or all of the TDRs available to the parcel could be severed at any time. Provisions allowing the sale of development rights from the RDT zone are found in § 59-C-9.6 of the Zoning Ordinance. Provisions allowing TDRs to increase residential density in receiving areas are found in various sections of the Zoning Ordinance and are not referenced here.

See Appendix I for a glossary of terms used in this chapter.

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[10] See Comment 3 by Wade Bulter, Pam Saul, Drew Stabler, William Willard, Bo Carlisle, and Jane Evans, paragraphs 7 and 8 in Appendix II.

[11] See Comment 6 by Scott Fosler, paragraph A in Appendix II.

[12] Severed means "to be recorded by easement among the land records of Montgomery County". A severed TDR is a TDR that is no longer attached to the sending property.

II. ACTIVITY UNDER THE EXISTING LAW

The County has placed more than 48,000 acres of land in the Agricultural Reserve under TDR easement. Planning Department analysis shows that since 1981, landowners have severed approximately 9,700 TDRs from properties in the RDT zone. Of those severed, approximately 6,100 have been transferred to receiving areas. Some 3,600 severed TDRs for various reasons have not been attached to a receiving area. In addition, there are 800 unsevered TDRs. These unsevered, excess TDRs plus the 3,600 severed, unextinguished TDRs equal approximately 4,400 TDRs that can still be used for development in receiving areas. The quantity of potential TDRs that can be transferred from sending areas is larger than the number of designated TDRs in receiving areas. Based upon the existing number of TDRs that can be purchased in receiving areas and past experience with the number of TDRs actually purchased, Planning staff estimates a deficit in receiving areas between 3,100 to 3,600 TDRs.[13]

Designating a sufficient number of receiving areas has been the responsibility of the County Council through the master plan development process. Since the use of TDRs is at the option of the developer, in some designated receiving areas, fewer TDRs than the number allowed by the master plan have been used. Therefore, the County has an ongoing need to maintain an adequate supply of receiving capacity. The price the landowner receives varies with the residential building activity in the County. To deal with the problem of sustaining an attractive market for TDRs, a Task Force was established in 2001 to recommend changes to the TDR program. This Task Force was composed of representatives from varied segments of the County and affected branches of the County government. The Task Force recommended policy, regulatory, and information changes to the TDR program, but only the tracking issue has been addressed. A summary of the Task Force recommendations appears in Appendix III. The Task Force reported their recommendations to the Planning Board in 2002; therefore, we refer to this Task Force as the 2002 TDR Task Force.

III. GROUP RECOMMENDATION TO REMEDY THE PROBLEMS

We believe the current TDR program is essential to the preservation of land in the Agricultural Reserve and to sustain the ability of rural landowners to capitalize their equity in the land. It should be modified to provide additional opportunities for property owners to sell their TDRs. There are not enough receiving areas to support the TDRs that remain to be sent from the RDT zone. We strongly support identifying new receiving areas for the existing TDR program while at the same time creating a mechanism and receiving areas for a new TDR program whereby developers of non-residential property can purchase TDRs, especially buildable TDRs, which have a higher value than excess TDRs.

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[13] At the time the Group considered the TDR program, the estimated deficit was 800 to 1,300 TDRs. In the time between the Group's last meeting and the editing of this final report, Council staff learned that a new estimate increased the deficit to 3,100 to 3,600. So while this updated information is included in the text, it was not available to the Group during its deliberations. A reasonable assumption is that it would only reinforce the Group's recommendations to expand the quantity of TDRs that can be accommodated in receiving areas.

As new TDR receiving areas are sought, we recommend the process assure that densities in all receiving areas, after application of total permissible TDRs in those receiving areas, do not exceed the carrying capacity of public infrastructure. This is critical both as good planning and to assure that residents living near TDR receiving areas are not unduly burdened by the TDR program, which is important both with regard to fairness and in maintaining broad public support for the Agricultural Reserve.[14]

We endorse the following recommendations made by the 2002 TDR Task Force:

- **The Master Plan evaluation process should formally include the creation or expansion of TDR receiving areas whenever any additional density is contemplated.** We believe that the County Council should adopt a policy whereby in any master plan if a site is recommended for increased density, there should be an assumption that the increased density should be through the use of TDRs, unless there is a compelling reason not to require TDRs. We believe the burden of proof should be to prove why TDRs are inappropriate on a particular site, rather than to prove why TDRs are warranted.
- **If additional density is considered via rezoning not recommended in the Master Plan, the use of TDRs should be part of the change.** Recommendations to accomplish this are given below.
- **The County should authorize discussions with Rockville and Gaithersburg on transfers of TDRs into municipalities.** We believe that inter-jurisdictional TDRs present a way to increase the number of receiving areas and prevent the loss of receiving areas on property that may be annexed. Since Rockville is in the process of revising its zoning ordinance, this may present an opportunity to establish this program. Because there is little direct benefit to municipalities for placing TDRs on properties within their boundaries, we believe that the County may need to develop incentives to encourage their participation (or consequences for failure to participate).
- **The County Council should eliminate the requirement in single-family zones and subdivision regulations that receiving areas use 2/3 of the possible TDRs.** The Zoning Ordinance requires that development using TDRs must use at least "two-thirds of the number of development rights permitted to be transferred to the property under the provisions of the applicable master plan approved by the district council."[15] We believe that eliminating this provision may actually *increase* the use of TDRs, especially on small or constrained properties where it is impossible to use two-thirds of the TDRs allowed by the zone.

At the time the TDR easement was defined, residential and agricultural uses were predominant in the land designated as the Agricultural Reserve. As a consequence, the easement is written in language to encourage agricultural use and simply limits the number of houses permitted on a parcel under easement. Now other uses that are permitted by the Zoning Ordinance are being proposed in the RDT zone. Legislation is needed to strengthen and clarify the intent of the TDR easement (see Chapter 5 on Pending Legislation).

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[14] See Comment 6 by Scott Fosler, paragraph B in Appendix II.

[15] Montgomery County Zoning Ordinance, § 59-C-1.393(b). This requirement may be waived by the Planning Board only if it finds that it would be desirable for environmental or compatibility reasons.

We recommend the County Council enact the following changes to the current TDR program:

- **Enact legislation similar to language in ZTA 05-23.** Such legislation would clarify in clear and direct terms the long-standing legislative intent that the development of RDT-zoned parcels encumbered by TDR easements be limited to single family houses and agricultural and agricultural-related uses only. See Chapter 5 on Pending Legislation for additional information.
- **Distinguish between excess and buildable TDRs.** By recognizing the value of a development right in the RDT zone and providing a more valuable exchange rate for such rights, landowners would be motivated to transfer those rights.[16]
- **Require excess TDRs for increasing density in floating zone applications/local map amendments.** Although TDRs have traditionally been applied through Euclidian zones, we believe that floating zones that increase density provide an appropriate opportunity for additional excess TDRs to be used. This is consistent with the second bullet under 2002 TDR Task Force endorsements above. We believe that this should be a high priority.
- **Designate buildable TDRs for use in floating zones as well as in certain commercial and industrial zones, and research and development (R&D) zones with an equivalency to floor area ratio (FAR) or square footage for their use.** Land in commercial and industrial zones could be allowed an increase in density to provide significant potential as new receiving areas. Assuming the County implements the BLT program, **we recommend non-residential receiving areas be designated to create new TDR capacity to purchase buildable TDRs providing an alternative way to fund the BLT program** (see Chapter 4).
- **Provide for TDR receiving capacity for mixed-use zones.** Mixed-use zones are used extensively in the most dense areas of the County (central business districts (CBDs) – Silver Spring, Bethesda and Friendship Heights) and near transit stations. Although the County Council has begun putting TDRs on the resident portion of two mixed-use zones (the Transit Oriented Mixed-Use zone and the Town Center Mixed-Use zone), it has not placed TDRs on the commercial portion of mixed-use zones or considered whether to add TDRs to the CBD zones. Both provide significant opportunities that should be realized. We note that the 2002 TDR Task Force recommended the creation of TDR receiving areas with density bonuses in some mixed-use zones.[17]

IV. TDR TRACKING

A. INTRODUCTION

The 2002 TDR Task Force recommended improvements to the TDR tracking system and this recommendation is being addressed. Tracking TDRs involves recording the status of the TDR from the time it is severed from the land by easement, through the sale of the TDR recorded by deed, and until the TDR is extinguished by use in a preliminary plan and subsequent recording

[16] See Comment 6 by Scott Fosler, paragraph D, in Appendix II.

[17] The TDR Task Force recommended TDR receiving areas be created in CBD, Transit Station, Town Center, and the higher density residential and mixed-use zones used in the vicinity of tra nsit stations.

on a subdivision plat. TDRs that are severed from the farmland by easement can be held by the landowner or sold to another party. The buyer of the TDR can also hold, sell, or use the TDR as a means of increasing density elsewhere in the County.

Once a TDR is severed from the land, an easement is recorded.[18] The easement records the date, TDR serial number, tax identification number associated with the parcel, acreage of the parcel, grantor and grantee of the easement, location of the parcel, number of houses on the parcel, TDR capacity of the parcel, and the number of TDRs being severed. A distinct liber and folio (book and page) for the easement assigned by the County are also recorded.

If the TDR is sold, a deed will record additional information relevant to tracking the TDR. The deed records the sale date, the buyer and seller of the TDR, the number of TDRs sold, the TDR serial number, the liber and folio of the easement that severed the TDR, the liber and folio of the deed, and frequently, the location and description of the parcel from which the TDR was severed.

Additional information used to track TDRs comes from the County Tax Assessors Office. This information includes current acreage of the parcel, number of houses on the parcel, improvements to the parcel, the tax identification number of any child lots associated with the parcel, as well as the landowner's name and address. This data is used as a cross reference to the data supplied by the County Attorney's Office.

Consolidation of the above data creates a data file for all parcels that create/sever a TDR indexed by tax identification number. This data is matched to Planning Department data on preliminary plan information. If a TDR is extinguished by use on a preliminary plan, the preliminary plan number is attached to the file and recorded for each individual TDR.

B. IMPROVED TDR TRACKING

For Fiscal Year 2007, the County Council directed the Montgomery County Planning Department to develop a comprehensive record of TDRs from creation through final use. With improved tracking, the County should be able to know at any point in time how many TDRs have been created, are left to be created, have been used, and other statistics. Additionally, the County should be able to look up TDR-related information about any parcel and be able to verify that TDRs are being created, sold, and used in accordance with the provisions of the TDR program.

By November 2006, the Planning Department had made significant progress in completing this task and reported their progress to us. The Planning Department has completed the comparison of TDR information in the County Attorney's records to those in the Planning Department's Development Review database (Hansen), to make sure both records match. The goal is a complete record in Hansen of sending parcel TDR information, and this goal is virtually complete (there are some outstanding questions for a few records). The Planning Department is

[18] The Montgomery County Attorney's Office records all easements and deeds that are created in the County. This is the primary source of data on TDRs.

currently creating a Geographic Information Systems (GIS) layer of land under TDR easement. This layer is tied to the TDR database in Hansen.

The Planning Department indicates that further work on TDR tracking will focus on parcels that have used TDRs (i.e., receiving areas). It is performing a quality assurance check of all TDRs that have been recorded on a subdivision plat. This process is somewhat more complicated than for sending areas because there is not a comprehensive reference for receiving parcels analogous to the County Attorney's record of created/sent TDRs. When this quality assurance is finished, Planning Department staff intends to add to the TDR GIS layer those receiving parcels where TDRs have been used.

Once the accounting and mapping of receiving parcels is complete, the County will have a system for tracking each TDR recorded from origination from the sending parcel to its being extinguished by final use on a receiving parcel. This combination of Hansen database and GIS layer will allow easy access for checking the status of any individual TDR or any sending or receiving parcel. It will allow status reports to be run when needed for policy analysis or TDR program evaluation. It will also allow County staff an easy method for determining if TDR use in any particular case is being conducted in accordance with the rules of the program (e.g., ensuring that a new landowner cannot create and sell TDRs that have already been sold by a previous landowner).

C. GROUP DISCUSSION

We received two briefings from the Planning Department on the status of tracking the sale of TDRs. We are satisfied that improved TDR tracking is well under way and that the planned TDR tracking system, if implemented properly, will meet future TDR information needs. We understand that the progress on TDR tracking is the result of high levels of coordination among staff from several public agencies, including the County Attorney's Office, the Department of Economic Development (DED), Park and Planning, and the State Tax Assessor's Office. We are encouraged by this coordination and support staff's review to determine whether any additional, or more formalized, arrangements for data transfer and review are needed. We support the creation of a TDR tracking manual to document the tracking procedures that have been established, and recommend that the Planning Board transmit an annual TDR status report to the County Executive and County Council.

V. NEXT STEPS

The Planning Department should draft amendments to the Zoning Ordinance and the Subdivision Regulations to amend the TDR program to require excess TDR receiving capacity in floating zones and define an exchange rate for buildable TDRs in research and development and certain commercial, industrial, and mixed-use zones, and eliminate the requirement that receiving areas use two-thirds of the possible TDRs.

The Planning Board and the Council should implement our suggested policy that maximizes the number of receiving areas identified in master plans (i.e., assume for purposes of master plans that if a site is recommended for increased density, the additional density should be through the use of TDRs unless there is a compelling reason to depart from this assumption).

The Planning Department should begin working with municipalities to develop an inter-jurisdictional TDR program.

The Planning Department should finish the necessary steps they have identified to complete implementing a system to track the use of TDRs, and begin submitting annual TDR reports to the Council.

CHAPTER 2:
CHILD LOTS IN THE
RURAL DENSITY TRANSFER ZONE

ISSUE: Should the Zoning Ordinance or practices concerning child lots be changed? The Zoning Ordinance allows for lots for children of property owners; however, language on child lots in the Rural Density Transfer (RDT) zone is unclear and subject to multiple interpretations. Questions have arisen about the wording and the intent of the Zoning Ordinance with regard to density and use. Additionally, there are no restrictions on the transfer of child lots to third parties after building permits are issued. If child lots can be immediately transferred, they may provide an incentive to build more houses than may otherwise be built. Finally, there are conflicting provisions in the Master Plan for the Preservation of Agriculture and the Ten-Year Comprehensive Water Supply and Sewerage Systems Plan regarding whether or not public water is available for child lots.

I. RELEVANT LAWS AND REGULATIONS

There are two exemption provisions in the Zoning Ordinance for creating child lots in the RDT zone:[19] (1) through the Maryland Agricultural Land Preservation Foundation (MALPF)[20]; and (2) in the process of subdivision. Participants in the MALPF State easement program must adhere to a more stringent set of requirements for child lots than those who create child lots under the County's program.

A. MALPF CHILD LOTS

MALPF promotes the creation of easements on agricultural land by placing easements which are more restrictive than zoning. The easement itself becomes the guiding document which details what permissible density there is (if any) and under what circumstances that density can be achieved.

The MALPF program permits lots to be released from the MALPF easements "only for the landowner who originally sold an easement, 1 acre or less for the purpose of constructing a dwelling house for the use only of that landowner or child of the landowner, up to a maximum of three lots."[21] For MALPF child lots, "the resulting density on the property shall be less than the

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[19] Child lots are also allowed in the Rural Cluster and Rural zones. Child lots are a "grandfathering" of development rights for some long-time landowners whose property was down-zoned.

[20] Montgomery County Zoning Ordinance, §59-C-9.74(a). The Maryland Agricultural Land Preservation Foundation's primary purpose is to preserve sufficient agricultural land to maintain a viable local base of food and fiber production for the present and future citizens of Maryland. The MALF program consists of two basic steps: the establishment of agricultural preservation districts, and the purchase of perpetual agricultural conservation easements. The Maryland Agricultural Land Preservation Foundation administers the easement program.

[21] Maryland Code, Agriculture §2-513(b)(2).

density allowed under zoning of the property before the Foundation purchased the easement."[22] By regulations, the County Planning Board must approve MALPF child lots,[23] which is done during the subdivision process.

Under the negotiated easement sold by the landowner through MALPF, the transfer of a child lot to a third party is prohibited within five years from the release of the MALPF easement, unless a transfer is specifically approved, such as for death or bankruptcy.

The Zoning Ordinance limits the creation of MALPF child lots to the number of development rights assigned to the property.[24] There is no mention of the relationship between MALPF child lots and overall density. The Zoning Ordinance does not specifically state that MALPF child lots are exempted from area and dimension requirements. MALPF child lots can never produce more lots than allowed by the underlying zoning density according to the terms of the easement.

