



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

**MCPB**  
**Item #16**  
**07/12/07**

**DATE:** July 2, 2007  
**TO:** Montgomery County Planning Board  
**VIA:** Rose Krasnow, Chief, Development Review *RK*  
Ralph Wilson, Acting Zoning Supervisor  
**FROM:** Greg Russ, Zoning Coordinator *GR*  
**REVIEW TYPE:** Zoning Text Amendments and Subdivision Regulation Amendment  
**PURPOSE:** To amend the Zoning Ordinance and Subdivision Regulations to implement the Ad Hoc Agricultural Policy Working Group and the Planning Board recommendations regarding agricultural issues

**TEXT AMENDMENT:** 07-06, 07-07, 07-08 and 07-09  
**SUBDIVISION REGULATION:** 07-02  
**REVIEW BASIS:** Advisory to the County Council sitting as the District Council, Chapter 59, the Zoning Ordinance and Chapter 50, the Subdivision Regulations  
**INTRODUCED BY:** Council President Praisner either at the request of the Ad Hoc Agricultural Policy Working Group or at the request of the Planning Board  
**INTRODUCED DATE:** June 12, 2007  
**PLANNING BOARD REVIEW:** July 12, 2007  
**PUBLIC HEARING:** July 19, 2007, 7:30 PM

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**STAFF RECOMMENDATION:** Transmit Comments to the County Council as follows:

- Staff recommends approval of **ZTA 07-08, SRA 07-02** (both related to elimination of the two-thirds use requirement for receiving areas of TDRs) and approval with modifications of **ZTA 07-09** (introduced at the request of the Planning Board and related to child lots and the assurance that the overall density of the property does not exceed one dwelling unit per 25 acres in any subdivision recorded after a certain date).

- Staff agrees with the general goal of **ZTA 07-07** to limit the uses allowed in the RDT when a property is under a transfer of development rights easement intended to protect and preserve agriculture and farmland. However, as written, ZTA 07-07 appears to have unintended consequences and therefore additional clarification is needed on the specifics of the legislation.
- Staff does not recommend approval of **ZTA 07-06**, as it allows child lots in excess of the base density for the RDT Zone. ZTA 07-09 was introduced at the request of the Planning Board as an alternative to this legislation and is supported by staff. As stated above, ZTA 07-09 would allow child lots as long as the overall property density does not exceed the maximum permitted in the RDT Zone (one dwelling unit per 25 acres).

## **BACKGROUND AND PURPOSE OF THE TEXT AMENDMENTS**

On March 12, 2007, the Planning Board transmitted their recommendations to the County Council regarding the Ad Hoc Agricultural Policy Working Group Report.

The Planning, Housing, and Economic Development (PHED) Committee met on March 12, 2007 to consider the recommendations of the Council's Ad Hoc Agricultural Working Group Report, including the Board's comments, and directed its staff to prepare policy legislation and amendments to the Zoning Ordinance (and Ten-Year Water and Sewer Plan) necessary to implement the recommendations of the Working Group.

Council staff prepared a chart of short, mid and long-term steps for the County Council in response to the Ad Hoc Agricultural Policy Working recommendations (Attachment 2). The zoning text amendments and the subdivision regulation amendment introduced on June 12, 2007 are part of the short-term tasks. Also introduced on June 12, 2007 was a text amendment requested by the Planning Board (ZTA 07-09) related to child lots that presents an alternative recommendation to the Working Group recommendations and would limit child lots such that the overall density of the property would not exceed one dwelling unit per 25 acres, regardless of whether there are child lots. The subject staff report addresses the proposed zoning text amendments and the subdivision regulation amendment.

Specifically, the proposed amendments address the following:

- ***Zoning Text Amendment (ZTA) 07-08 and Subdivision Regulation Amendment (SRA) 07-02*** eliminate the requirement that receiving areas use at least 2/3's of the possible Transfer Development Rights.

- **ZTA 07-06** proposes to clarify and strengthen child lot provisions in the Zoning Ordinance to accomplish the following:
  - indicate that child lots are in addition to market-rate lots;
  - require that the record plat indicates that a lot is a child lot;
  - require that a covenant be recorded in the land records at the time the plat is recorded specifying that the house on the child lot must be owned by the child for five years and must not be leased except to an immediate family member;
  - require that the building permit be issued in the child's name;
  - require that a majority of any child lot must be preserved in agriculture;
  - codify the long-standing practice that requires that each child is only entitled to one child lot, regardless of the number of properties owned by the parent and that the construction of a dwelling on each child lot requires the use of a TDR;
  - allow a child lot to be created after the death of the owner if the owners' intent has been established through a will or other document admissible in probate; and
  - provides penalties for violations of these provisions.
- **ZTA 07-07** clarifies that the development of RDT zoned parcels encumbered by TDR easements must be limited to single-family houses and agricultural related uses only.
- As stated above, **ZTA 07-09**, which was requested by the Planning Board, presents an alternative recommendation to the Working Group recommendations (ZTA 07-06) and would limit child lots such that the overall density of the property would not exceed one dwelling unit per 25 acres, regardless of whether there are child lots.