B. SUBDIVISION CHILD LOTS

The Zoning Ordinance provision permits an "exemption" of lots "for use for a one-family residence by a child, or the spouse of a child, of the property owner".[25] In order to create a child lot, the following conditions must be met:

1. The property owner must establish that he or she had legal title on or before the approval date of the sectional map amendment (January 6, 1981) which initially zoned the property to RDT;
2. This provision applies to only one lot for each child of the property owner; and
3. Any lots created for use for one-family residence by children of the property owner must not exceed the number of development rights for the property.[26] (There is no mention of the relationship between subdivision child lots and overall density.)

Subdivision child lots "are exempt from the area and dimensional requirements of section 59-C-9.4 but must meet the requirements of the zone applicable to them prior to their classification in the [RDT] zone."[27] Before zoned RDT, properties in the Agricultural Reserve were zoned Rural, which has a density of one dwelling for every five acres.

C. DENSITY IN THE RDT ZONE

Generally, the maximum density in the RDT zone is one house per 25 acres. Section 59-C-9.41 specifically excludes farm tenant dwellings and accessory apartments, but not child lots, from that density limitation.[28] Section 59-C-9.4 states that the density limits in the RDT zone "apply

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[22] Maryland Code, Agriculture §2-513(b)(3)(i).
[23] Code of Maryland Regulations (COMAR) 15.15.01.17(c)(1)(c).
[24] *Id.*
[25] Montgomery County Zoning Ordinance, §59-C-9.74(b)(4) (emphasis added).
[26] *Id.*, §59-C-9.74(b)(4).
[27] *Id.*, §59-C-9.74(b).
[28] *Id.*, §59-C-9.41.

in all cases, except as specified in . . . the exemption provisions of section 59-C-9.7",[29] which include child lots. For "subdivision" child lots, the only exemption specified in the exemption provisions of 59-C-9.7 is from "area and dimensions", not density.

There are two ways to create lots in the Zoning Ordinance: (1) exceptions to density (pre-existing parcels and child lots as a matter of practice); and (2) regular density ("market" lots). **The Zoning Ordinance is unclear on whether density for child lots is in addition to the general permissible "market" density of one housing for every 25 acres.** (For example, is a property owner with 100 acres and two children allowed six lots, that is, two child lots and four base density lots?). The Zoning Ordinance does not specify whether excepted housings are the exclusive way to develop or that development can use both ways of creating lots. The overall density allowed on a parcel differs depending on whether only one method is allowed or both methods are allowed.

D. CHILD LOTS USE

The Zoning Ordinance permits the creation of a child lot "for *use* for a one-family residence by a child, or the spouse of a child".[30] The Zoning Ordinance defines "use" as follows: "Except as otherwise provided, the principal purpose for which a lot or the main building thereon is designed, arranged, or intended, and for which it is or may be *used, occupied,* or *maintained.*"[31] The Zoning Ordinance does not limit the ownership of child lots or the transfer of child lots to third parties, and it does not require any notation on the record plat concerning child lots.

III. ACTIVITY UNDER THE EXISTING LAW

A. CURRENT ACTIVITY

Since 1981, 95 child lots have been created within 46 subdivisions in the RDT Zone. That averages approximately two child lots per plan when a subdivision plan contains child lots. Child lots represent 18% of the total number of lots created in the zone. Planning Board staff and Department of Economic Development staff developed an inventory of RDT properties eligible for child lots. The best available information suggests that there are 99 RDT zoned properties at least 10 acres[32] that have not transferred ownership since January 6, 1981.[33] The number of children a landowner has limits the number of potential child lots. Based upon the experience of the program to date, approximately 198 *additional* child lots are possible to be created in the Agricultural Reserve.

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[29] *Id.*, §59-C-9.4.
[30] *Id.*, §59-C-9.74(b)(4).
[31] Montgomery County Zoning Ordinance, §59-A-2.1 (emphasis added).
[32] A property smaller than 10 acres is not entitled to create a child lot.
[33] On January 6, 1981, a sectional map amendment was adopted that downzoned land in the Agricultural Reserve from one house per five acres to one house per 25 acres.

The child lot provision will be a self-extinguishing program. The number of landowners that have owned property in the RDT zone since 1981 will diminish to zero over time. The number of children from that set of owners will peak at some point in time (if it has not done so already). There is still an open question as to whether a child lot can be created by a will (after the death of a long time owner) when property is owned with rights of survivorship. Given the existing text of the Zoning Ordinance, this question can only be answered when a County agency has the opportunity to interpret the word "title".[34]

Allegations of abuse of the child lot provisions have arisen and are a result of differing interpretations of provisions in the Zoning Ordinance highlighted above.

B. CURRENT PLANNING BOARD ZONING ORDINANCE INTERPRETATIONS

Since the establishment of the RDT zone, the Planning Board has interpreted the Zoning Ordinance to limit the maximum density of subdivisions with child lots to one lot per child in addition to the base density allowed in the RDT zone (e.g., if a landowner has 3 children on a 25-acre parcel, current Planning Board interpretation would allow the landowner 4 lots; base density would allow the landowner only 1 lot). **The Planning Board has considered changing this interpretation.** The Planning Board requires a property owner to retain one transferable development right (TDR) for each lot.[35] The combination of child lots and base density may not exceed the total number of TDRs available for the property.[36]

When a subdivision application includes child lots in the RDT zone, the Planning Board requires an affidavit from the landowner stating that any lot created is for the owner's child or the spouse of a child.[37] The Planning Board also requires an affidavit at record plat confirming that the building will be for the use of the owner's children or spouses of the children. More recently, building permits are being checked to ensure that the permit is being issued to the child of the property owner. There have been instances where the County has refused to issue a building permit on a child lot to someone who is not the child of the landowner.

There have been no prohibitions or restrictions placed on the sale of child lots by the Planning Board at the time of subdivision approval. The Planning Board has discussed changing this practice.

III. GROUP RECOMMENDATION TO REMEDY THE PROBLEMS

We recommend continuing the use of bona fide child lots in the RDT zone. Group members believe that child lots are an important means to promote family-based agriculture. They provide a way for children to live on their parent's land and help farm on the family farm or simply allow

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[34] The Planning Board has not been presented a subdivision with the issue of child lots created after the death of an owner; this question arose in a Planning Board staff proposed zoning text amendment.
[35] Montgomery County Planning Board, "Plowing New Ground", page 10 (2001).
[36] Planning Staff memo, Ganassa property, February 16, 2006.
[37] This long-standing practice is not a literal requirement of the Zoning Ordinance.

children to be near their parents. Further, some believe they are a source of compensation, in addition to TDRs, for the loss of equity landowners experienced during the 1981 downzoning. Because the current Zoning Ordinance is unclear regarding the framework for the child lot provisions, **we recommend the County Council amend the Zoning Ordinance to clarify when child lots are allowed.** Regarding density, **we recommend the maximum density of subdivisions with child lots be one lot per child *in addition* to the base density allowed in the RDT zone** (one house per 25 acres). For example, a property owner with 100 acres and two children will be allowed six lots (two child lots and four base density lots).[38]

To clarify the intent and limitation of the child lot program, **we recommend the following additional requirements:**

- **The child must own the home constructed on the child lot for five years.** When a house is built, the child must own the lot at the time of building permit and must continue to own the house for five years after construction. An existing dwelling that becomes a child lot will be governed by the five year ownership requirement. **We recommend enforcement of the ownership requirement be resolved through a title search at the time of sale.**
- **Exceptions to the ownership requirement should be allowed for hardship cases,** such as those used in MALPF (e.g., foreclosure of the property, death of the child before the end of the five year period of ownership, serious incapacity, and callup for military service).[39]
- **Do not allow a child owning a child lot home to lease the home or enter into a contract for sale for five years after construction. However, the landowner's child should be allowed to lease the house to another immediate family member (e.g., the grandchild of the original owner).** We discussed requiring the child to occupy a child lot, but agree that monitoring occupancy could be difficult. **For enforcement, we recommend the Department of Permitting Services (DPS) develop a "complaint-based" enforcement mechanism.** Under this system, DPS would follow-up with any complaints filed. We feel more extensive enforcement options are too costly, may invade privacy rights, and are not worth the effort.
- **A landowner can only create one child lot for each child.** We strongly feel that a landowner is only entitled to one child lot per child regardless of the number of properties a landowner has. In other words, we feel that a landowner is not entitled to one child lot per child for each property the landowner has.
- **Each child lot should require the use of one TDR.** Child lots should not be allowed if the property owner has already sold all TDRs. (Planning and Executive staff have historically advised property owners to hold onto one TDR for each potential child lot.)

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[38] See Comment 1 by Margaret Chasson, Nancy Dacek, Bob Goldberg, and Tom Hoffmann and endorsed by Jim O'Connell and Comment 6 by Scott Fosler, paragraph C in Appendix II.

[39] ***Follow-Up Required:*** Further work should be done to determine what specific circumstances would constitute a hardship and what body would make the decision on a hardship matter.

- **A child lot can be created after the death of the landowner if the landowner's intent was to create the lot and is established in writing through a will or other document admissible in probate.**
- **A majority of land on any parcel with child lots be reserved for agriculture and prohibited from development.** Our recommendation is to set a standard low enough so that it would not reduce the total number of allowable lots. A requirement to keep a majority of the land reserved for agriculture would probably have no impact on large properties where the number of children is limited but could limit the **size or location** of child lots on small parcels. For example, an owner of 25 acres with two children would have to keep the one market rate house and child lots on 7.5 acres if the goal were to preserve 70 percent of the property in agriculture. We believe that this provision should not result in a decrease in the potential number of child lots.
- **We did not have the opportunity to discuss in detail whether there should be a minimum acreage requirement for child lots or a maximum size but believe these are appropriate issues for follow-up work.**

We believe care must be taken to adequately ensure that these recommendations are adhered to. Therefore, to facilitate the implementation of the ownership requirement and leasing prohibition, **we recommend establishing the following procedures:**

- **The record plat must indicate that the property contains a child lot.** To this end, **the Planning Department must require a covenant to be recorded in the land records at the same time the plat is recorded.** The covenant should contain a provision indicating that the house must be owned by the child for five years after construction and may not be leased during that time. Violation of the covenant should have penalties.
- **The building permit must be issued only in the child's name.** The building permit should not be approved until DPS has determined that the child has signed an affidavit noting the limitations on ownership and leasing and knowledge of the covenant.
- **There should be substantial monetary penalties to discourage violation of these requirements.**

We considered some limits that we determined were unnecessary because of the other recommendations set forth in this Chapter. We do not recommend limiting the creation of child lots to property owners with land in agricultural production. Group members feel that any landowner who owned land during the 1981 downzoning should be allowed to create child lots, regardless of whether the land is in agricultural production. We also do not recommend establishing a sunset date for the child lot provisions. Group members generally feel that a natural sunset date already exists when the landowners from the 1981 downzoning either pass away or sell their property. Therefore, we feel that an arbitrary deadline is unnecessary. Further, although we support allowing a child to create a child lot after the death of a landowner, we do not believe that there should be a time limit on the child's ability to create the lot because a child's lifespan will serve as a natural time limit.

IV. PUBLIC WATER TO CHILD LOTS

A. RELEVANT LAWS AND REGULATIONS

There is an inherent conflict between the Ten-Year Comprehensive Water and Sewerage Systems Plan and the 1980 Functional Master Plan for the Preservation of Agriculture and Rural Open Space. The Master Plan recommends **denying** "public water and sewer service to areas designated for agricultural preservation that utilize the" RDT zone.[40] The Water and Sewerage Plan provides, "[c]ommunity [public] water service may be provided to support the subdivision of lots for the children of the owners of qualifying properties." Further, the Water and Sewerage Plan notes that "[w]ater service in these cases is generally intended to be provided from abutting water mains, although water main extensions can be considered where those extensions are consistent with the requirements for large lot development . . .[41]

B. GROUP RECOMMENDATION

We support confirming the provision in the Water and Sewerage Plan to allow public water service to be provided but with amendments to limit the applicability so that this provision would only be used in limited circumstance. **We recommend amending the language of the Water and Sewerage Plan to allow public water to child lots in the following circumstances:**

- **When the child lot can be served from an existing, abutting water main and service to the property would not provide the opportunity for service to other RDT properties.**
- **When public water service can be provided in a manner that would not prevent the future application for a State or County easement for farmland preservation.**[42] Properties receiving public water are not eligible for State easement programs or the BLT program as described in Chapter 4. This could increase the appeal of residential development (at one house per 25 acres) over preservation through an easement program.

We make this recommendation based on the assumption that there are only a small number of potential child lots that would qualify for public water under our recommendation. **Once implemented, we recommend the County monitor how many lots use this provision.** If it appears that a significant number of lots are being provided with public water, we would urge the County reconsider this policy.

We recommend the County Council approve any request for public water to a child lot in the RDT zone by a majority vote. As the Council gains experience with such approvals, it might consider permitting them to be made administratively in accordance with clear criteria

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[40] Functional Master Plan for Preservation of Agriculture, page 59.

[41] Montgomery County, "Ten-Year Comprehensive Water Supply and Sewerage Systems Plan", Chapter 1, § II.E.9 (2003).

[42] For example, if public water is provided on the edge of a lot and would not jeopardize application for the rest of the property.

stipulated by the Council (for instance, by more clearly defining whether "abutting" means 10 ft. or 10,000 ft.).

V. NEXT STEPS

The Planning Board should draft a zoning text amendment that would clarify the Zoning Ordinance and impose limitations on the use of child lots in the RDT zone, including examining follow-up questions of whether there should be a minimum acreage or a maximum size, what specific circumstances should constitute a hardship, and who should determine whether the hardship requirements are satisfied.

The Planning Department should begin requiring a covenant to be recorded in the land records when a child lot is created specifying that a house on the child lot must be owned by the child for five years and must not be leased except to immediate family.

The Department of Environmental Protection should develop a monitoring mechanism to track how many child lots are utilizing public water.

The Department of Permitting Services should continue ensuring that building permits for child lots are approved only for the landowner's children and begin developing a complaint-based enforcement mechanism to respond in situations when the owner of a child lot leases the home. The County should establish a monetary penalty for child lot violations.

CHAPTER 3:
SAND MOUNDS

ISSUE: Should the use of sand mounds be prohibited or limited in the Rural Density Transfer (RDT) zone? The Zoning Ordinance limits density in the RDT zone to one house per 25 acres. Development in this zone is likely to yield less than the base density, especially without the use of sand mounds due to sewer limitations (e.g., when land is unable to perc). The use of sand mounds can potentially increase the total number of buildable lots in the RDT Zone. This, in turn, could potentially increase the fragmentation of agricultural land.

I. INTRODUCTION

A. GENERAL BACKGROUND

A sand mound is an on-site sewerage disposal system elevated above the natural soil surface. The mound system, on average about 35 feet wide, 90 feet long, and 5 feet high, can sometimes be used to overcome site limitations which would preclude the use of other traditional, underground trench type sewage disposal systems. Such site limitations include high water tables and shallow soils over bedrock. A sand mound system cannot be used unless the requirements for slope, permeability, and other design features are satisfied. However, there are properties that can develop using mound systems that could not be developed using conventional underground "trench" systems.

Assuming an equal number of houses and septic systems, sand mounds are more environmentally friendly than traditional septic systems. The sand provides a medium where bacteria can digest sewage effluent efficiently. Soil below the mounds provides for additional water treatment. There are no documented failures of sand mounds in Montgomery County. The maintenance of sand mounds is very similar to that of traditional septic systems.

Developers prefer using trench systems if they can accommodate the same number of houses as sand mounds. Trench systems are invisible to the casual observer and cost approximately $10,000. Sand mounds are raised 30 to 60 inches above ground and cost approximately $30,000. Where landowners know the limited suitability of their soils for trench systems, they may choose to use sand mounds to avoid excessive perc testing or to provide easier location of sites than is often possible for trench systems. Because a sand mound can function in more areas than trench systems, the technology may offer more options for the location of lots on any given property.

B. BACKGROUND ON SEWER-RELATED ZONING STRATEGIES

The planning process considers the availability of sewer and the feasibility of septic systems in determining the appropriate zoning for land in rural zoning. Where public sewer is available, the zoning is generally set at the maximum density intended. In those zones where sewer is not

generally available (the RDT zone, the Rural zone, the Rural Cluster zone, and the RE-2 (2-acre zone)) the ability of the land to perc has been considered as part of the zoning/density decision. Where the soils are poor, the zoning has typically been set at higher density than desirable over the entire property on the assumption that the full density will not be achieved. This is done to provide some flexibility for property owners with difficult soils to locate houses where feasible on smaller lots and to avoid an unnecessarily complex zoning pattern.

Although this zoning strategy is important in considering potential development in the RDT zone, it was also used extensively outside the RDT zone. The use of sand mounds or other previously unanticipated technologies could significantly increase density over that projected in the County's residential wedge and even in suburban communities, particularly in areas zoned RE-2.

II. RELEVANT LAWS, REGULATIONS, AND POLICIES

A. STATE LAW/REGULATION

The Maryland Code discusses sand mounds twice. In one section, the State Code defines a sand mound disposal system as a conventional system for the coastal plain physiographic province[43] and in a different section defines a sand mound septic system as an innovative/alternative septic system for a grant program.[44] **State regulations define a sand mound system as a "conventional on-site sewage disposal system".**[45] State regulations require the County to allow an on-site sewage disposal system if it determines that the site and proposed design can safely dispose of sewage and conform to applicable laws and regulations.[46] State law also requires Montgomery County to adopt a 10 year water and sewer plan[47] that is consistent with the applicable master plan.[48]

B. COUNTY REGULATION/POLICY

Ten-Year Comprehensive Water Supply and Sewerage Systems Plan

As noted above, State law requires the County to adopt a water and sewer plan that is consistent with all applicable master plans. The latest County Ten-Year Comprehensive Water Supply and Sewerage Systems Plan was approved in 2003. While the Water and Sewerage Plan does not explicitly mention sand mound systems, it does state that properties in the RDT zone are "not intended to be served by community systems." The Water and Sewerage Plan makes case-by-

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[43] MD Code, Environment Article, § 9-216(a), (b)(1)(iii). Montgomery County is in the piedmont physiographic province.
[44] MD Code, Environment Article, § 9-1401(b)(2)(i).
[45] Code of Maryland Regulations (COMAR), § 26.01.02.01.
[46] COMAR, § 26.04.02.02(L)
[47] Maryland Code, Environment Article, § 9-515.
[48] *Id.*, § 9-505(a)(1).

case exceptions where community service is "logical, economical, environmentally acceptable, and does not risk extending service to non-eligible properties."[49]

1980 Functional Master Plan for the Preservation of Agriculture & Rural Open Space

The 1980 Functional Master Plan recognizes that availability of sewer may limit achievable density. Therefore, the Plan recommends that a comprehensive "policy regarding the private use of alternative individual or community sewerage systems outside of the sewer envelope."[50] Although sand mounds were viewed as an alternative in 1980, the Master Plan does not specifically state that sand mounds are alternative systems. The Master Plan also made several recommendations regarding sewers, including the following:

- Do not use public sewer service for the entire Study Area within 20 years from the date of adoption.
- Deny public water and sewer service in the RDT zone.
- Deny private use of alternative systems in the RDT zone, except for public health reasons.
- Study the use of alternative systems in Rural Open Space areas.
- Consider some rural communities and villages for alternative systems to increase low-cost housing and for public health reasons.[51]

Montgomery County Regulations

The Code of Montgomery County Regulations (COMCOR) references the specifications set forth in State regulations that a sand mound must meet.[52]

C. REGULATORY HISTORY

At the time of the adoption of the Functional Master Plan, sand mounds were not a conventional septic system. As noted above, the Functional Master Plan recommended prohibiting alternative systems. In 1986, Maryland regulations included sand mounds as a conventional system. From 1987 to 1994 some in the agricultural community found it increasingly difficult to achieve septic absorption fields due to Fractured Rock Test. Montgomery County did not permit sand mounds as a conventional system until executive regulations were amended in 1994. During the initial administration of the executive regulations, sand mounds were a "last resort" option. An applicant had to demonstrate that a trench system would not work before a sand mound system would be considered. Now there are no limitations on sand mounds other than the physical requirements for a workable system.

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[49] Montgomery County Ten-Year Comprehensive Water Supply and Sewerage Systems Plan, (2003) page 17.
[50] Preservation of Agricultural & Rural Open Space Functional Master Plan, page 17 (1980).
[51] *Id.*, at 61-62.
[52] COMCOR, § 27A.00.01.

Although other counties in Maryland vary in some sand mound specifications, (e.g., percolation and system size) no Maryland County restricts the use of sand mounds for agricultural preservation reasons.

III. ACTIVITY UNDER THE EXISTING LAW

The Department of Permitting Services estimates that there are 75 sand mound systems in operation throughout the County in all zones. As of March 2006, the Planning Board has approved 127 preliminary plans of subdivision in the RDT zone since 1988. Approximately 11% (14) of those subdivisions relied upon sand mound systems either wholly or in part. These subdivisions created 45 single-family lots that could be platted utilizing sand mounds; 18 of those lots now have houses on them. Forty-one of those lots are for new houses; four lots represent existing dwellings on these properties that use a sand mound for a new septic reserve field established as part of the development process. Of these 41 lots, 23 sand mound systems are approved but not constructed (15 via one plan). (For perspective on this number, 851 lots have been recorded in the RDT zone since 1978.)

Sand mound systems are also allowed on lots and parcels that do not need to go through the subdivision process(e.g., tenant houses, existing structures, and existing lots). These are not counted in the subdivision numbers. Since 1999, 45 sand mounds have been constructed in the RDT zone (including those that have gone through subdivision and those exempt). Of those 45 mounds, 11 (or 24%) were for repairs to existing homes.

IV. OPTIONS AND GROUP RECOMMENDATIONS TO REMEDY THE PROBLEMS

It is unclear whether current law permits the County to limit the use of sand mounds since current State law permits sand mounds (i.e., does the State law pre-empt the County from enacting a law that prohibits or limits the use of sand mounds). We concurred with the recommendation of Council staff to not delve into this complicated legal issue. Rather, we focused on what the best policy is for the County to implement at this stage. **We recommend the Council investigate the legal ramifications of our recommendations and identify the appropriate legal strategy to implement them.**

Although we have been told that Councilmembers historically assumed that septic availability would limit density to less than the maximum permitted in the RDT zone, some Group members believe this intent is not clear and provides a significant source of confusion for property owners. **In the future we believe that the Planning Board and Council should select zones that better reflect the desired density, rather than assume that septic limitations will control density.**[53]

We debated whether a quantitative, acreage-based limitation on sand mounds was the best solution available that might gain widespread support. The sand mound issue was the most controversial topic we discussed, as reflected by the extensive comments Group members

[53] See Comment 4 by Margaret Chasson in Appendix II.

submitted both in support and in opposition to the majority recommendation.[54] A majority of the Working Group supports a quantitative, acreage-based limitation on sand mounds (described below) that might reduce overall application of sand mounds by an estimated 25% over what would otherwise occur. A minority of the Working Group is not convinced of this approach, and would recommend limiting the use of sand mounds more aggressively or on some other basis. We all agree that there are a number of "special cases" where use of sand mounds is justified, as discussed below. One reason for this minority view is a deeply held concern that the impact of the majority's proposal is not well enough understood to be reliably predicted. The Working Group spent substantial time trying to achieve an acreage-based compromise that would satisfy all members, but in the end, concluded it would be appropriate to explain this difference of views in this Report.

We recommend one sand mound per 25 acres be permitted for the first 75 acres. Beyond that, one sand mound should be allowed for every 50 acres of land. We further recommend that these numerical standards apply to any future new technology for on-site sewerage disposal. For any subdivision involving sand mounds, we recommend Planning Department staff be required to determine whether the subdivision minimizes fragmentation of agricultural land by locating buildings to preserve viable farmland.

The number of sand mounds permitted under our recommendation (433), is 22 percent less than the number of sand mound that would otherwise be permitted (557) in the area of the County where sand mounds are advantageous. Both numbers (433 and 557) exclude existing houses on property.[55] (See table on the next page.)

[54] See Comment 2 by Margaret Chasson, Nancy Dacek, Scott Fosler, Bob Goldberg, Tom Hoffmann, and Jim O'Connell; Comment 3 by Wade Butler, Pam Saul, Drew Stabler, William Willard, Bo Carlisle, and Jane Evans; Comment 5 by Jim Clifford; Comment 7 by Pam Saul; and Comment 8 by Elizabeth Tolbert in Appendix II.

[55] These estimates of potential sand mounds do not include the exemptions described below.

POTENTIAL SAND MOUND USAGE UNDER GROUP RECOMMENDATION

Acreage	Number of Sand Mounds	Number of properties in size range	Gross of potential sand mounds	Existing number of dwellings	Net of potential sand mounds *
25<50	1	17	17	1	16
50<75	2	14	28	3	25
75<125	3	32	96	10	86
125<175	4	18	72	3	69
175<225	5	8	40	0	40
225<275	6	9	54	0	54
275<325	7	9	63	0	63
325<375	8	5	40	5	35
375<425	9	3	27	0	27
425<825	10-17	0	0	0	0
825<875	18	1	18	0	18
TOTALS		116	455	22	433

* Net number of sand mounds is the total potential minus existing development on the property.

In addition, we recommend allowing sand mounds under the following circumstances:

- **Where there is an existing house and the sand mound would not result in the development of an additional house.** Situations in which this may occur include where there is a failing septic system or the need to create a new reserve field for an existing home. We believe property owners should be able to use the best technology to serve existing homes and address failures.
- **When it enables the property owner with an approved deep trench perc to better locate potential houses to preserve agriculture.** Under this scenario the property owner must first obtain the approval of the Department of Permitting Services (DPS) for a deep trench system perc. We suspect that the circumstances in which a property owner will want to pay for the additional cost of a sand mound will be limited, but we believe this should be an option for an owner wanting to protect land for agricultural purposes. Once a landowner uses a sand mound to relocate a house, the unused perc cannot be used for an additional residential development.
- **For child lots,** provided that our recommendations related to child lots are also adopted (e.g., ownership requirement- see Chapter 2). Sand Mounds will be approved for child lots where they are approved under the zoning provision or approved under the Agricultural Easement Program MALPF/AEP.
- **For farm tenant housing.** In addition, we recommend sand mounds be allowed under the circumstances listed below for parcels existing as of December 1, 2006.
- **For a pre-existing parcel** that is defined as an exempted lot or parcel in the zoning regulations.
- **Grandfather provision.** Any property owner who has submitted a Water Table Application and conducted testing of water table holes between January 1, 2000 and

October 1, 2006 is not limited by any new restrictions, provided that record plats for the property are approved by December 31, 2009.

- **For any permitted agricultural use under the zoning regulations** (e.g., farm market).
- **For the purpose of qualifying for a State or County easement program** (including a Building Lot Termination program).

IV. NEXT STEPS

Council legal staff should coordinate with Planning and Executive legal staff to conduct legal research to determine what changes in law or regulations are necessary to accomplish the Report's recommendations. Changes to the Ten- Year Comprehensive Water Supply and Sewerage Systems Plan will certainly be necessary. The first task of this group should be to resolve outstanding questions related to State preemption.

CHAPTER 4:
BUILDING LOT TERMINATION PROGRAM

ISSUE: Should the County support a Building Lot Termination (BLT) easement program to discourage fragmentation of farmland? Development in the Rural Density Transfer (RDT) zone can result in the fragmentation of farmland, limiting future use of this land for types of farming that require large tracts of land. While there are some types of agriculture that can be sustained on 25 acres or less, if financially competitive alternatives to development are not identified, properties may develop with residential uses that would stunt agricultural activities.

While the County reports more than 48,000 acres of land preserved through Transferable Development Rights (TDR) easements, that land is limited by easement only to uses permitted in the RDT zone and in the number of houses to be allowed. In most cases this number is one house for each 25 acres, the same as the zoning limit. It has been the practice of the Agricultural Services Division and Planning Board to recommend that the landowner retain a TDR for each 25 acres not already built upon as a potential building lot. Thus, a substantial number of potential building lots remain viable in the Agricultural Reserve. The value of lots for residential development in the Agricultural Reserve is significant, providing an incentive to sell lots for development. It is important to provide an incentive to keep a considerable amount of the land under the TDR easements in farming. To meet the goal of preserving land for farming and preventing fragmentation of the Reserve, some method of compensating landowners for the value of those buildable TDRs must be found. **We recommend a BLT Easement as one of the tools to accomplish this goal.**[56]

The target of the BLT program is those unused building lots that either have been or can be created on the RDT zoned ground. Simply put, these unused lots, along with the retained TDRs and approved septic fields that make them viable as building lots, should be eliminated for future development by the execution of an agricultural easement on the land on which the lots or potential lots are located. The landowner would be paid fair compensation for the termination of the lot(s).

I. ACTIVITY UNDER THE EXISTING LAW

Easement purchase programs fall within the scope of existing County authority.[57] There are currently seven easement programs within the County's farmland preservation toolbox, excluding TDR easements:

Montgomery County Agricultural Easement Program
Maryland Agricultural Land Preservation Foundation (MALPF) Program
Maryland Environmental Trust Program
Montgomery County Rural Legacy Program

[56] See Comment 6 by Scott Fosler, paragraph D in Appendix II.
[57] Montgomery County Code, § 2B-7.

Legacy Open Space
Conservation Reserve Enhancement Program
Forest Conservation Easements

Under these seven easement programs approximately 14,000 acres of the 77,000 acres zoned RDT in the Agricultural Reserve are protected. None of these programs would be replaced by the BLT Easement Program.

II. GROUP RECOMMENDATION TO REMEDY THE PROBLEMS

We believe that the best way to reduce potential development and prevent fragmentation of farmland in the Agricultural Reserve is to provide financial incentives that offer an attractive alternative to development. The major problems to be solved in establishing the program are what eligibility criteria are appropriate, how to prioritize applicants, how to determine a fair compensation for the building lot, and how the program can be funded. We believe that our recommendations are acceptable answers and the BLT program can be established successfully.

We agree that there are two goals and purposes of a BLT program: (1) reduce the number of buildable lots in the Agricultural Reserve while providing equity to landowners; and (2) preserve by easement as much usable farmland as possible. Some Group members feel that the primary purpose of the BLT program is to reduce the number of rooftops in the Agricultural Reserve while others feel that the primary purpose is to prevent fragmentation and preserve as much farmland as possible. Some Group members believe the motivation behind the BLT program is unimportant so long as the County implements the program, but other Group members feel that the purpose of the program matters when determining program priorities.

As with other easement programs, one feature of this program would be to give the Agricultural Preservation Advisory Board some authority to designate where additional building could occur on the parcel.

A. ELIGIBILITY

We recommend the following eligibility criteria for participation in a BLT program:

- **The Department of Permitting Services (DPS) must provide certification that an approved soil percolation site exists on the property for each lot being terminated.** DPS must also provide a sketch map locating the percolation site to be terminated in form suitable for recording as part of the agricultural easement.
- **Property owners must have retained a buildable TDR for each lot terminated.** Property owners that have utilized their buildable TDRs on a parcel (either by sale of the TDRs or to build) do not have a buildable lot to terminate.
- **Properties must not be encumbered by an existing preservation easement, except easements placed through the existing TDR program.** We believe that landowners

should not be compensated more than once for abstaining from developing their property. We recommend properties that have sold easements through the existing TDR program not be excluded from a BLT program because of the nature of the TDR easement.

- **Properties must serialize the excess TDRs through a TDR easement that is recorded among the land records.** We do not believe it is necessary to require a landowner to sell their excess TDRs, but we believe a landowner must at least serialize any remaining excess TDRs. Requiring serialization effectively ensures that a bona fide buildable TDR is conveyed to the County.
- **Properties must be at least 25 acres, or be contiguous to other land protected from development by agricultural and conservation easements.** We believe "contiguous" should be defined as one parcel touching another parcel in some manner as shown on the property deed. If one property is across the road or across a utility right of way from another property, those two properties are contiguous; if the road is dedicated, however, the two properties are not contiguous. This definition is similar to that used by the Department of Economic Development (DED) in other programs.
- **At least 50% of the land in a parcel under the BLT easement must meet USDA soil classification standards Class I, II, or III or Woodland Classifications 1 and 2.** This is a State requirement for State funding for agricultural easements and the BLT program must use this requirement to use Agricultural Transfer Tax proceeds.
- **Properties must be zoned RDT and be outside water and sewer categories 1, 2, or 3.** This is another State requirement for using Transfer Tax proceeds and therefore should be used. We do not believe, however, that the BLT program should be limited to specific geographical areas in the RDT zone.
- **Child lots are not eligible.**

B. PRIORITY

We recognize the importance of placing as much farmland under easement as possible. It is important to have a fair and transparent method for selecting properties offered for this easement. Therefore we recommend the criteria to prioritize applications should include date of receipt of a complete application (that meets all of the eligibility criteria), size of the property and farmland preservation. The Agricultural Preservation Advisory Board should assist with rankings in the event of a tie.