## ANALYSIS

The analysis below discusses some of the major points of the legislation.

**I. ZTA 07-07** - Limits the uses allowed in the RDT zone when a property is under a transfer of development rights easement; and generally amends uses allowed in the Rural Density Transfer zone.

*If a property is under a recorded transfer of development rights easement, only the following uses are allowed:*

- (a) *One-family dwellings;*
- (b) *all agricultural uses;*
- (c) *all agricultural–industrial uses; and*
- (d) *all agricultural–commercial uses.*

*Each use that requires a special exception under Sec. 59-C-9.3 is allowed only by the approval of a special exception.*

**Staff Response:** The proposed amendment continues to allow or permit by special exception land uses found in four out of ten land use categories. The presumed intent of the amendment is to ensure that single-family, agriculture and agricultural related uses are the primary uses in the RDT zone. This goal is worthwhile, as it seeks to protect and preserve agriculture and farmland. However, it is unclear whether only uses that require approval of a special exception in the above categories (a)-(d) are allowed or if all uses in Sect. 59-C-9.3 that require special exception approval are allowed.

ZTA 07-07 does not specify if a required minimum number of TDR's are to be retained for any property under a TDR easement. It is unclear whether the ZTA means that any portion of a property, or the entire property, must be covered by an easement (all TDR's are transferred), before the restriction on uses applies. Clarification of this issue is imperative in establishing the intent of this legislation.

As written, ZTA 07-07 creates several unintended consequences for land uses in the RDT Zone. Presently, according to Sec. 59-C-9.3 of the Zoning Ordinance, all of the following land use categories are listed under the RDT Zone:

- (a) Agricultural
- (b) Agricultural-Industrial
- (c) Agricultural-Commercial
- (d) Resource Production and Extraction,
- (e) Residential
- (f) Transportation, Communication and Utilities,
- (g) Commercial
- (h) Services
- (i) Cultural, Entertainment and Recreational
- (j) Miscellaneous

Within each of these categories, specific land uses are enumerated and these uses are either permitted by right or permitted by special exception in the RDT Zone. ZTA 07-07 would eliminate categories (d) thru (j) from the RDT zone. For example, under the Services category, a publicly supported ambulance, rescue squad, and fire station would no longer be permitted in the RDT zone, if the property were encumbered with a recorded TDR. Similarly, under the Commercial category, agriculturally related farm supply or farm machinery sales and service and auction facilities would no longer be allowed by special exception on RDT zoned property encumbered with a TDR easement, because the entire category of uses has been precluded. A family burial site (a special exception use) found under the Services category could no longer be located

on a family farm property encumbered with a recorded TDR easement. Accessory apartments or accessory dwellings on a property, unless encumbered with a recorded TDR easement, would be eliminated from the RDT zone. Both accessory apartments and accessory dwellings are cited in the proposed language of ZTA 07-06, with respect to Density in RDT Zone (See Sect 59-C-9.41 (a) which appears to contradict ZTA 07-07).

Planning Board staff questions if the intent of this ZTA is to preclude the many land uses related to or necessary for preservation of agriculture uses in the RDT zone. The elimination of these land uses has the potential to be detrimental to the overall interests of farmers. Adoption of the ZTA would create a large class of non-conforming uses and structures in the RDT zone and would preclude expansion if the need arose. There is also no grandfather provision for existing RDT zoned property encumbered with a TDR easement and including a land use no longer allowed under the ZTA.

Finally, if a property in the RDT zone does not have a recorded transfer development right easement, then existing land use categories (a) thru (j) can continue either by right or be allowed by special exception in this zone. Farmers may be reluctant to encumber their property with TDR easements if the permitted number uses for the property is reduced by adoption of ZTA 07-07.

**II. ZTA 07-08** - Eliminates the requirement that a development must use at least two-thirds of the allowable number of transferable development rights in order to use any transferable development right; and generally amends development approval procedures.

**Staff Response:** The intent of this ZTA is to eliminate the two-thirds requirement for TDRs in receiving areas. This requirement has created problems for small or constrained properties where it has been difficult to achieve the full 2/3 requirement. When the developer cannot meet this requirement, TDRs tend not to be used at all, which contributes to the surplus TDRs available for sale. Staff believes elimination of this requirement would increase the use of TDRs on these sites and reduce the TDR surplus. Staff supports this zoning text amendment.

**III. SRA 07-02** Eliminates the requirement that a development must use at least two-thirds of the allowable number of transferable development rights in order to use any transferable development rights.

**Staff Response:** The intent of this SRA is to eliminate the two-thirds requirement for TDR's in subdivision applications. This requirement has created problems for small or constrained properties where it has been difficult to achieve the full two-thirds requirement. When the developer cannot meet this requirement, TDRs tend not to be used at all, which contributes to the

surplus TDRs available for sale. Staff believes elimination of this requirement would increase the use of TDRs on these sites and reduce the TDR surplus. Staff supports this subdivision regulation amendment.