C. COMPENSATION

We recommend compensation be set at a percentage of the fair market value of a buildable lot in the RDT zone.[58] Annually the average value for a typical building lot in the RDT zone would be established by acquiring appraisals from at least three qualified appraisers requesting their market evaluation of a typical building lot in the RDT zone. The appraisals will also

[58] ***Follow-Up Required:*** What lot size should be used to establish value? Group members suggest lot sizes ranging from one-acre to 25-acres.

determine the residual value of property once the ability to build is terminated. The annual adjusted market value price would be a percentage of the average of the appraisals. The set value will not differentiate between lots based on their location or the quality of the building site. Compensation will involve the County's purchasing the "Permissible Residential Lot Right" TDR for each lot that is terminated.

We do not support requiring compensation based on approved lots because this option would require a landowner to expend too many resources on obtaining development review approvals. Moreover, this option may result in the landowner's opting to sell lots rather than participate in the BLT program if the owner has met all of the requirements and has an approved lot.

We recommend the County be flexible and allow an option for payments to be spread over two tax years, as opposed to requiring the County to pay a landowner in full at the time the building lot is terminated.

Since the County is purchasing buildable TDRs, the Group discussed the ultimate disposition of the purchased TDRs. Current statistics indicate that there is a significant shortage of TDR receiving areas in the County. Any buildable TDRs not converted into TDRs for non-residential uses as suggested in the section below should be terminated or held for future trading to support the BLT program. We oppose the County's selling TDRs as creating a situation which may invite market disruption (e.g., artificially setting prices too low or too high).

D. FUNDING

We recommend public funding of the BLT program. In the FY07-12 Capital Improvements Program (CIP), the County has approved $8,204,000 for the next fiscal year to purchase easements for agricultural preservation programs, including a BLT program.[59] For FY2008 $6,346,000 has been budgeted for all farmland preservation program initiatives. The Department of Economic Development (DED) estimates that $5.5 million would be available for the BLT program. The Agriculture Transfer Tax may provide ongoing funding which averages approximately $2,000,000 per year to support the existing preservation programs and the BLT easement program.[60]

Additional sources of public revenue to support the program will be necessary in the future. Possible sources of funding could include a bond issue for preservation purposes or a small limited term tax. The response to the program once it is in place will help gauge the relative demand for this program as compared with other preservation programs and determine whether the existing funding source, the Agriculture Transfer Tax, is sufficient.

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[59] The FY07-12 CIP provides for funding for the following four programs: Montgomery County Agricultural Easement Program; Maryland Agricultural Land Preservation Foundation; Rural Legacy Program; and the BLT program.

[60] It may be unrealistic for the County to approve an ongoing BLT program which is also funded by the Agriculture Transfer Tax revenue.

We also believe that the BLT program can be funded privately via the creation of a new market-driven TDR program for buildable TDRs for non-residential properties. This would require utilizing the program for buildable TDRs described in Chapter 1 on the TDR program. The County could offer non-residential TDRs to pay for all or part of the purchase price for landowners applying to the BLT program. Developers of properties in residential receiving areas would continue to buy excess TDRs, while developers of property in the new non-residential receiving areas would purchase buildable TDRs at a significantly greater cost.

E. PROCEDURE

We recommend the following procedures:

- The landowner will apply to DED demonstrating eligibility under the above stated criteria.
- DED Agricultural Services Division will review applications to assure eligibility criteria are met and the application is complete.
- The Agricultural Preservation Advisory Board will review applications for recommendations to the Director of DED.
- The County Attorney will evaluate applications and approve the Contract and Easement documents.
- The package will then be sent to the County Executive for action.
- At settlement, the landowner will be paid in cash or by an option for payments to be spread over two tax years. Our recommendation is that, when available, non-residential use TDRs could be added to the program so that they can be provided to the property owner in lieu of cash or as a component of the consideration paid under the BLT Program. Any buildable TDRs not converted under the program to non-residential TDRs should be terminated.

III. NEXT STEPS

DED should draft Executive regulations that would implement the BLT program as envisioned by the Group. For items that require follow-up work, DED should work with appropriate groups and individuals to determine how to resolve those issues.

The Planning Department should be tasked with creating a new TDR program whereby owners of non-residential properties would need to purchase buildable TDRs to increase density.

CHAPTER 5:
PENDING LEGISLATION

ISSUE: Should the Council enact legislation pending as of October 31, 2006? Although all pending zoning text amendments (ZTAs) expired on October 31 pursuant to State law, we discussed any legislation, including ZTAs, pending as of October 31, 2006 that related to the Agricultural Reserve.

I. ZTA 05-23, TDR EASEMENT – NONRESIDENTIAL USES

A. BACKGROUND

Agriculture is the preferred use in the Rural Density Transfer (RDT) zone. The intent of the RDT zone is "to promote agriculture as the primary land use in sections of the County designated for agricultural preservation," applied through the County's general plan and area master plans. The County's Transferable Development Rights (TDR) Easement program exemplifies this intent. In consideration for allowing a property owner to sell "development rights" to developers based on their landholdings in the RDT zone, the County executes an easement with the owner to preserve those landholdings principally for agriculture and limit future construction on the encumbered property to one single family house per 25 acres. The Council has recently taken action to ensure that uses that are neither agricultural, nor residential, are limited in the RDT zone.[61]

On December 13, 2005, ZTA 05-23 was introduced to require TDR easements to limit future development of non-residential and non-agricultural uses ("non-agricultural" is hereafter referred to mean all uses except residential and agricultural uses). In addition, ZTA 05-23 would prohibit a property developed with a non-agricultural use from participating in the TDR program. ZTA 05-23 has now lapsed.

B. GROUP RECOMMENDATION

We recommend the Council introduce and enact legislation to clarify in clear and direct terms the long-standing legislative intent that the development of RDT-zoned parcels encumbered by TDR easements shall be limited to single family and agricultural and agricultural-related uses only.

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[61] The Council recently enacted two changes in law and regulation that limit the growth of PIFs in the RDT zone. First, it amended the Ten-Year Comprehensive Water Supply and Sewerage Systems Plan to prohibit the extension of public water and sewer services for PIFs in RDT zoned property. Therefore, all future PIFs on RDT zoned property are limited to private sewerage treatment systems. Second, the Council limited private multi-use sewerage disposal systems for non-agricultural uses in the RDT zone to 600 gallons of effluent per day for any housing unit and no more than 4,999 gallons of water per day for any given property. On a practical basis, the maximum size multi-use system creates an upper limit on the maximum total size of structures allowed.

The second impact of ZTA 05-23 is to prohibit a property developed with a private institutional facility (PIF) from selling any TDRs, regardless of the size of the PIF or the property (e.g., a large property with a small PIF structure would be prohibited from selling any TDRs). While we support the concept of decreasing the potential TDRs for sale once a PIF has been located on the property, we believe that additional work must be completed to determine the legality of reducing the TDRs for sale, and the relationship between the size of the property, the size of the PIF and the number of TDRs.

The follow-up work needed to address the second part of ZTA 05-23 should not delay passage of the provision discussed earlier that limits a landowner whose land is under easement to single-family and agricultural uses only. The issues could be considered in two separate text amendments.

II. ZTA 05-15, IMPERVIOUS SURFACE LIMIT REQUIREMENTS FOR THE RE-2, RE-1, RURAL, RC & RDT ZONES

A. BACKGROUND

On October 3, 2005, ZTA 05-15 (first introduced in December 2004 as ZTA 04-27) was introduced to limit all impervious surfaces that are not related to agriculture to 15% in the RDT zone and 20% in the RC, RE-2 and RE-1 zones. An impervious surface is a hard surface area that prevents or substantially impedes the natural infiltration of water into the underlying soil. Examples of impervious surface include buildings, decks, patios, parking areas and all paved surfaces such as driveways, roads, sidewalks, tennis courts, and basketball courts. ZTA 05-15 has now lapsed.

B. GROUP RECOMMENDATION

We recommend against enacting legislation similar to ZTA 05-15 at this time. Since introduction of ZTA 05-15, the Council has passed legislation and changes to the Ten-Year Comprehensive Water Supply and Sewerage Systems Plan that effect the Agricultural Reserve. Any effort to move forward on this legislation must be considered with an agricultural exemption that holds agricultural uses harmless. We believe that the Council should continue to monitor the development in the RDT zone to determine whether any further changes are needed, but a limit on imperviousness does not appear necessary at this time.

III. EXPEDITED BILL 38-05, SEWAGE DISPOSAL – SEPTIC SYSTEMS – TEMPORARY PROHIBITION

A. BACKGROUND

Expedited Bill 38-05 was introduced on November 8, 2005, to temporarily prohibit the use of mound systems or any innovative or alternative individual septic systems for new construction until July 31, 2006. We are recommending specific recommendations on sand mound use which should address the concerns raised by the Council making a temporary prohibition unnecessary.

B. GROUP RECOMMENDATION

We recommend not enacting legislation similar to Expedited Bill 38-05. In Chapter 3, we recommend alternative legislation that would limit, but not prohibit, sand mounds. If the alternative legislation is enacted, we do not believe that this legislation is necessary to reduce potential development in the Agricultural Reserve.

IV. BILL 38-04, AGRICULTURAL LAND PRESERVATION – PUBLIC SALE OF DEVELOPMENT RIGHTS

A. BACKGROUND

Bill 38-04 was introduced on November 9, 2004 to authorize the sale of County-owned TDRs. The purpose of such a sale was to "provide the opportunity for buyers to gain access to development rights when privately-owned development rights are not available." This legislation has now expired.

B. GROUP RECOMMENDATION

We recommend against enacting legislation similar to Bill 38-04. Current statistics indicate that there is a shortage of TDR receiving areas in the County. We believe that increasing the supply of TDRs would not only reduce the price that private landowners receive for TDRs but would also put the County in direct competition with private landowners that have TDRs to sell. The transfer of privately held TDRs into bona fide TDR receiving areas must remain a County priority.

CHAPTER 6:
ADDITIONAL ISSUES

The Council's resolution establishing the Ad Hoc Agricultural Working Group called for a comprehensive review while also intentionally limiting the scope of the Group's work to the issues discussed above. We feel that a broader comprehensive review of policies and laws related to the Agricultural Reserve is necessary and our goal here is to identify a range of issues that should be considered. We offer some preliminary thoughts on right-to-farm legislation, education strategies, and design standards, and suggest a list of questions regarding other important issues.

I. RIGHT-TO-FARM LEGISLATION

ISSUE: Does the County need to pass additional legislation to protect a farmer's "right-to-farm"? As suburban communities expand into rural communities, conflicts can arise between farmers who want to farm the land and neighbors who expect suburban standards for noise, odors, etc. Conflicts can also arise between farmers and other farmers. These conflicts can interfere with agricultural activities.

A. RELEVANT LAWS AND REGULATIONS

"Right-to-farm" legislation is often adopted as a response to nuisance complaints between farmers and their neighbors. An excerpt from the State legislation is reproduced below. Since Montgomery County does not have a "nuisance ordinance," Council staff has perused the County Code and identified legislation that is relevant to the broad category of nuisance law. These excerpts appear below.

1. STATE LAW

State law provides for the following protections for farmers from nuisance claims:

> Operation continued for 1 year or more. If an agricultural operation has been under way for a period of 1 year or more and if the operation is in compliance with applicable federal, State, and local health, environmental, zoning, and permit requirements relating to any nuisance claim and is not conducted in a negligent manner:
>
> > The operation, including any noise, odors, dust, or insects from the operation, may not be deemed to be a public or private nuisance; and

A private action may not be sustained on the grounds that the operation interferes or has interfered with the use or enjoyment of other property, whether public or private.[62]

2. COUNTY LAW

Zoning Ordinance

Section 59-C-9.23 of the Montgomery County Zoning Ordinance sets forth the intent of the Rural Density Transfer (RDT) zone. This section states that "[a]griculture is the preferred use in the [RDT] zone. *All agricultural operations are permitted at any time, including the operation of farm machinery*"[63].

Air Quality

Chapter 3 of the Montgomery County Code, entitled "Air Quality", generally prevents an individual from burning refuse or plant life outside of a building without a permit and limits the purposes for which a permit may be issued. Section 3-8(c)(1) allows the Director of the Department of Environmental Protection (DEP) to issue a permit for agricultural open burning.

Section 3-9(a) states that "[a] person must not cause or allow the emission into the atmosphere of any gas, vapor, or particulate matter beyond the person's property line or house if a resulting odor creates air pollution."[64] The County Code does not contain a provision exempting farmers from the general odor provisions of the Code.

Erosion, Sediment Control, and Stormwater Management

Chapter 19 in the County Code, entitled "Erosion, Sediment Control, and Stormwater Management", provides that "[i]f illegal pollutant discharges from properties engaged in agriculture impair aquatic life or public health, cause stream habitat degradation, or result in water quality standards or criteria violations, the Department must pursue correction of these violations . . ."[65] This section specifically addresses agricultural operations and there is no exemption.

Noise Control

Chapter 31B of the County Code, entitled "Noise Control", provides the standards for acceptable levels of noise during both the day and night times. The table below summarizes the general standards related to acceptable noise levels in the agricultural zones.

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[62] Maryland Code, Courts and Judicial Proceedings, § 5-403(c).
[63] Montgomery County Code, § 59-C-9.23 (emphasis added).
[64] Montgomery County Code, § 3-9(a).
[65] Montgomery County Code, § 19-51(c).

Maximum Allowable Noise Levels in the Agricultural Zones[66]

	Daytime (decibels)	**Nighttime** (decibels)
Land zoned in agricultural zones* where the owner **has not** transferred the development rights.	65	55
Land zoned in agricultural zones* where the owner **has** transferred the development rights.	67	62

* The agricultural zones are Rural, Rural Cluster (RC), Rural Density Transfer (RDT), Rural Neighborhood Cluster (RNC), Rural Service (RS), and Low Density Rural Cluster Development Zone (LDRCDZ).[67]

Section 31B-10 includes a relevant exception. Section 31B-10(a)(1) states that the Noise Control chapter does not apply to "agricultural field machinery used and operated in accordance with the manufacturer's specifications".[68]

Pesticides

Chapter 33B of the County Code, entitled "Pesticides" regulates the use and distribution of pesticides. The definitions section exempts agricultural land from the requirements in that section.[69]

Solid Waste

Chapter 48 of the County Code contains laws related to solid waste. Section 48-22 prohibits people from hauling refuse into the County without a permit. Provisions in this section exempt fertilizer and stable manure used for agricultural purposes from this general prohibition.[70]

B. ACTIVITY UNDER EXISTING LAW

As suburban communities expand and abut agricultural land, conflicts may arise between farmers who wish to continue their farming and non-farmers who want to preserve the use and enjoyment of their property. Conflicts can also arise between farmers. These conflicts can involve complaints about "odor, flies, dust, noise from field work, spraying of farm chemicals, [and] slow moving farm machinery."[71]

Currently, complaints are filed with the DEP. Staff from DEP indicate that the number of complaints filed, while not "common", have increased as development in the UpCounty area has increased. According to DEP's data, in the past 10 years (through May 2006), DEP has only

[66] Montgomery County Code, §§ 31B-2(l)(1)-(2), 31B-5(a)(1).
[67] Montgomery County Code, § 59-C-9.1.
[68] Montgomery County Code, § 31B-10(a)(1).
[69] Montgomery County Code, § 33B-1 defines *lawn* as excluding agricultural land.
[70] Montgomery County Code, § 48-22.
[71] Janie Hipp, "Balancing the Right to Farm with the Rights of Others", page 1 (National Public Policy Education Conference, 1998).

recorded 25 complaints in the Agricultural Reserve. About half of those were illegal dumping complaints, which would not be addressed in right-to-farm legislation.

Council staff performed a cursory online search that did not identify current Maryland court opinions addressing nuisance claims related to agricultural land and farming in Maryland. The lack of reported judicial opinions is not surprising given the strong State language that protects farmers from nuisance lawsuits.