**IV. ZTA 07-06** Adds definitions for "Child Lot" and "Immediate Family Member" to the Zoning Ordinance; amends density calculations in the Rural Density Transfer Zone to exclude a lot for a child under specified conditions; amends the standards to approve a child lot in the Rural Density Transfer Zone; and; generally amends child lot provisions in the RDT Zone.

**Staff Response:** The intent of the ZTA is to define child lots and specify the applicability, density and standards for these lots in the RDT Zone. Staff does not support this ZTA as it allows child lots in excess of the base density for the RDT Zone. The County Council, at the request of the Planning Board, has introduced alternative **ZTA 07-09** in order to ensure that the overall density of the property does not exceed one dwelling unit per 25 acres in any subdivision recorded after June 12, 2007. Nonetheless, the following comments are offered with respect to ZTA 07-06:

#### ***Definitions***

The definition for *immediate family* member appears to strictly follow bloodlines. It is unclear whether or not stepparents, stepchildren, and stepsiblings would be included. The strict definition does not allow for "blended" families that may have members who are interested in continuing to farm the property, e.g. a widowed farmer who later marries a woman with small children. It is unclear whether or not these stepchildren would be precluded from obtaining a child lot, based on the definition as written.

A matching subdivision regulation amendment to include the definition of child lots in Chapter 50 is also needed.

#### ***Sec. 59-C-9.4 Development Standards***

##### ***Sec. 58-C-9.41.1 (a) Applicability***

59-C-9.41.1 (a) (1) (B) ". ...expressed the intent to create the lot in a will or a codicil admissible in probate proceedings."

Staff does not support this provision and recommends that it be deleted. The intended beneficiaries have had 26 years to create child lots. Major land use decisions should not be subject to the vagaries of different judges in probate proceedings.

Under Subsection 59-C-9.41.1 (a) (4) *...a majority of the land in the subdivision creating the lot must be reserved for agriculture.*

'Majority of the land' should be defined. There is no threshold number or percentage given which will constitute the majority of land to be reserved for

agriculture. It is questionable how this provision could be enforced to ensure that the majority of the land remains in agriculture.

(c) Transfer restrictions - Staff questions which government agency is going to enforce or monitor a residency requirement for a child lot. Staff respectfully suggests that monitoring the transfer of lots is not a function of the Planning Board. Hardship is defined for only two circumstances but others may be envisioned.

The regulation of child lots appears to be modeled on landowners' voluntary participation in agricultural easement programs. (MALPF). Staff believes that legislatively mandated restrictions on alienation, or residency requirements, are not enforceable.

(d) Penalty for Violations

(1) The provisions contained in Sect 59-A-1.3 are broad and range from punishment under state law, monetary fines and a special hearing by a Hearing Examiner. It is unclear whether the ZTA intends for all three provisions (a) (b) and (c) of Sect 59-A-1.3 to apply for violations of child lots.

(2) Staff questions which agency is going to monitor the following provision:  
*if any party to the transfer of the building permit does not comply with all requirements of Section 59-C-9.41.1.*

This provision is an enforcement issue and more aptly suited for DPS to monitor or enforce, as well as to impose monetary penalties.

(e) Covenant Required

Staff questions why a covenant between the Planning Board and a property owner is needed. A covenant between the property owner and Montgomery County would be more logical to record in the county land records.

***Section 59-C-9.7 Exempted Lots and Parcels***

" (a) The number of lots created for children in accordance with the Maryland Agricultural Land Preservation Program must not exceed the development rights assigned to the property *and retained by the property owner*"

***Staff Response:*** The proposed language clarifies that child lots are not applicable where development rights have been extinguished.

With respect to Sect 59-C-9.74 (b) (1) (2) and (3), staff does not support the insertion of the date for these three provisions of Sect 59-C-9.7. The following language as currently stated in Section 59-C-9.74 should remain.

*..."prior to the approval date of the sectional map amendment which initially zoned the property to the Rural Density Transfer Zone."*

The current language provides flexibility in terms of a property's placement into the RDT Zone. Not all properties in the RDT Zone were placed there through the 1981 action. For example, several properties were rezoned from R-200 to the RDT Zone by G-352, the Damascus Sectional Map Amendment, on 9/21/1982. Staff does not support the recommended changes and believes the existing language should remain, as it will continue to apply to a group of properties other than those properties solely affected by the 1981 action of the County Council. **The existing language (not the proposed date of January 7, 1981) should also remain in the Planning Board alternative legislation, ZTA 07-09.**

Under Section 59-C-9.74(b)(4), Staff concurs with the replacement of the word *residence* with the word *dwelling*, but staff does not support the inclusion of the phrase

*"... if the lot satisfies the requirements of 59-C-9.41,"* (See previous comments pertaining to Section 59-C-9.41)

## **RECOMMENDATION**

Staff recommends approval of ZTA 07-08, SRA 07-02 (both related to elimination of the two-thirds use requirement for receiving areas of TDRs) and approval with modifications of ZTA 07-09 (related to child lots and the assurance that the overall density of the property does not exceed one dwelling unit per 25 acres in any subdivision recorded after a certain date).