C. GROUP RECOMMENDATIONS TO REMEDY THE PROBLEMS

The Group discussed the following options:

1. Do nothing
2. Enact Right-to-Farm Legislation
3. Enact Legislation Requiring Disclosure Requirements

We do not support the "do nothing" approach because Group members are concerned that if residential development in the Agricultural Reserve increases, the potential number of complaints against agricultural operations could increase. Nor do we support enacting right-to-farm legislation for two reasons: (1) we feel that current County and State law adequately protects farmers from nuisance lawsuits;[72] and (2) we reviewed data compiled by DEP that indicates that there is not a widespread problem. However, if the Council does opt to enact right-to-farm legislation, **we recommend the Council exclude the use of grievance procedures because these procedures tend to favor homebuyers and be costly for farmers.**

We recommend the Council enact legislation requiring disclosure for homes being sold in agricultural zones informing potential homebuyers of current County and State law that protects farmers from nuisance claims. We feel that this approach may reduce the number of complaints lodged against farmers by increasing the awareness of homebuyers that current laws protect farmers from agricultural-related complaints. If the number of complaints lodged against farmers continues to increase despite a disclosure notice, **we would recommend that the Council explore whether additional action is required to protect farmers.** If additional action is needed, some Group members suggest the Council pass a resolution affirming the right of farmers to farm in the Agricultural Reserve.[73]

D. NEXT STEPS

The County Council should enact legislation requiring disclosure for homes being sold in agricultural zones informing potential homebuyers of current County and State law that protects farmers from certain nuisance claims related to farming.

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[72] See discussion on pages 41 and 43.

[73] ***Follow-Up Required***: At what stage of the home buying process should this disclosure be required (e.g., when a contract is signed, at closing, etc.)? What form should the disclosure take?

II. EDUCATION STRATEGIES

A. GROUP RECOMMENDATION

We recommend the County invest in an education campaign to inform County residents of the importance and location of the Agricultural Reserve. Group members suggest the following campaign strategies be considered: signs indicating the boundaries of the Agricultural Reserve, pamphlets, events, a "speaker on call" list, coordination with Montgomery County Public Schools, special programs for after-school children's groups and seniors, public service announcements, an advertising campaign, cable TV programming, a website, expanding the cooperative extension service, and expanding the Agriculture History Farm Park. We feel the existing Agricultural committees should be involved in the development of this educational campaign.

B. NEXT STEPS

The Department of Economic Development should work with the Agriculture community to develop an educational program designed to inform County residents of the importance of the Agricultural Reserve.

Signs indicating entry to and exit from the Agriculture Reserve would be appropriate. An example that might be useful is the historical marker sign for the Viers Mill on Viers Mill Road. This is a small bronze-like sign giving some historical data.

III. DESIGN STANDARDS

Design strategies would guide the location of residential lots created in the RDT zone to maintain farmable areas and minimize the impact of residences. The size of the lot, the need for septic treatment and the ability to use private roads also impact location/design. Placement of homes on the land may have a more important impact on retaining rural character than lot size, especially at the low density of the RDT Zone.

A. ACTIVITY UNDER THE EXISTING LAW

The County does not currently have provisions for design standards for clustering, home placement, or for allowing more lots on private roads in the RDT zone. Existing law requires that lots in the RDT zone be a minimum of 40,000 square feet. The Rustic Road Functional Master Plan recommends placement of buildings to protect view sheds.

B. GROUP RECOMMENDATION TO REMEDY THE PROBLEMS

We did not discuss specific options related to design strategies because of time constraints, **but we recommend the Planning Department further explore options to reduce fragmentation of agricultural land by locating buildings to preserve viable farmland.** Options could include design standards, clustering, the use of private roads, etc. We believe that if developed properly, these strategies could be an important tool. However, if these strategies are not developed properly, they could run counter to the underlying goal of reducing farmland fragmentation. (For example clustering for environmental purposes has sometimes led to a recommendation to place houses in the middle of productive land to protect forested areas.)

We believe that efforts to identify potential strategies should involve property owners and must be cognizant of the existing tensions between the Planning Department and rural property owners on this issue. **We recommend the Planning Department consider using existing agricultural advisory groups to help develop these strategies.**

We further believe that any strategy must maintain property owner equity and achieve the goal of preserving farmland, which may sometimes conflict with other County policies (e.g., forest conservation). Several Group members believe that incentives should be provided to encourage, rather than mandate, location strategies. Some Group members believe strongly that the incentives should not include additional density, while other Group members believe that additional density should be considered as a potential incentive.

IV. ADDITIONAL AGRICULTURE ISSUES

A. GENERAL ISSUES

- What role can non-profit entities play in the effort to keep land as farmland, (rather than being converted for residential development)?

- Do any of the needed policy changes require an amendment to the Master Plan for the Preservation of Agriculture and Rural Open Space or can all needed modifications occur through changes to the Zoning Ordinance and other County laws?

B. ZONING

- Should the uses and/or special exceptions allowed in the RDT zone be limited or expanded (e.g., to limit institutional uses or allow children's day camps)? Should the County designate additional areas for the "Rural Service Zone"?

- Should the County designate additional areas for the "Rural Service Zone"?

- Should new development standards/zoning be created or used for developments and subdivisions in the RDT zone (e.g., to allow smaller lots, require rural preservation design standards, etc.)?

- Should public road requirements be changed to allow more houses to access private drives in rural areas (Planning Department page 7)?

C. TENANT HOMES

- Should there be new requirements to ensure that the ownership of tenant homes is not transferred to individuals not employed on the farm?

- Should the number of tenant homes be limited?

D. RUSTIC ROADS

- Are changes needed regarding roads in the Agricultural Reserve and rustic roads in particular?

E. ECONOMIC HEALTH OF THE AGRICULTURAL RESERVE

- Are changes needed to the County's efforts to monitor the economic health and evolution of the agricultural industry in the County and to County programs to promote the health of this industry? (Note that this question is intended to address issues unrelated to land use.)

- How can the County ensure a focus on sustainable agriculture and not just the preservation of farmland?

- What additional analysis is needed of changing trends in farming and opportunities for alternative/small scale farming?

- How should the County monitor and react to the impact on farming from environmental legislation and deer management? Are changes required or needed?

APPENDIX I: GLOSSARY/ ACRONYMS OF TERMS

Agricultural Advisory Committee (AAC) – A fifteen member committee appointed by the Montgomery County Executive and confirmed by the County Council to advise the County Executive and the County Council on all matters affecting agriculture in Montgomery County.

Agricultural Easement Program (AEP) – A Montgomery County agricultural land preservation program that gives the County the ability to purchase agricultural land preservation easements to preserve land for agricultural production. The program was created to increase both the level of voluntary participation in farmland preservation programs and expand the eligibility of farmland parcels.

Agricultural Preservation Advisory Board (APA) – A five member board appointed by the Montgomery County Executive and confirmed by the County Council to promote the preservation of agriculture within the County. The Board provides advice and recommendations for the establishment of Agricultural Districts, sets priorities for easement acquisitions, provides guidance for setting program policies, and makes recommendations on proposed regulations.

Agricultural Reserve – A defined area of the County, primarily agriculture, which includes most of the County's remaining working farms as well as other non-farm land uses that will serve to define and support those farms. The Agricultural Reserve was created in 1981 when the Montgomery County Council rezoned land in the northern third of the County from the Rural zone to the Rural Density Transfer zone. For the purpose of this report, property zoned Rural Density Transfer and in private ownership is the focus of the farmland preservation recommendations.

Base Density – The maximum number of dwelling units permitted by the zoning classification of a property in a receiving area computed over the gross area of the property without the application of provisions in the Zoning Ordinance that allow for increased density (e.g., TDRs, MPDUs).

Building Lot Termination Program (BLT) – A proposed agricultural easement program that would provide a means for a landowner to receive compensation in exchange for relinquishing the right to a potential building lot. See the definition for "Transferable Development Rights" and Chapter 4 for a more detailed description.

Central Business District (CBD) – A central business district is designed to encourage residential and commercial development at relatively high densities. There are four central business districts in Montgomery County: Bethesda, Friendship Heights, Silver Spring, and Wheaton.

Density – The ratio of residential units to the gross acreage of the property.

Department of Economic Development (DED) – A department in the Montgomery County government that implements programs and aids in the creation and advancement of businesses in

the County to ensure the economic growth and vitality of the County. The Agricultural Services Division in the Department of Economic Development supports and promotes the viability of the agricultural industry in Montgomery County.

Department of Environmental Protection (DEP) – A department in the Montgomery County government that protects and enhances the quality of life in the County through the conservation, preservation, and restoration of the environment. The Department of Environmental Protection is guided by the principles of science, resource management, sustainability, and stewardship.

Department of Permitting Services (DPS) – A department in the Montgomery County government that enforces standards that control what goes on before, during, and after construction. Anyone who wants to develop land, build something, or establish a business in a particular area of the County must first obtain a permit from the Department of Permitting Services.

Euclidean Zone – A type of zoning that establishes zoning districts with set boundaries and specific standards that govern permitted uses, lot size, setbacks, and building height. Euclidian zones are typically applied by the government through a Sectional Map Amendment. There are four types of Euclidean zones: residential, commercial, industrial, and agricultural.

Farm tenant housing (tenant housing) – A structure occupied by an agricultural worker actively engaged in farming on a full-time or part-time basis on a farm on which the farm tenant dwelling is located.

Floating Zone – A type of zoning that does not apply to a property until the property owner requests the County apply the zone to their property. Rezoning a property must be compatible with surrounding uses and in accord with the expressed purpose and other requirements of the zone. Once a floating zone is applied to a property, it establishes the standards for development.

Floor Area Ratio (FAR) – A means of establishing the maximum building size which is controlled by a mathematical ratio between the total amount of gross floor space that can be built and the total land area. This figure is determined by dividing the gross floor area of buildings on a lot by the area of that lot.

Geographic Information Systems (GIS) – Data and computer programs that provide the ability to map and spatially analyze any feature associated with property (i.e., zoning, wetlands, forests, man-made improvements).

Hansen – A proprietary computer program used by the Montgomery County Planning Board and the Department of Permitting Services to track development approvals.

Local Map Amendment (LMA) – A change in zoning sought by the owner or contract purchaser of a particular property. The local map amendment covers a single tract, all portions of which are proposed for classification in the same zone.

Maryland Agricultural Land Preservation Foundation (MALPF) – This program protects and preserves agricultural land from development throughout the State of Maryland and provides for the purchase of development rights easements directly from landowners.

Maryland-National Capital Park and Planning Commission (M-NCPPC) – A bi-county agency comprised of the Montgomery County Planning Board and the Prince George's County Planning Board.

Mixed-Use Zones – These zones attempt to ensure the compatibility of residential and nonresidential uses by providing for an integrated mix of residential, commercial, research and development, and institutional uses while adequately providing open space for the entire community.

Montgomery County Planning Board – A five-member Board responsible to the County Council to advise and assist the Council in planning, zoning, and subdivision. The Planning Board is responsible for developing land use plans for review and approval by the County Council and implementing adopted plans though its review of development applications and administration of subdivision regulations. The Board, acting as the Park Commission, also plans, acquires, maintains, and operates the County park system.

Private Institutional Facility (PIF) – A structure utilized by a non-government, not-for-profit organization, such as houses of worship, private schools, or other tax-exempt groups. Some private institutional facilities are allowed in the Rural Density Transfer zone.

Receiving Area – An area designated on an approved and adopted general, master, sector, or functional plan appropriate for development beyond its base density through the transfer of development rights.

Residential Estate Zone (RE-2) – A zoning classification that limits development to one dwelling unit per two acres.

Rural Cluster Zone (RC) – A zoning classification that permits clustering of housing in areas designated Rural Open Space. It permits housing on a tract of land zoned for one unit per five acres to be clustered on lots as small as 40,000 square feet (approximately 1 acre) while retaining the remaining acreage in open space, which may be used for agriculture or other limited uses.

Rural Density Transfer Zone (RDT) – The zone applied to the Agricultural Reserve. Actual development is limited to one house per 25 acres, with the provision that such development can be placed on lots as small as 40,000 square feet. Property in this zone comprise the designated transferable development rights sending area. Prior to 1981, the vast bulk of land now zoned Rural Density Transfer was zoned Rural.

Rural Zone – The Rural Residential Zone allows one dwelling unit per five acres. This zone does not allow the clustering of lots as allowed in the Rural Density Transfer and Rural Cluster zones.

Sectional Map Amendment (SMA) – A comprehensive rezoning of a particular area of the County to implement the recommendations of a general, master, sector, or functional plan. Sectional Map Amendments can only be proposed by the Montgomery County Planning Board or the Montgomery County Council and are approved by the Council.

Sending Area – An area designated on an approved and adopted general master, sector, or functional plan as a sending area appropriate for the conveyance of transferable development rights from the area. All sending areas are zoned Rural Density Transfer.

Transferable Development Rights (TDR) – Inchoate rights established under Section 59-C-9 of the Montgomery County Zoning Ordinance that grants a landowner one TDR for every five acres of land in a parcel owned in the Rural Density Transfer zone. These rights, once serialized through the easement process, may be transferred to receiving areas and used for density above the base density.

Buildable Transferable Development Right – A transferable development right retained by a property owner in the Rural Density Transfer zone for the purpose of being able to build a dwelling (sometimes referred to as the 5th TDR, development TDR, or Super TDR).

Excess Transferable Development Right – Transferable development rights that can be sold to another party without impacting the landowner's ability to develop in accordance with the base density of the Rural Density Transfer zone.

Severed Transferable Development Right – A transferable development right that is no longer attached to a sending property by virtue of an easement recorded in the land records of the County.

Extinguished Transferable Development Right – A transferable development right that has been severed, conveyed to a developer, and the serialized numbers have been recorded on a development plan in a receiving area or conveyed to Montgomery County under the Building Lot Termination Program.

Transferable Development Right Receiving Capacity – The potential number of transferable development rights that can be used to create more houses on land designated as a transferable development right receiving area via the application of transferable development right zoning. The Zoning Ordinance regulates the maximum number of transferable Development Rights that can be used.

Transferable Development Right Sending Capacity – The potential number of transferable development rights that can be used from a particular parcel of land zoned Rural Density Transfer. This is the number of acres of the parcel divided by 5, as transferable development rights are assigned based on the 1:5 ratio. This capacity figure does not distinguish between transferable development rights necessary for houses, buildable transferable development rights, or excess transferable development rights.

Zoning Text Amendment (ZTA) – Legislation that, if enacted by the Montgomery County Council, would amend Chapter 59 of the County Code (i.e., the Zoning Ordinance).

APPENDIX II:
COMMENTS OF DISSENT, RESERVATION AND CLARIFICATION

COMMENT 1:

Submitted by: Margaret Chasson, Nancy Dacek, Bob Goldberg, Tom Hoffmann
Endorsed by: Jim O'Connell

In implementing the Functional Master Plan for the Preservation of Agriculture and Rural Open Space, the limitation of the number of child lots to the number of TDRs was a way of saying that for the purposes of child lot development, one should consider the restraints prior to the adoption of the 1981 sectional map. This certainly is not to say that one should disregard the new zoning provisions for all development. The practice of allowing a landowner to exceed the density restrictions of current zoning for the creation of market lots in subdivisions containing child lots is contrary to the thrust of the Master Plan. This practice gives priority to development over preserving agriculture. While the number of child lots permitted may exceed the density of current zoning, in no case should the creation of market lots be allowed to exceed the base density.

COMMENT 2:

Submitted by: Margaret Chasson, Nancy Dacek, Scott Fosler, Bob Goldberg, Tom Hoffmann, Jim O'Connell[74]

The Working Group's attempt to reach agreement on limiting the use of sand mounds proved to be the most divisive issue faced, although there was consensus among the Working Group that the use of sand mound technology should be limited. The issue debated therefore was to settle on an acceptable scope and measurement of sand mound limitation. It is important to note that these limitations are not a reduction in actual development rights for any landowner, as "regular percs" are always permitted within the existing zoning of one lot / 25 acres.

The proposal contained in the report, which resulted from a very close vote in the Working Group, is to allow parcels of less than 100 acres to employ sand mounds to develop to maximum zoned potential (one building lot per 25 acres) but to restrict application of sand mounds in larger parcels (greater than 75 acres) to one additional sand mound per 50 acres. The undersigned minority group felt strongly that this proposal was not strong enough in limiting the ongoing utilization of sand mound technology.