Staff agrees with the general goal of ZTA 07-07 to limit the uses allowed in the RDT when a property is under a transfer of development rights easement to protect and preserve agriculture and farmland. However, as written, ZTA 07-07 creates several unintended consequences for land uses in the RDT Zone and therefore needs additional clarification on the specifics of the intent of the legislation.

The staff does not recommend approval of ZTA 07-06, as it allows child lots in excess of the base density for the RDT Zone. ZTA 07-09 was introduced at the request of the Planning Board as an alternative to this legislation.

## **Attachments**

1. Zoning Text Amendment Nos. 07-06, 07-07, 07-08 & 07-09 and SRA 07-02
2. Next Steps for the County Council in Response to the Ad-Hoc Agriculture Policy Working Group Recommendations
3. Planning Board Recommendations regarding the Ad-Hoc Agriculture Policy Working Group Report



## ATTACHMENT 1

Zoning Text Amendment No: 07-06  
Concerning: RDT - Child Lots Standards  
Draft No. & Date: 1 – 5/22/07  
Introduced: June 12, 2007  
Public Hearing: July 19, 2007; 7:30 PM  
Adopted:  
Effective:  
Ordinance No:

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION OF  
THE MARYLAND-WASHINGTON REGIONAL DISTRICT WITHIN  
MONTGOMERY COUNTY, MARYLAND**

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By:

Council President Praisner at the request of the Ad Hoc Agricultural Policy Working Group

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**AN AMENDMENT** to the Montgomery County Zoning Ordinance for the purpose of:

- amending the density calculations in the RDT Zone to exclude a lot for a child under specified conditions;
- amending the standards to approve a child lot in the RDT Zone;
- generally amending the child lot provisions in the RDT Zone

By amending the following section of the Montgomery County Zoning Ordinance, Chapter 59 of the Montgomery County Code:

DIVISION 59-C-9	“Agricultural Zones”
Section 59-C-9.41	“Density in RDT zone”
Section 59-C-9.74	“Exempted lots and parcels-Rural Density Transfer zone”

**EXPLANATION:** ***Boldface** indicates a heading or a defined term.*

*Underlining indicates text that is added to existing laws by the original text amendment.*

*[Single boldface brackets] indicate text that is deleted from existing law by the original text amendment.*

*Double underlining indicates text that is added to the text amendment by amendment.*

*[[Double boldface brackets]] indicate text that is deleted from the text amendment by amendment.*

*\* \* \* indicates existing law unaffected by the text amendment.*

*ORDINANCE*

*The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District in Montgomery County, Maryland, approves the following ordinance:*

**Sec. 1. DIVISION 59-A-2 is amended as follows:**

**59-A-2.1. Definitions.**

In this Chapter, the following words and phrases have the meanings indicated:

\* \* \*

**Child Lot:** A lot created for use for a one-family dwelling unit by a child, or the spouse of a child, of a property owner.

\* \* \*

**Immediate Family Member:** A person's parents, spouse, children, and siblings

**Sec. 2. DIVISION 59-C-9 is amended as follows:**

**DIVISION 59-C-9. Agricultural Zones.**

\* \* \*

**59-C-9.4. Development standards.**

The following requirements apply in all cases, except as specified in the optional standards for cluster development set forth in sections 59-C-9.5 and 59-C-9.57 and the exemption provisions of section 59-C-9.7. [The following dwelling units on land in the RDT zone are excluded from this calculation, provided that the use remains accessory to a farm. Once the property is subdivided, the dwelling is not excluded:]

**59-C-9.41. Density in RDT zone.**

[Only one one-family dwelling unit per 25 acres is permitted. (See section 59-C-9.6 for permitted transferable density.) The following dwelling units on land in the RDT zone are excluded from this calculation, provided that the use remains accessory to a farm. Once the property is subdivided, the dwelling is not excluded:

(a) A farm tenant dwelling, farm tenant mobile home or guest house as defined in section 59-A-2.1, title "Definitions."

(b) An accessory apartment or accessory dwelling regulated by the special exception provisions of division 59-G-1 and 59-G-2.]

Except as provided in subsection (a) or (b), only one one-family dwelling unit per 25 acres is permitted. (See Section 59-C-9.6 for permitted transferable density.)

Density above one one-family dwelling unit per 25 acres is allowed if:

(a) the dwelling unit is accessory to a farm, is not on a separate parcel or lot, and is either:

(1) a farm tenant dwelling, farm tenant mobile home, or guest house; or

(2) an accessory apartment or accessory dwelling regulated by the special exception provisions of Division 59-G-1 and 59-G-2.

(b) the lot satisfies the requirements of Section 59-C-9.41.1.

**59-C-9.41.1. Child Lots in the RDT Zone**

(a) **Applicability.** A child lot above the density of one one-family dwelling unit per 25 acres is allowed in the RDT zone only if the following requirements are satisfied.