The Functional Master Plan for the Preservation of Agriculture and Rural Open Space speaks strongly against alternative individual sewerage disposal system usage in the RDT zone. The Master Plan took this position for the purpose of limiting maximum build out in the RDT zone. Wide-spread use of sand mounds will undercut that goal. Whether or not sand mounds are an "alternative" system has been much debated, but the authors of the Master Plan clearly intended to use sanitation management tools to limit growth in the RDT zone. The management of growth in the Agricultural Reserve was structured around a total package of carrots and sticks – TDRs, zoning, sewerage systems. If one of these management tools is lost or degraded, the desirable extent of development in the Agricultural Reserve will be exceeded. Similarly, introduction of new sanitation technologies, if not limited, could in the future cause the "sand mound debate" to be replayed.

The official Working Group recommendation would potentially allow creation of lots using sand mounds numbering over half as many as lots created in the entire RDT zone since 1978. This would be in addition to the number of lots that could be created using standard trench septic systems. The minority believes this level of development would severely fragment the remaining agricultural land and create a need for too many services in the RDT zone.

The recommendations of the Working Group complement each other with enhanced TDR receiving areas and the BLT easement program offering alternatives to development, offsetting limitations on the use of sand mound sewerage disposal. Therefore it is important that the package of recommendations be considered as a whole.

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[74] Mike Rubin fully agrees with all paragraphs in this minority statement with the exception of the limitation expressed in second sentence of final paragraph. Mr. Rubin would support one sand mound for each 25 acres up to parcels of 75 acres. Any parcel above this size would be at 1:50. This would mean a parcel of 75.1 acres to 149.9 acres would get less yield utilizing a sand mound than those of 75 acres. This limitation would allow small landholders to get more yield while protecting the larger, potential working farm parcels.

As the Working Group discussed the use of sand mound technology, there was general agreement about special cases in which the use would be desirable. These are stated in the Report and the minority agrees with all of them.

The Working Group also agreed that fragmentation of farmland should be avoided in all situations, and that conservation design standards should be developed and implemented for sand mound development. With such standards in place, the minority accepts that it would be reasonable to accommodate one sand mound per 50 acres in addition to the special cases agreed upon without destroying the purposes of the Agricultural Reserve. We recommend this standard for parcels developed using sand mounds, and also for future application to any future new technologies for on-site sewerage systems.

COMMENT 3

Submitted by: Wade Butler, Pam Saul, Drew Stabler, William Willard, Bo Carlisle, Jane Evans

The farmer representatives of the Agricultural Policy Working Group were asked to support several proposals that would clarify some existing county provisions and also develop policies for reducing the fragmentation of farmland in the agricultural reserve. It was our view that fragmentation of agricultural lands represents the greatest threat to long term agricultural economic viability, while other group members seemed to focus on the number of new residences as the main threat.

We were concerned that if we could not achieve consensus on these matters, the County Council would make the decisions in a way that may not be desirable to the interests of farmers and rural landowners. With these concerns in mind, we attempted to comprehensively address the interests of the agricultural community without jeopardizing our standing in our community and negatively impacting our ability to interact with our peers. We trust that you can understand and appreciate our position since we represent the future of agriculture in the county and we are the true agricultural stakeholders.

The roots of the agricultural community in Montgomery County run deep, and we represent a traditional and unique heritage which dates back to the days of our founding fathers. With such long standing heritage, our families' interest in maintaining our rural lifestyle and setting, are among the values of paramount importance to us. It is with this understanding and our sense of commitment to our community that we embraced the vision and mission of the Ad Hoc Agricultural Policy Working Group with a sense of urgency and responsibility.

Over the past several months, this group met to discuss the important land use issues of today and their impact on our most precious resource, our land. As agriculturists and stewards of the land, we view this resource in ways much different than other stakeholders who live in the agricultural reserve. The farmers believe the report will provide an opportunity to adequately address several pending issues and introduce some new initiatives and programs which include guidance for a real estate disclosure provision, clarification for future cases involving child lots, tenant dwellings, and a new building lot termination program, enhancements for the TDR program, and a new policy for sand mounds.

Developing a new sand mound policy proved the most challenging of issues and this represented the only issue where the group members had difficulty reaching a consensus. We recognized that it was unrealistic to expect no change as a reasonable outcome, so we discussed and negotiated these issues in good faith and with opened minds in reaching what we thought was the compromise as outlined on page 9 which resulted in a sand mound reduction of 25%. At the last moment the compromise was evolving into a new proposal that was more restrictive than what we agreed to support. With any reduction of sand mounds, there remains great uncertainty as to whether the County Council is truly committed to helping farmers as compared to, once again, taking from farmers.

As group members and leaders of the agricultural community, our job was to represent all agricultural interests. We were being pressured to support a proposed sand mound reduction of 48%, and the question of adequate funding for compensation was not clear. We felt that this approach was neither fair nor equitable because we questioned whether funding for a building lot termination program will be sufficient to compensate landowners for giving up vested property rights. In light of these considerations, we collectively agreed that we simply could not support more than 25% reduction in future use of sand mounds.

Twenty six years ago, the County Council once again down zoned the rural and agricultural areas with the TDR program as a means to offset the lost equity from the RDT zone. Today, the farmers remain discouraged by the TDR market as reduced demand in receiving areas has resulted in no TDR sales and therefore no means is currently available for farmers wanting to sell their TDRs.

An adequately funded program to provide a mechanism to preserve equity and compensate landowners will need to be developed and implemented.

COMMENT 4

Submitted by: Margaret Chasson

The statement that the group believe that the Planning Board and Council should select zones that better reflect the desired density, rather than assume that septic limitations will control density is contrary to the recommendation of the group to limit density through restricting the use of sand mounds to control growth. While it is true that some members of the group interpret the zoned density to be a guarantee of the amount of building that occurs in a zone, in reality zoning is a maximum, not a base guarantee. This point needs to be made in all discussions of zoning and density.

COMMENT 5

Submitted by: Jim Clifford

I believe there is a real desire by the members of the Ad Hoc Agricultural Policy Working Group to make certain the final report reflects how hard fought and difficult it was to try to reach a compromise between the parties regarding the application and use of Sand Mounds in the Ag Reserve.

Given the fact that certain members, representing different points of view, had to yield on their respective heartfelt positions in order to reach a reasonable consensus, I would respectfully request the Council give serious consideration to the reported proposal before them before implementing any alterations to the recommendation.

At the inception of the group meetings back on May 25, 2006, certain members representing the agricultural community felt strongly that the Sand Mound policy should be consistent with state law and therefore the full realization of one lot per 25 acres, as permitted in the RDT zone, should have the potential to be realized through Sand Mounds. There was a feeling among this group that the concern to limit this was "much to do about nothing" since the reality is that very few Sand Mounds had been utilized in the RDT zone since being permitted in 1993. On the other hand, other members sought to eliminate Sand Mounds (except in limited circumstances) as being an alternative septic disposal system not allowed by the 1980 Agricultural Reserve Master Plan.

Both groups reached a consensus relatively easily regarding what circumstances should be an exception to any restriction to Sand Mounds. Those exceptions are evidenced in the reported Ad Hoc Committee proposal.

In an effort to reach a compromise beyond the agreed upon exceptions, certain agricultural representatives proposed that any parcel in the RDT zone should be given the opportunity to subdivide using Sand Mounds on a 1 to 25 acre ratio but should be limited to the Minor Subdivision procedure, thereby limiting the total Sand Mound usage under that procedure to five lots. After that, any subdivision would require the full subdivision procedure using a one lot per 50 acres ratio. The counter proposal by other group members was to permit one lot per 50 acres from the start, with any lots less than 50 acres entitled to at least one Sand Mound. No consensus could be reached on either proposal. As a further compromise by both sides, the proposal was to allow three lots for the first 75 acres to protect small landowners and then one lot per 50 acres thereafter. Although not all group members were happy with this proposal, it appeared to be the compromise needed to garner support from the majority.

This proposal was reported by the Sand Mound subcommittee as their understanding of the Ad Hoc Committee's preferred compromise. However, it failed to obtain a passing vote in the final meeting due to concerns regarding its application and its real impact in reducing Sand Mound Lots.

I believe the compromise recommended in the report bridges this divide between the opposing points of view and I ask the County Council to support this recommendation as set forth in the report and the exceptions

Thank you County Council members past and present for the opportunity to serve on this meaningful committee and thanks to all on the Ad Hoc Committee and Staff for a well conducted effort.

COMMENT 6

Submitted by: Scott Fosler

A. I was a member of the County Council and a co-sponsor of the legislation creating the Agricultural Reserve in 1981. In voting to create the Agricultural Reserve, I believed that the preservation of equity in land accomplished by the TDR program was not only a matter of fairness to landowners, but also a way of helping farmers preserve capital in order to enhance the likelihood that they would continue farming successfully.

B. In voting to create the Agricultural Reserve, I considered the principle that TDRs would not be permitted to establish densities exceeding carrying capacity to be integral to the original TDR program, and believe now that principle will be all the more important if the TDR program is expanded to include non-residential receiving areas.

C. My intention in voting to allow child lots was to enhance the prospects that a farming family could continue to farm successfully by having their adult children live on the farm. To me, that meant allowing an increase in the permissible zoning density, if necessary, to accommodate child lots, but it did not mean automatically increasing the permissible zoning density by the number of children a farmer had, on top of the base zoning. Unfortunately, the Council at that time (myself included) neither crafted the child-lot provision effectively, nor articulated its intent clearly, which is one of the reasons it has been both misinterpreted and, in my opinion, inappropriately implemented. The proposal in this report essentially accepts a quarter-century practice – and hence reasonable expectations on the part of bona fide farmers in calculating the equity in their property -- in defining the density permitted by child lots, while calling for strict enforcement in limiting the establishment of child lots to use by the adult children of property owners. This is not a perfect solution, but I think it is probably the fairest and most practical way of correcting the deficiencies in the original legislation and curbing the worst abuses of the child lot provision, which have involved selling ("flipping") newly established child lots to buyers other than the children of property owners, in some cases resulting in residential construction incompatible with agriculture.

D. As a member of County Council that created the Agricultural Reserve, I believe our failure to anticipate the wide variability in value between "buildable TDRs" and "excess TDRs" – as much as ten-fold, if not more -- is one of the principal deficiencies in the original Agricultural Reserve legislation, and that the BLT program proposed in this report is the best way yet suggested to help correct it.

COMMENT 7

Submitted by: Pam Saul

General comments:

For the record, I am disappointed in how the final meetings of the working group were conducted. Extensive editing of subgroup reports before they could be presented to the full group led to serious contentions and confusion that could have been avoided if we were simply given more time to understand the debate and the views of all the members.

Specific comments:

During the last minutes of final meeting of the working group, I introduced a motion surrounding a future sand mound policy that attempted to bridge the gap between agricultural representatives and the other members of the working group. The report includes a recommended reduction of 25 % for future sand mounds which agricultural representatives support.

The major challenge for the working group centered around the initial 7:7 split vote wherein the sand mound chapter was going down a path where we could not achieve a consensus recommendation that we were able to achieve on all of the other mandated issues by the County Council. Many of us expressed concerns that a more in depth discussion on the sand mound policy was warranted and that we needed more time to discuss the proposals which were presented during our November meeting. As a result, too much confusion and too many questions were left unanswered.

The basis and intent of my motion was to solidify support for no more than 25 % reduction in future sand mounds by adding two additional conditions to the total threshold of net sand mounds 433 that 25 % would represent. These two conditions pertained to how future technology of septic systems would be permitted and how subdivisions using sand mounds could reduce the fragmentation of farmland. The vote on my motion resulted in 11 members for it and only 1 member against it. It is my view that this vote helped to validate the 25 % future sand mound policy and served as the basis for the recommendation by the working group in the final report. I encourage the County Council to support this recommendation regarding sand mounds in the agricultural reserve.

Like the other group members, I am sensitive and appreciative regarding the enormous undertaking this working group and final report involved. As a farmer, I am committed to investing my time and energy to get the job done right. The rush to finish in the allotted time ensured less than 100% accuracy of the report. Clarification will have to be made in the future before implementing recommendations to encompass the details we were unable to discuss.

COMMENT 8

Submitted by: Elizabeth Tolbert

While I was present during the Final Meeting of the Working Group December 18, 2006, I could not bring myself to cast the tie breaking vote surrounding the proposed policy for approving future sand mounds in our Agricultural Reserve. As the appointed chair of the Working Group, I have been concerned by some of our discussions and the perceptions of problems that facts do not appear to support.

Based upon the data from Mr. Clifford's study, a maximum build-out would be 650-700 homes. The Eastern part of the County soils will sustain traditional percs, so what we are talking about is limiting growth in the Northwestern part of the County. Mr. Beatty stated that approximately 80% of all percolation tests in the Northwestern part of the County fail. That includes traditional and sand mounds. Now if you apply the 20% maximum build out potential that may pass percolation tests, we are only talking about 130-140 homes that may be built.

I want to be clear on my view of sand mounds and the environment of the working group. The Working Group was comprised of many well intentioned people, some do not farm and know little about farming or what it takes to farm, and a few who actually earn a living by farming. Some members were very vocal about not about promoting farming or sustainable farming, but about any development in the Ag Reserve, especially where sand mounds are concerned. They seem to agree that sand mounds are safe, environmentally friendly and work well, just as long as you do not use them for development.

In conclusion, I believe the sand mound recommendations, as outlined in the final report, represent a reasonable outcome given the complexity of this subject matter and the level of debate that it created.

APPENDIX III:
SUMMARY OF 2002 TRANSFERABLE DEVELOPMENT RIGHTS TASK FORCE RECOMMENDATIONS

July 19, 2002

MEMORANDUM

TO: **Montgomery County Planning Board and Montgomery County Council**

FROM: **TDR Task Force Members**

SUBJECT: **Recommendations for Addressing TDR Program Problems**

The 1999 staff report to the Planning Board on agricultural issues addressed the need to stabilize TDR prices and find long-term solutions to the problem of declining TDR prices. In creating the RDT Zone and its 25-acre density in 1980, a promise was made that sufficient and realistic receiving areas would be provided. While this system has worked well until recently, today there are too few receiving areas and the value of TDRs has declined.

The study of the TDR program arose from the acknowledged problem in maintaining fair TDR prices. A review of TDR prices found that they began dropping in 1997 from an average high of $11,000 to as low as $6,300 in 2000. Prices for TDRs have fluctuated from $5,000 to $11,000 in the twenty years of the program. In the past year, prices have stabilized (at least for now) at an average of approximately $7,250 per TDR, about where they were in the early 1990's. While fluctuations are to be expected, the degree of fluctuation is troubling. A greater concern is that the use of TDRs in development has been dropping steadily.

Evaluation of this situation revealed multiple reasons for these problems. They include decreased use of receiving areas, and a cumulative loss of receiving areas from annexations, rezonings, and master plan revisions. This has resulted in an imbalance of realistic sending to receiving area TDRs. These are issues that have arisen since the completion of the last TDR Status Report in 1996. The report in the Appendix contains a summary of these findings.

It is worth highlighting the successes of the TDR program. By the end of 2001, the TDR program had protected over 40,000 rural acres from development through density transfers - at very minimal expenditure of public dollars. This private sector transfer of density is the rough equivalent of a $60 million dollar investment in open space preservation, that also has benefited the County's smart growth goals of putting development where there is infrastructure to support it. In comparison, the contributions from other preservation programs used in the County have protected just over 12,000 acres at a public cost of approximately $29.5 million dollars. The enormous differential in price per acre of land preserved, with the added benefit of development occurring in areas of adequate infrastructure - serves to highlight the need to stabilize and augment the TDR program to enable it to complete its mission.

The program must be revitalized now. The baseline of receiving areas has been eroded and the necessary balance between available TDRs and viable receiving areas must be

restored. Very few TDRs have been sold in the past four years, and few TDRs have been used in receiving areas. The work of the Task Force has been to analyze the reasons for this decline and to evaluate workable changes to the program.

The Task Force evaluated all of the recommendations contained in the 1999 and 2000 reports to the Planning Board and County Council, and added other concepts for consideration presented by Task Force members. The actions ultimately recommended including short and long term remedies, of varying levels of effectiveness. Like most problems, the reality is that there is no single remedy that will easily resolve the TDR concerns. The Task Force concluded that the best approach is a series of initiatives, all contributing certain elements to the solution. Ultimately, three types of recommendations are proposed - policy, regulatory, and communications. They address different elements of the TDR conundrum.

The Task Force is convinced that if the County pursues the recommendations in this report, the TDR goals can be met. Implementation of these recommendations will not only assist the preservation of the Agricultural Reserve, they will also assist in the smart growth initiatives to which Montgomery County has committed for the future. The support of the Planning Board and County Council is needed to pursue these creative initiatives.

Montgomery County has an extraordinarily successful TDR program, recognized nationally and even internationally. It was recently profiled in "Preservation", the magazine of the National Trust for Historic Preservation (attached to this report); and was the focus of an international panel on TDR programs this spring. The commitment of 1980 has resulted in over 53,000 acres permanently preserved through TDR and subsequent programs, by far the most successful in the nation.

Just as the TDR program has been changed several times in the past 20 years, and has been augmented by the Maryland's Rural Legacy program, and the County's Agricultural Easement and Legacy Open Space programs - so TDR itself must now evolve - again - to meet current challenges. The Task Force believes that this is now a challenge with a viable likelihood of achieving its goals.

The TDR program never envisioned all TDRs being transferred, as noted in the TDR Sending Statistics from the July 1999 report to the Planning Board. Every TDR status report has noted the number of TDRs anticipated to remain on the land in the RDT Zone. Via TDR and other programs, the total number of TDRs realistically anticipated to transfer has been reduced from almost 10,000 to a little more than 4,000. The focus of the TDR Task Force work was to find the ways to whittle away at the approximately 4,300 remaining TDRs that we realistically anticipate being removed from the RDT Zone. This represents 21,500 acres of protection that can be achieved through a combination of methods.

With this in mind, the Task Force presents the following concepts for action. We request that these changes be adopted and staff be assigned to implement the recommendations. The concepts represent a concerted effort to be realistic and politically feasible in the approaches suggested. These recommendations reinforce the

objective of supporting a *working* agricultural landscape in the County's Agricultural Reserve, as opposed to allowing it to become an area of low-density subdivisions.

A number of the concepts contemplated by the Task Force - sometimes at length over several meetings - were ultimately not recommended for action. There was often extraordinary support for these ideas from some Task Force members, and equally strong opposition or just strong qualms about unintended consequences from other members. Because of the strength of some of these concepts, the Task Force believes the Planning Board and County Council should be aware of their consideration even though they were ultimately not recommended to be included at this time. A list of these concepts is in the Appendix.

Because the Task Force members believe this effort is now an enterprise with an end in sight, we also recommend that the next phase of the Agricultural Preservation Program in Montgomery County should be directed toward programs beyond TDRs that consider opportunities to:

1. Further reduce residential density in the Agricultural Reserve through other types of easement, land purchase, and density transfer programs;

2. Support policies and programs to facilitate and maintain a viable working agricultural landscape in the County for the future; and

3. Develop additional marketing and support programs to ease the transition to new and evolving forms of agriculture that will be both economically viable and environmentally sustainable in the future.

Finally, the Task Force recommends that a subsequent evaluation of the issues pertaining to "child lots" and the absolute severance of TDRs is warranted. Although somewhat outside the scope of this report, the Task Force members wrestled with several aspects of these issues that should be considered by a separate group that would include representation from the legal staff at the M-NCPPC and the Montgomery County Attorney's office.

TDR TASK FORCE SUMMARY OF CONCEPTS TO BE RECOMMENDED

POLICY TOOLS

1. The Planning Board and County Council should adopt the following statement of policy for use in the development and implementation of master plans:

In order to support the Transferable Development Rights Program, the Master Plan evaluation process in all areas of Montgomery County outside the Agricultural Reserve must formally include the creation or expansion of TDR Receiving Zones whenever any additional density is contemplated. Criteria for the consideration of TDRs during Master Plan Review and Amendments include:

Master Plan Development

a. *During any Master Plan review process the Rural Area Team and the Agricultural Services Division must be informed of any discussions of potential additional density on properties and the status of existing TDR receiving sites. This will enable the discussions to be in the context of the program (and County needs) as a whole, and not centered solely on the receiving areas impacts only.*

b. *When discussions of TDR receiving sites are before public bodies, representatives of the Agricultural Community are to be invited to attend in the event they wish to express support for retention of existing sites, or the inclusion of additional sites.*

c. *If TDR receiving sites are discussed for possible removal, this negative impact upon the TDR program as a whole must be highlighted, taken into account, and provision made for replacement of these sites at alternative locations.*

   If a designated receiving site is to be re-designated to a land use without TDR potential, an alternate site for the use of TDRs must be designated in order to achieve a "no net loss" of TDR potential.

d. *The process for choosing receiving areas must include a rational test of the viability of the site to actually develop at the density specified - in relation to environmental limitations, market factors, and community factors such as compatibility and adequate infrastructure.*

e. *The Master Plans must strive to achieve a fair share distribution of TDRs to insure that environmental, community, and other impacts resulting from intensified use of TDRs are not borne disproportionately in a limited number of receiving areas.*

Master Plan Implementation

a. *When TDR receiving area sites are proposed for development, every effort must be made to persuade the developer to use the TDR potential in the property; and the Rural Area Team and the Agricultural Services Division staff are to be informed of any potential receiving area development.*

b. *If a designated receiving site is to be developed with a non-residential land use that will not use the TDR potential – an alternate site for the use of TDRs must be designated in order to achieve a "no net loss" of TDR potential in a master plan, including the potential use of a minor master plan amendment to replace the TDR site.*

2. The Planning Board and County Council should adopt the following policy to allow TDRs to be used in floating zones in appropriate circumstances.

If the additional density is to be considered via rezoning on property that is not recommended in a master plan, the use of TDRs should be a part of that change. Given the extreme difficulty of achieving a rezoning on a property with a Euclidian zone designation outside the master plan process (due to the change or mistake rule), floating zones are the usual mechanism for achieving additional density in Montgomery County. Since the proof necessary for Planning Board and County Council support of floating zones takes into account the same factors that are used to consider TDR receiving zones, this change should be implemented as a means to allow the additional use of TDRs where there is developer interest. The TDRs should be the primary mechanism for achieving additional density.

For example, when a rezoning application is proposed using a floating zone (such as a townhouse zone) that would change the use and density from the underlying Euclidean zone recommended for a parcel of land by the relevant Master Plan; one of the factors to be weighed (ceteris paribus) in deciding whether to grant the requested increase in density should be the extent to which the applicant will acquire and use TDRs in the proposed development.

For example, if a private school or other institutional use on R-90 land decides to relocate making the site available for infill redevelopment, *and staff evaluation indicates that the land will support a higher level of density without imposing adverse effects on the neighborhood*, the additional density permitted under the floating zone should be partially, if not fully, achieved by the use of TDRs.

3. The County should authorize the discussion of inter-jurisdictional transfers of TDRs to receiving sites in the larger county municipalities (Rockville and Gaithersburg) particularly at locations near transit centers.

The Task Force believes there is realistic potential for the creation of inter-jurisdictional transfer of TDRs. This is being done in other communities nationally, and they believe

there is little to be lost in pursuing such discussions, particularly related to locations along the Metro Red Line or MARC Rail where transit-oriented redevelopment is being considered.

As an example, the staff recently learned of a very successful TDR transfer program between King County and Seattle in Washington State. The impetus for that program was the realization, reinforced by the state, that the residents of Seattle were as benefited by the King County TDR program as the residents of King County; and therefore they should be a part of finding locations for TDRs to transfer. Surely, there is also support for this concept within the philosophy of Maryland's Smart Growth initiatives.

4. **The County Executive hopes to significantly increase the number of affordable and housing units for the elderly built each year. The TDR program should play a role in placing this type of housing. Therefore, under certain criteria, allow use of TDRs for extra density for these types of priority housing.**

This concept has the greatest potential if the housing is located at transit centers as part of mixed-use projects. Location factors, such as adequate current infrastructure, are very important to communities in the placement of these types of projects. The use of TDRs needs to play a role as part of incentive programs to create more affordable and senior housing.

5. **Support a "Land Preservation Summit" to coordinate the efforts of all the existent programs - government and non-profit - working to preserve agricultural working lands and rural open space.**

As open space preservation, agricultural preservation, and historic preservation movements in Montgomery County have evolved over the past decade or so, multiple organizations and programs have proliferated. As yet, there has not been a coordinated process to allow all these public and private groups to discuss how their visions and goals can be mutually enhanced through cooperative efforts. A strong basis exists for this "summit" through the pioneering work of Legacy Open Space to quantify and classify the lands to be saved, and move toward identified common goals through varied methodologies and a possible layered approach to easements.

REGULATORY TOOLS

1. **Change the minimum TDR use requirements:**

    a. **Reduce the TDR minimum use requirement for properties of 20 acres or less to 25% of capacity when the TDR receiving zone density is 10 dwelling units per acre or more.**

b. Eliminate the TDR minimum use requirement for properties of 5 acres or less when the TDR receiving zone capacity is 20 dwelling units per acre or fewer.

Experience with the program has shown that small sites and those with substantial environmental limitations often make it infeasible to use the required number of TDRs contemplated by the Master Plan. Under current regulations, a developer proposing to use less than two-thirds of the TDRs permitted in a receiving area must have the approval of the Planning Board. That approval is negotiated and often requires concessions as a condition of approval. This situation is often further complicated by the requirements and options of the MPDU program. Consequently, to avoid negotiations with the Planning Board, developers of these marginal sites are very likely to choose to build without using any TDRs. And because of the MPDU complication, these two programs are in conflict with each other.
To avoid this consequence in the situations where this is most likely to occur, the Task Force recommends that the two-thirds use requirement be modified as stated above. This change will not impact many sites, but will have the potential to spur some TDR development if the choice is freely available to the developer (in the instances noted) without having to seek Planning Board approval for the reduced number of TDR units.

2. Allow relief from on-site afforestation if TDRs are used.

Afforestation is a part of the County's forest conservation requirements that requires new trees to be planted on non-forested portions of a development site. Some receiving sites are heavily impacted by forest conservation requirements. After lengthy discussions of this issue, the Task Force believes that on some TDR receiving sites all or a portion of the afforestation requirement can be implemented at off-site locations as a means to increase the use of TDRs. This option would only be available for the non-forested land outside of required stream buffers.

This recommendation derives from our understanding that in a number of instances the trees required to be planted may be more urgently needed at other locations in the impacted watershed. This concept would augment the use of intended TDR capacity at the receiving site while improving forest cover where it is more needed. While it would be the developer's choice to use this option, the M-NCPPC Environmental Planning staff should be authorized to approve any proposed off-site afforestation locations.

The Planning Board should direct the staff to study the receiving sites most likely to utilize this concept, and the watersheds and properties where it is most likely to be useful. These would be properties where conservation values can be met or enhanced via the offsite afforestation.

3. Create TDR receiving versions of the CBD, Planned Development, Transit Station, and Mixed Use Zones to use when they have existing or are designated for, planned transit access. These zones should have appropriate density bonuses for the use of TDRs in housing production.

As the Montgomery County Commission on the Future recently stated, "The County should encourage as much future job and housing development as possible to locate in transportation corridors.....Development should be in forms best suited to effective transit service and use. This may mean redeveloping certain areas along transportation corridors that are currently zoned for low-density to attractive mixed-use residential and non-residential uses."

This is a concept with significant potential and the TDR program needs to be a stakeholder in future discussions of this concept - including the I-270 Corridor Master Plan initiatives now underway. Implementing this recommendation should have high priority, because of the fast schedule of these Master Plan revisions including the Shady Grove Sector Plan, Gaithersburg Vicinity Master Plan, and Germantown Master Plan.

The concept seems to have general support even with many neighborhood organizations -particularly if limited to areas with transit service that is frequent and reliable (most preferably fixed rail). Many believe that using TDRs for these zones instead of primarily in single-family residential zones allows more control over the development design. This is often more important for the surrounding community than the absolute density.

The Planning Board should direct the staff to conduct the additional study required to work out transfer ratios, and to answer questions such as how would TDRs fit into the maximum density requirement for these zones. The Task Forces specifically recommends:

a. ***Create TDR receiving areas with density bonuses in CBD, Transit Station, Town Center and the higher density residential and mixed-use zones used in the vicinity of transit (rail or bus) stations.***

   This is a concept with significant potential for creating capacity for additional transit-oriented housing, a goal that is widely shared. The concept has general support even with many neighborhood organizations that are beginning to see good-quality redevelopment of Metro-oriented property as beneficial for their neighborhoods. *The Task Force emphasizes that these density bonuses should be tied to proximity to a high usage transit corridor.*

   In addition, there are limited instances where additional density or bonuses may be desirable outside the official boundaries of CBDs or Town Centers. Under-developed (or redevelopable) border areas around CBDs that are along arterial roads can provide good opportunities for redevelopment and TDRs should be a primary mechanism for that additional density. *In these instances the zoning text should provide requirements that the site be on a major arterial, highway, or business district street served by a high frequency bus service and no more than one mile from a rail or bus station.*

b. **Create *additional* TDR receiving zones with the flexibility of the Planned Development Zones in Master Plan development.**

One problem that has discouraged the application of the TDR zones during Master Plan reviews in recent years is the tendency to prefer the Planned Development (PD) Zones because of their added design flexibility. The County should create TDR receiving capacity within these zones as has been recently recommended in the Potomac Master Plan. (ZTA 02-11 currently in process recommends a density bonus of 10% in the PD-2 Zone using TDRs, if recommended for the site in a Master Plan.) This should include the PD Zones with a mix of housing and employment such as the MXPD Zone.

Further study should consider a TDR equivalent for FAR (floor area ratio) used for non-residential uses. Methods for determining equivalency already in use in other communities include:

1. Comparison of traffic generation of equivalent space;

2. Evaluation of traffic generation per square foot for office space compared to traffic generation per square foot for residential space;

3. Comparison of revenue streams for commercial versus residential rental space (basing a TDR equivalent on the comparative potential profit return for the same space).

Implementation of these recommendations has the potential to achieve high receiving zone capacity. If this should become the case, there is the potential in the future (once all viable existing RDT/TDRs are transferred) for transferring density from locations other than the RDT Zones, perhaps from Legacy Open Space sites or other areas deemed important to protect from development. There is also the potential to use the receiving area capacity in creative ways to purchase the final 20% of development rights that tend to stay within the RDT Zone, further reducing housing construction in the Agricultural Reserve.

4. Allow residential uses by right in certain commercial zones through use of TDRs.

The County already allows residential development in some commercial zones, but there are often misgivings about losing commercial space to residential development. Using TDRs as the mechanism for allowing this change of use has the potential to provide relief to the TDR program and to allow commercial zones as a location for needed affordable housing. Additional study is needed to determine likely locations and transfer ratios, but this concept would perhaps most easily work through the mechanism of a limited increase in height. This is a concept that could be set up to work inside or outside the master plan process.

INFORMATION TOOLS

1. Begin an annual TDR "countdown" tally and progress report, accounting for all deductions from the total remaining TDRs to be severed in the RDT Zone:

A "countdown" tally, coupled with an annual report to the Planning Board and County Council, will highlight the progress in achieving the goal of 70,000 acres of protected land through the various existing programs. This concept has the potential to reduce the imagined threat of additional density in the growth areas by publicizing the declining number of transfer units necessary to achieve preservation goals. The Task Force members believe that the TDR program needs to establish a timeline for this goal. This report would highlight acres protected and deductions of TDRs from the RDT Zone through TDR transfers, parkland acquisition, Legacy Open Space easements, Rural Legacy easements, Montgomery County Agricultural easements, Maryland Agricultural Land Preservation Foundation easements, Maryland Environmental Trust easements, and hopefully a continuing growth in the mechanism of private land trust easements.

2. Implement an improved and easier to use "tracking system" to determine TDRs retained for subdivision vs. those sold.

The 1995 Future of Agriculture Study noted that better records of TDR severances, sales and recordings are increasingly necessary to monitor the effectiveness of the TDR program. An up to date tracking system, long overdue, will better monitor the degree of need for additional receiving areas, quickly determine the TDR status of RDT properties, and ensure that sufficient TDRs have been retained to accommodate any new lots created on the original property. A methodology is needed, perhaps using GIS capability, for a reliable and user-friendly system. The current system does not even co-relate TDR properties to property identification number.