(1) The property owner must have:

(A) recorded title to the property before January 7, 1981;

(B) applied for approval to create the lot or expressed the intent to create the lot in a will or a codicil admissible in probate proceedings; and

(C) retained a development right for each lot.

(2) The Planning Board must not approve more than one child lot for each child of the property owner, regardless of the number of properties owned.

(3) A child lot must be identified on a record plat.

(4) A majority of the land in the subdivision creating the lot must be reserved for agriculture.

(b) **Building Permit Restricted.** A building permit for a one-family dwelling unit on a child lot must be issued only to:

(1) a child of the property owner;

(2) the spouse of a child of the property owner;

(3) a contractor for a child of the property owner; or

(4) a contractor for the spouse of a child of the property owner.

(c) **Transfer restricted.** Except as provided in subsection (c)(1) and (c)(2), ownership of the a child lot must not be transferred or leased within five years of the date of final inspection of a one-family dwelling unit by the Department of Permitting Services:

(1) The owner of the child lot may only lease the lot to an immediate family member.

(2) Ownership of a child lot may be transferred if the Planning Board finds a hardship after the date of final inspection, such as death of the child or a bona fide foreclosure of the mortgage or deed of trust.

(d) **Penalty for Violations.**

(1) Except as provided in subsection (d)(2), any violation of this subsection is subject to the penalty and enforcement provisions in Section 59-A-1.3.

(2) The Planning Board may take legal action to stop or cancel any transfer or building permit of a child lot if any party to the transfer or the building permit does not comply with all requirements of Section 59-C-9.41.1. The Planning Board may recover any funds improperly obtained from any sale or lease of child lot in violation of this subsection, plus costs and interest at the rate prescribed by law from the date a violation occurred.

(e) **Covenant required.** A covenant between the property owner and the Montgomery County Planning Board must be recorded in the Montgomery County land records. The covenant must:

- (1) be recorded simultaneously with the record plat;
- (2) identify the transfer restrictions in subsection (c); and
- (3) identify the penalties for violations as identified in subsection (d).

\* \* \*

**59-C-9.7. Exempted lots and parcels and existing buildings and permits.**

\* \* \*

**59-C-9.74. Exempted lots and parcels—Rural Density Transfer zone.**

(a) The number of lots created for children in accordance with the Maryland Agricultural Land Preservation Program must not exceed the development rights assigned to the property and retained by the property owner.

(b) The following 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 Rural Density Transfer zone] before January 7, 1981.

- 99 (1) A recorded lot created by subdivision, if the record plat was  
100 approved for recordation by the Planning Board [prior to the  
101 approval date of the sectional map amendment which initially  
102 zoned the property to the Rural Density Transfer Zone] before  
103 January 7, 1981.
- 104 (2) A lot created by deed executed [on or] before [the approval date  
105 of the sectional map amendment which initially zoned the  
106 property to the Rural Density Transfer Zone] January 7, 1981.
- 107 (3) A record lot having an area of less than 5 acres created after  
108 [the approval date of the sectional map amendment which  
109 initially zoned the property to the Rural Density Transfer Zone]  
110 January 7, 1981 by replatting 2 or more lots; provided that the  
111 resulting number of lots is not greater than the number which  
112 were replatted.
- 113 (4) A lot created for use for a one-family [residence] dwelling by a  
114 child, or the spouse of a child, of the property owner, [provided  
115 that the following conditions are met] if the lot satisfies the  
116 requirements of 59-C-9.41.1. [:
- 117 (i) The property owner can establish that he had legal title  
118 on or before the approval date of the sectional map  
119 amendment which initially zoned the property to the  
120 Rural Density Transfer Zone;
- 121 (ii) This provision applies to only one such lot for each child  
122 of the property owner; and

123                   (iii)           Any lots created for use for one-family residence by  
124                                   children of the property owner must not exceed the  
125                                   number of development rights for the property owner.]

126       \*     \*     \*

127           **Sec. 3. Effective date.** This ordinance takes effect 20 days after the date of  
128   Council adoption.

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130   This is a correct copy of Council action.

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Linda M. Lauer, Clerk of the Council

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Zoning Text Amendment No: 07-07  
Concerning: Rural Density Transfer – Use  
Limitations  
Draft No. & Date: 1 – 5/16/07  
Introduced: June 12, 2007  
Public Hearing: July 19, 2007; 7:30 PM  
Adopted:  
Effective:  
Ordinance No:

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION OF  
THE MARYLAND-WASHINGTON REGIONAL DISTRICT WITHIN  
MONTGOMERY COUNTY, MARYLAND**

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By: Council President at the Request of the Ad Hoc Agricultural Policy Working Group

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**AN AMENDMENT** to the Montgomery County Zoning Ordinance for the purpose of:

- to limit the uses allowed in the Rural Density Transfer Zone when a property is under a transfer of development rights easement; and
- generally amend uses allowed in the Rural Density Transfer Zone.

By amending the following section of the Montgomery County Zoning Ordinance, Chapter 59 of the Montgomery County Code:

**DIVISION 59-C-9 “AGRICULTURAL ZONES”**  
**Section 59-C-9.3 “Land uses”**

**EXPLANATION:** **Boldface** indicates a heading or a defined term.  
Underlining indicates text that is added to existing laws by the original text amendment.  
[Single boldface brackets] indicate text that is deleted from existing law by the original text amendment.  
Double underlining indicates text that is added to the text amendment by amendment.  
[[Double boldface brackets]] indicate text that is deleted from the text amendment by amendment.  
\* \* \* indicates existing law unaffected by the text amendment.

## *ORDINANCE*

*The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District in Montgomery County, Maryland, approves the following ordinance:*

**Sec. 1. DIVISION 59-C-9 is amended as follows:**

**DIVISION 59-C-9. AGRICULTURAL ZONES.**

\* \* \*

**59-C-9.3 Land uses.**

\* \* \*

	Rural	RC	LDRC	RD <sup>T</sup> *	RS	RNC	RNC/TDR

\* If a property is under a recorded transfer of developments rights easement, only the following uses are allowed.

- (a) one-family dwellings;
- (b) all agricultural uses;
- (c) all agricultural-industrial uses; and
- (d) all agricultural-commercial uses.

Each use that requires a special exception under Sec. 59C-9.3 is allowed only by the approval of a special exception.

**Sec. 2. Effective date.** This ordinance takes effect 20 days after the date of Council adoption.

This is a correct copy of Council action.

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Linda M. Lauer, Clerk of the Council

Zoning Text Amendment No: 07-08  
Concerning: Transfer of development  
Rights- standards  
Draft No. & Date: 1 – 5/18/2007  
Introduced: June 12, 2007  
Public Hearing: July 19, 2007; 7:30 PM  
Adopted:  
Effective:  
Ordinance No:

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION OF  
THE MARYLAND-WASHINGTON REGIONAL DISTRICT WITHIN  
MONTGOMERY COUNTY, MARYLAND**

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By: Council President Praisner at the request of the Ad Hoc Agricultural Policy Working Group

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**AN AMENDMENT** to the Montgomery County Zoning Ordinance to:

- eliminate the requirement that a development must use at least two-thirds of the allowable number of transferable development rights in order to use any transferable development right; and
- generally amend development approval procedures.

By amending the following sections of the Montgomery County Zoning Ordinance, Chapter 59 of the Montgomery County Code:

DIVISION 59-C-1     “Residential Zones, One-Family”  
Section 59-C-1.393   “Development Approval Procedures Under the Optional Method of Development”  
DIVISION 59-C-2.   “Residential Zones, Multiple-Family”  
Section 59-C-2.443   “Development approval procedures under the optional method of development.”

**EXPLANATION:** ***Boldface** indicates a heading or a defined term.*  
*Underlining indicates text that is added to existing laws by the original text amendment.*  
*[Single boldface brackets] indicate text that is deleted from existing law by the original text amendment.*  
*Double underlining indicates text that is added to the text amendment by amendment.*  
*[[Double boldface brackets]] indicate text that is deleted from the text amendment by amendment.*  
*\* \* \* indicates existing law unaffected by the text amendment.*

*ORDINANCE*

*The County Council for Montgomery County, sitting as the District Council for that portion of the Maryland-Washington Regional District in Montgomery County, Maryland, approves the following ordinance:*

1       **Sec. 1. Division 59-C-1 is amended as follows:**

2       **DIVISION 59-C-1. RESIDENTIAL ZONES, ONE-FAMILY.**

3       **59-C-1.393. Development Approval Procedures Under the Optional Method of**  
4       **Development.**

5                               \*       \*       \*

6       (b) [Such a preliminary plan must include at least two-thirds of the  
7           number of development rights permitted to be transferred to the  
8           property under the provisions of the applicable master plan approved  
9           by the district council. However, upon a finding by the planning  
10          board that for environmental or compatibility reasons it would be  
11          desirable to permit a lower density, the two-thirds requirement may be  
12          waived.]

13       [(c)] A site plan shall be submitted and approved in accordance with the  
14       provisions of division 59-D-3.

15       [(d)][(c)]The [planning board] Planning Board must approve a request to  
16       utilize development rights if the request:

- 17           (1) Does not exceed the limitation on the density or number of  
18           dwelling units permitted in the zone and in the applicable  
19           master plan approved by the district council;  
20           (2) Is in accordance with the provisions of this chapter;  
21           (3) Is in accordance with [chapter] Chapter 50, title "Subdivision of  
22           Land;"  
23           (4) Is consistent with other recommendations of the master plan  
24           approved by the [district council] District Council; and  
25           (5) Achieves a desirable development compatible with both site  
26           conditions and surrounding existing and future development.

27           [(e)] (d)       Prior to recordation of a final record plat for a subdivision using  
28                               transferred development rights, an easement to the Montgomery  
29                               County Government in the form required by Section 59-C-  
30                               1.392(a) limiting future construction of dwellings on a property  
31                               in the RDT zone by the number of development rights received  
32                               must be recorded among the land records of Montgomery  
33                               County, Maryland.