The Rural Area Team and Resource Team have been working on this project, as time and resources allow, with the M-NCPPC GIS staff and the Agricultural Services Division staff, and other Montgomery County staff for over two years. However, it apparently has not been considered a priority and staff resources have been limited for this project. *The Task Force recommends that this become a priority work program item for these agencies, and this accountability finalized.*

3. Revise the TDR Status Report Methodology

On an approximate five-year basis, the M-NCPPC staff has prepared a status report on the TDR program. Due to the lack of modern record keeping, as noted above, this task is always arduous and extraordinarily complicated. When a better system is put in place, the TDR program status report will be able to be updated more easily, and with more reliable numbers.

While the Status Report has always evaluated the remaining receiving areas, it has never given an assessment of the realistic potential for development on the remaining receiving areas. The Task Force recommends that without such an assessment the Status Report presents an inaccurate impression of the balance between sending and receiving area TDRs.

One of the reasons that the precipitous drop in TDR prices was not foreseeable in the last Status Report (1997) is that it indicated a reasonable surplus of receiving areas. In reality, many of them were not realistically attractive to developers. That subjective element of realism needs to be a part of the Status Report.

4. Conduct a survey of property owners in the RDT Zone to provide information regarding the variety of easement programs available in the County.

This project would be helpful in a determination of how many TDRs in the RDT Zone might be realistically transferable - as well as providing information to property owners on the multiple easement programs available for rural property owners. The M-NCPPC staff can work with the Agricultural Services staff and the Legacy Open Space staff to draft a survey form.

APPENDIX IV:
AGRICULTURAL PRESERVATION PROGRAMS IN OTHER JURISDICTIONS

MEMORANDUM

December 5, 2006

TO: Scott Fosler, Co-Chair, AD HOC Agriculture Policy Working Group

FROM: Shondell Foster, Research Associate
Jeff Zyontz, Legislative Attorney

SUBJECT: Other Jurisdictions Use of TDRs to Preserve Farmland

This memo responds to your request to examine the experiences in other jurisdictions with the agricultural preservation issues addressed by the working group. The American Farmland Trust's last comprehensive national survey was published in January 2001. A that time, 60% of the land with TDR easements in the country was located in Montgomery County.

1) There are approximately 50 jurisdictions in the United States that use TDRs. Montgomery County's program has placed more easements on sending areas than all other programs combined. Most places that use TDRs allow more houses per acre than one house for every 25 acres, the base density allowed in the RDT zone. We found two jurisdictions using TDRs, both west of the Mississippi River that had zoning less dense than Montgomery County.
2) Although relatively few jurisdictions have a TDR program, many have a purchase of development rights program (PDR) also know as the purchase of agricultural conservation easements (PACE). PDR programs buy easements in exchange for a price paid, similar to the MALPF program in Maryland.
3) Some jurisdiction provide for "child lots" even when land is under TDR easements. Some of these easements limit the number of child lots that can be created by each land owner. We did not find any jurisdictions, however, that allowed the creation of new lots in excess of existing zoning, such as Montgomery County's child lots. There are other jurisdictions that permit previously recorded lots to develop.
4) Some jurisdictions limit the size of residential lots that can be created. Some jurisdictions limit the percentage of land area in residential lots or only allow lots that do not diminish the viability of the land to support agriculture. Some jurisdictions limit both the size of the lot and the percentage of land that can be used for agriculture.
5) We did not find any jurisdictions that limit the type of septic system allowed for the purpose of reducing the number of potential houses. We focused on jurisdictions in Maryland for this topic.

Council staff interviewed and reviewed the ordinances and easements of other programs around the country. The following describes our findings.

Interviews

The following chart summarizes the information that was gathered from other jurisdictions that have successful agricultural preservation programs, suggested by Judy Daniel and the American Farmland Trust- Farmland Information Center.

In compiling this chart, three preliminary questions help to identify the counties that most resemble Montgomery County's farmland preservation program:

1. How would you describe the pressure to develop farms into commercial or residential use?
2. Does your county control the conversion of farmland to developed land (either commercial or residential) by zoning or purchased easement?
3. Does your county give farm landowners transferable development rights to sell?

All jurisdictions surveyed are currently subject to strong pressures to develop farmland into commercial or residential use except one. The New Jersey Pinelands is the only region not subject to development pressure because the Pinelands area is protected under state and federal law.

In areas where land is regulated by the county government, zoning is rarely used exclusively but is often used along with purchased easements as means of controlling the conversion of farmland into developed land. For example, Boulder County, Colorado uses zoning but is most effective in controlling farmland conversion through purchased easements.

The question of whether the jurisdiction used transferable development rights provided many different responses. Several counties were not included in the chart because the TDR programs they used helped to preserve open space, and not specifically agricultural land.

Of the jurisdictions included in the survey, only Boulder County, Colorado indicates that their TDR program actively serves as an incentive to preserve farmland. This is in contrast to Blue Earth County, Minnesota where the impetus for farmers to participate in their TDR program is to gain substantial profits, even though in theory it preserves farmland. The other counties identified have TDR programs that are difficult to implement since land use is regulated by municipalities and participation in TDR programs is optional among municipalities.

In addition to the chart, the list of Local Governments with TDR Programs complied by the American Farmland Trust- Farmland Information Center is also attached.

Survey for Agricultural Preservation

How would you describe the pressure of farms to develop into commercial or residential uses?

Jurisdiction	Strong	Moderate	Weak
Blue Earth County, WI	X		
Boulder County, CO	X		
Buckingham Township, Buck County, PA	X		
Burlington County, NJ	X		
Dane County, WI- especially around urban areas (Madison)	X		
Lancaster County, PA	X		
Loudon County, VA	X		
Michigan State	X		
New Jersey Pinelands			X
Vermont State	X		

Do you control the conversion of farm land to development mostly by zoning or purchased easements?

Jurisdiction	Zoning	Purchased Easements	Other
Blue Earth County, WI	X		
Boulder County, CO-most effective through purchase easements but primarily zoning	X		X
Buckingham Township, Buck County, PA- uses **both** zoning and purchased easements			X
Burlington County, NJ-municipalities have authority over land use but controls water use			X
Dane County, WI- try to influence through zoning but municipal annexation makes it difficult	X		
Lancaster County, PA uses both zoning and purchased easements			X
Loudon County, VA – some land is zoned while other land restrictions are choices by the land owner to place land under easement			X
Michigan State (mostly) a little farmland is controlled through purchase easements	X	X	
New Jersey Pinelands	X		
Vermont State	X		

Do you give farm land owners transferable development rights to sell?

Jurisdiction	YES	NO
Blue Earth County, WI- are not used to preserve farmland but more to help farmers sell more land and make more money	X	
Boulder County, CO- used as an incentive to conserve farmland and open space	X	
Buckingham Township, Buck County, PA	X	
Burlington County, NJ- only two municipalities have participated since late 1980s early 1990s. Used by open space landowners and not agricultural land owners	X	
Dane County, WI- does have a Farmland Preservation Program that gives tax credits to land owners that have their land zoned exclusively for agriculture		X
Lancaster County, PA- some townships have TDRs but TDRs do not cross municipal boundaries		X
Loudon County, VA- does have purchase development rights		X
Michigan State		X
New Jersey Pinelands- but difficult to implement because the commission does not have authority in townships and municipalities	X	
Vermont State	X	

Ordinance Review

Transfer Development Rights (TDR) is a program that is accepted across the country, but difficult to implement. TDR's often require the sponsorship by a County but participation is optional for townships and municipalities. In addition, receiving sites usually must remain within the township or municipality in order for the development rights to transfer. Municipalities often do not contain both farm areas and urbanized areas in sufficient quantity for a successful program. Jurisdictions that do implement TDR programs vary the application of the program; the number of TDRs a landowner may transfer vary; the density the landowner may develop the land and what provisions are placed on the sending parcel varies. The following chart summarizes how the ordinances of various jurisdictions across the country implement TDR programs.

TDR Ordinances

1. If the land converts to residential uses, how many houses per acre are allowed?

Blue Earth County, MN	In the A Agricultural District- no more than four dwellings per 40 acres; In the C Conservation District- no more than one dwelling unit per 40 acres.
Boulder County, CO	1 per 35 acres; over 140 acres, 2 per 35 acres
Cape Elizabeth, ME *Density depends on how the development is connected to certain types of sewage*	1 per 20,000 sq. ft. of net residential area- public sewage system 1 per 40,000 sq. ft. of net residential area- on site sewage disposal when transferred from an abutting parcel or parcel has the same ownership 1 per 50,000 sq. ft. of net residential area- when transferred from parcel located within 2000 ft of developed parcel 60, 000 sq. ft. of net residential area- when transferred from parcel located more than 2000 ft of developed parcel
Charles County, MD *Three development credits will be subtracted for each dwelling located on a parcel in the Agricultural Land Preservation District*	1 per 3 acres
King County, WA *Ranges depending on the zone*	Urban separator & R-1 Zone- 4 dwelling units per acre; RA Zone (inside forest)- 1 dwelling unit per 5 acres; A-10 &A-35- 1 dwelling unit per 5 acres; F Zone- 1 dwelling unit per 80 acres or 1 dwelling unit for each lot btw. 15 to 80 acres
Marin County, CA	*Does not mention the density*
Township of Lumberton, NJ	1 dwelling unit per 2 acres
West Hempfield Township, PA	1 per 25 acres if the land was zoned in the Rural Agriculture District or Rural Residential District prior to 3/14/1978; if land is zoned in either of these districts after 3/14/1978, density is determined by total acreage: If land is between 2 to 50 acres- 1, 50 to 75 acres- 2 lots, 75 to 100- 3 lots, 100 to 125- 4 lots, etc…

2. How many TDRs can they transfer?

Blue Earth County, MN	Agriculture District- development rights may be transferred to a contiguous 40 acres in the A district, upon obtaining a conditional use permit Conservation District- development rights may be transferred to a contiguous 40 acres upon obtaining a conditional use permit
Boulder County, Colorado *Up to 140 acres, 1 TDR may be retained*	2 per 35–52.49 acres; 3 per 52.5-69.9 acres; 4 per 70-87.49 acres; 5 per 87.5–104.9; 6 per 105–122.49 acres; 7 per 122.5-139.9 acres; 2 per 35 acres for 140+;
Cape Elizabeth, ME	*Transfer rates are not in zoning*
Charles County, MD	*Transfer rates are not in zoning*
King County, WA	1 per 1 acre minus the acres of submerged land and any land being retained for development on the site
Marin County, CA	*Transfer rates are not in zoning*
Township of Lumberton, NJ	A formula uses the septic suitability of soils; based on this number a TDR amount is determined for the parcel and 1 TDR credit is subtracted from the TDR amount for each single family unit existing on a given parcel at the time the section is adopted.
West Hempfield Township, PA	The maximum number of dwelling units permitted is determined by the Open Space Design Option provisions in the district the tract is located multiplied by five (5) if in the Rural Agricultural district. If in the Rural Residential district- .067 multiplied by the area of the tract of land minus 3 (at least) to allow for one retained TDR.

3. Are there any special provisions for clustering/design or grandfathering/child lots?

Blue Earth County, MN	If the land existed as a whole parcel as of October 1, 1992, large tracts of land may be divided into no less than 40 acre parcels without going through the subdivision process. If the land is already divided in parcels less than 40 acres, one lot may create one lot, for every 40 acres, without going through the formal subdivision process so long as the owner has not previously split the property and no other residential lots exist within the 40 acres. Any and all subsequent divisions must go through the subdivision process.
Boulder County, Colorado	*None mentioned*
Cape Elizabeth, ME	*None mentioned*
Charles County, MD	A covenant in the instrument of transfer restricts the sending parcel from subdividing unless for it is for agricultural purposes.
King County, WA	Land that is in one zone may only be developed through a clustering subdivision, short subdivision, or binding site plan that creates a permanent preservation tract as large or larger than the portion of the subdivision set aside as lots.
Marin County, CA	Clustering Requirements. In A districts (A3 to A60) and in ARP districts, non-agricultural development shall be clustered to retain the maximum amount of land in agricultural production or available for future agricultural use. Homes, roads, residential support facilities, and other non-agricultural development, shall be clustered on no more than five percent of the gross acreage, to the extent feasible, with the remaining acreage retained in agricultural production and/or open space.

	Clustering shall be considered when applying for a TDR. Generally, structures should be clustered or sited in the most accessible, least visually prominent, and most geologically stable portion or portions of the site. In areas where usable agricultural land exists, residential development shall be clustered or sited so as to minimize disruption of existing or possible future agricultural uses.
Township of Lumberton, NJ	A parcel must be free from encumbrances prior to enrolling in the TDR program because once enrolled in the program the sending parcel is restricted to utilize the land only for farm, farm buildings and detached dwellings.
West Hempfield Township, PA	Restrictive Covenant- the entire sending lot is restricted from any future development that is non-agricultural except where a TDR is retained on the sending lot.

Easement Review

The ability to build one or more additional residences/dwellings onto a property after it has come under easement is an issue that is usually addressed at the beginning of the negotiation for the easement. Few jurisdictions actually have provisions in the easement that allow for the development of a "child lot." More often, the Grantor will reserve land that does not come under easement because the language of the easement will expressly prohibit residential, commercial, or industrial development after the delivery of the deed of easement. The following is a summary of how various jurisdictions' conservation easements allow or restrict residential development on the land that is subject to the easement.

Issues:

1. What rights does a landowner retain after placing the land under easement?
2. What restrictions does the easement place on the land?

In **Pennsylvania**, the restriction that is placed on the land when a lot is under a Deed of Agricultural Conservation Easement is that construction or use of any building/structure after delivery of the deed is prohibited. The easement does provide for an exception: the construction of one additional residential structure is permitted if construction and use is limited to providing housing for persons who farm the land that is subject to the easement, no other structure has been built on the land since the delivery of the Deed of Easement, the residence and curtilage occupies no more than two acres of the property and the location of the residence does not diminish the economic viability of the land for agricultural purposes.

In addition, the land may be subdivided, however, the easement applies to all the subdivisions and it must state which of the subdivided parcels the residential structure is permitted. For all other parcels, no residence is permitted.

In **King County, Washington**, the Grantors of an easement reserve the right to use a limited number of single family units for the Grantor, the family of the Grantor, or agricultural employees. No more than a limited number of dwelling units in total will be permitted, even if the land is subdivided. One restriction placed on the land after it is under easement is that if the Grantor subdivides the land, the land may only be subdivided to less than 20 acres if a reserved homesite is attached to each parcel of the subdivided land and the reserved homesites on the parcels does not increase the density of housing on the land- using the total acreage prior to the subdivision, one reserved homesite per 35 acres. Another restriction is that no more than five percent of the land, or of any subdivided parcel, may be covered by structures and/or nontillable surfaces.

The **Commonwealth of Massachusetts** Agricultural Covenants do not reference the total number of residences permitted on the property under easement or whether the property is subject to the applicable zoning ordinance. However, the language in the covenant does allow the Grantor to construct a residence, driveway, septic system, any other underground sanitary system, or other utility for use by the Grantor or a family member of the Grantor who is actively

conveyance so long as it is consistent with agricultural, single and/or extended family residential uses.

The easement does not reference the size or density of the residual dwelling site and does not indicate whether the local zoning ordinance controls the development density of such site.

Town of Dunn, Dane County, Wisconsin Conservation Easements state the property may not be subdivided into smaller parcels. It is the intent that the property remains as a whole. However, the language of the easement also states that the Grantors may specifically reserve development rights, and such rights are not subject to the easement. The Grantor is permitted to maintain, improve, expand or replace the existing single family residential dwelling and accessory buildings so long as the total aggregate ground coverage of all buildings, other structures and improvements do not exceed 5% of the total acreage.

The easement does not reference the size or density of the residences and does not indicate whether the local zoning ordinance controls the development density of the land.

Fauquier County, VA prohibits subdivision, division, family transfer, boundary adjustment, or division of the property on land that is subject to an agricultural easement. In addition, the land is not permitted to have construction, placement, or maintenance of a structure or improvements, unless it existed prior to the deed conveyance, then it may be repaired, expanded or replaced.

Even though the property may not be subdivided into additional lots, no more than one single family dwelling may exist on each lot and only one secondary dwelling per parcel is permitted for a parcel that is 50, or more, acres. A secondary parcel may be established for a caretaker or tenant farmer. The maximum number of secondary dwellings for the entire property is four and the size of secondary dwellings cannot exceed 60% of the square footage of the primary residence. In addition, all buildings/structures cannot exceed two percent of the surface area of the property.

The easement does not reference the size of each lot and does not indicate whether the local zoning ordinance determines the density for the parcel.