34           [(f)] (e)       A final record plat for a subdivision using transferred  
35                               development rights shall contain a statement setting forth the  
36                               development proposed, the zoning classification of the  
37                               property, the number of development rights used, and a notation  
38                               of the recordation of the conveyance required by Section 59-C-  
39                               1.392(b).

40           **Sec. 2. Division 59-C-2 is amended as follows:**

41           **DIVISION 59-C-2. RESIDENTIAL ZONES, MULTIPLE-FAMILY.**

42           **59-C-2.443. Development approval procedures under the optional method of**  
43           **development.**

44                               \*       \*       \*

45           (b)   [Such a preliminary plan must include at least two-thirds of the  
46                               number of development rights permitted to be transferred to the  
47                               property under the provisions of the applicable master or sector plan  
48                               approved by the district council. However, upon a finding by the  
49                               Planning Board that for environmental or compatibility reasons it  
50                               would be desirable to permit a lower density, the two-thirds  
51                               requirement may be waived.]

52           [(c)] A site plan must be submitted and approved in accordance with the  
53                               provisions of division 59-D-3.

54        ~~[(d)]~~ (c)        The Planning Board must approve a request to utilize  
55        development rights if the request:

- 56                    (1)    does not exceed the limitations on the density or number  
57                    of dwelling units permitted in the zone and in the  
58                    applicable master or sector plan approved by the district  
59                    council;
- 60                    (2)    is in accordance with provisions of this chapter;
- 61                    (3)    is in accordance with ~~[chapter]~~ Chapter 50, title  
62                    "Subdivision of Land";
- 63                    (4)    is consistent with other recommendations of the master  
64                    or sector plan approved by the ~~[district council]~~ District  
65                    Council; and
- 66                    (5)    achieves a desirable development compatible with both  
67                    site conditions and surrounding existing and future  
68                    development.

69        ~~[(e)]~~ (d)        Prior to Planning Board approval of a final record plat for a  
70        subdivision using transferred development rights, an easement  
71        to the Montgomery County Government in the form required by  
72        subsection (a) above limiting future construction of dwellings  
73        on a property in the RDT zone by the number of development  
74        rights received must be recorded among the land records of  
75        Montgomery County, Maryland.

76        ~~[(f)]~~ (e)        A final record plat for a subdivision using transferred  
77        development rights must contain a statement setting forth the  
78        development proposed, the zoning classification of the  
79        property, the number of development rights used, and a notation



of the recordation of this conveyance required by section 59-C-  
2.442(b)

**Sec. 3. Effective date.** This ordinance takes effect 20 days after the  
date of Council adoption.

This is a correct copy of Council action.

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Linda M. Lauer, Clerk of the Council

Ordinance No. \_\_\_\_\_  
Subdivision Regulation Amend. No. 07-02  
Concerning: Transferable Development  
Rights - Subdivision Standard  
Revised: 5/20/2007 Draft No. 1  
Introduced: June 12, 2007  
Public Hearing: July 19, 2007; 7:30 PM  
Adopted: \_\_\_\_\_  
Effective: \_\_\_\_\_

**COUNTY COUNCIL  
FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION  
OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT  
WITHIN MONTGOMERY COUNTY, MARYLAND**

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By: Council President Praisner at the request of the Ad Hoc Agricultural Policy Working Group

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**AN AMENDMENT** to the Subdivision Regulations to:

- eliminate the requirement that a development must use at least two-thirds of the allowable number of transferable development rights in order to use any transferable development rights.

By amending the following section of County Code Chapter 50:

Section 50-34, Preliminary subdivision plans-Filing and specifications

**Boldface**

Underlining

[Single boldface brackets]

Double underlining

[[Double boldface brackets]]

\* \* \*

*Heading or defined term.*

*Added to existing law by original bill.*

*Deleted from existing law by original bill.*

*Added by amendment.*

*Deleted from existing law or the bill by amendment.*

*Existing law unaffected by bill.*

ORDINANCE

*The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District in Montgomery County, Maryland, approves the following Ordinance:*

1

**Sec. 1. Section 50-34 is amended as follows:**

**50-34. Preliminary subdivision plans-Filing and specifications**

\* \* \*

(i) *[Development rights.* Such a preliminary subdivision plan must include at least two-thirds of the number of development rights permitted to be transferred to the property under the provisions of the appropriate general, master, sector or functional plan. However, upon a finding by the Planning Board that for environmental reasons it would be desirable to permit a lower density, the two-thirds requirement may be waived.]

~~[(j)]~~ A preliminary subdivision plan application for a subdivision to be located in a transportation management district, as designated under Chapter 42A, Article II, must contain a draft traffic mitigation agreement that meets the requirements of that article unless one has previously been submitted at the time of project plan submittal under the optional method of development.

**Sec. 2. Effective date.** This ordinance takes effect on the date of Council adoption.

*Approved:*

---

Isiah Leggett, County Executive

Date

*This is a correct copy of Council action.*

---

Linda M. Lauer, Clerk of the Council

Date

Zoning Text Amendment No: 07-09  
Concerning: RDT - Child Lots Standards  
Draft No. & Date: 1 – 5/31/07  
Introduced: June 12, 2007  
Public Hearing: 7/19/07; 7:30 PM  
Adopted:  
Effective:  
Ordinance No:

**COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND  
SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION OF  
THE MARYLAND-WASHINGTON REGIONAL DISTRICT WITHIN  
MONTGOMERY COUNTY, MARYLAND**

---

By:  
Council President Praisner on behalf of the Maryland-National Capital  
Park and Planning Commission

---

**AN AMENDMENT** to the Montgomery County Zoning Ordinance for the purpose of:

- amending the density calculations in the RDT Zone to clarify that the number of child lots must not exceed the allowable base density; and
- generally amending the conditions for creation of a child lot in the RDT Zone.

By amending the following section of the Montgomery County Zoning Ordinance, Chapter 59 of the Montgomery County Code:

DIVISION 59-C-9      “Agricultural Zones”  
Section 59-C-9.74    “Exempted lots and parcels-Rural Density Transfer zone”

**EXPLANATION:** ***Boldface** indicates a heading or a defined term.*

*Underlining indicates text that is added to existing laws by the original text amendment.*

*[Single boldface brackets] indicate text that is deleted from existing law by the original text amendment.*

*Double underlining indicates text that is added to the text amendment by amendment.*

*[[Double boldface brackets]] indicate text that is deleted from the text amendment by amendment.*

*\* \* \* indicates existing law unaffected by the text amendment.*

*ORDINANCE*

*The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District in Montgomery County, Maryland, approves the following ordinance:*

**Sec. 1. DIVISION 59-C-9 is amended as follows:**

**DIVISION 59-C-9. Agricultural Zones.**

\* \* \*

**59-C-9.4. Development standards.**

The following requirements apply in all cases, except as specified in the optional standards for cluster development set forth in sections 59-C-9.5 and 59-C-9.57 and the exemption provisions of section 59-C-9.7.

\* \* \*

**59-C-9.7. Exempted lots and parcels and existing buildings and permits.**

\* \* \*

**59-C-9.74. Exempted lots and parcels—Rural Density Transfer zone.**

(a) The number of lots created for children in accordance with the Maryland Agricultural Land Preservation Program must not exceed the development rights assigned to the property and retained by the property owner.

(b) The following 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 Rural Density Transfer zone] [[before January 7, 1981]] prior to their classification in the Rural Density Transfer zone.

(1) A recorded lot created by subdivision, if the record plat was approved for recordation by the Planning Board [prior to the approval date of the sectional map amendment which initially zoned the property to the Rural Density Transfer Zone] [[before

- 51 (iii) Any lots created for use for one-family residence by  
52 children of the property owner must not exceed the  
53 number of development rights for the property owner[.];  
54 and  
55 (iv) The overall density of the property does not exceed one  
56 dwelling unit per 25 acres in any subdivision recorded  
57 after June 12, 2007.

58 \* \* \*

59 **Sec. 2. Effective date.** This ordinance takes effect 20 days after the date of  
60 Council adoption.

61

62 This is a correct copy of Council action.

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67 Linda M. Lauer, Clerk of the Council

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**NEXT STEPS FOR THE COUNTY COUNCIL IN RESPONSE TO  
THE AD-HOC AGRICULTURE POLICY WORKING GROUP RECOMMENDATIONS**

**SHORT-TERM**

	<b><u>What Needs to be Done to Implement Working Group Recommendations?</u></b>	<b><u>By Whom?</u></b>
1	<b>TDRs:</b> Continue implementing a system that tracks the use of TDRs; submit annual TDR reports to the Council. (Annual Report)	M-NCPPC Ongoing
4	<b>TDRs:</b> Eliminate the requirement that receiving areas use 2/3 of the possible TDRs. (ZTA & SRA)	M-NCPPC (DONE – Council Staff)
7	<b>CHILD LOTS:</b> Clarify the Zoning Ordinance to indicate that child lots are in addition to market lots. (ZTA)	Council (DONE – Council Staff)
8	<b>CHILD LOTS:</b> Clearly restrict child lots to ensure ownership by child (allowing for hardships). Strategies include: <ul style="list-style-type: none"> <li>• Require that the record plat indicate it is a child lot (SRA)</li> <li>• Require that a covenant be recorded in the land records at the time the plat is recorded specifying that the house on the child lot must be owned by the child for five years and must not be leased except to immediate family. (SRA)</li> <li>• Require that the building permit be issued in the child's name. (SRA)</li> </ul>	M-NCPPC (DONE – Council Staff)
9	<b>CHILD LOTS:</b> A majority of any child lot must be preserved in agriculture (important) for small lots. (ZTA & SRA)	M-NCPPC (DONE – Council Staff)
10	<b>CHILD LOTS:</b> Codify the long-standing practices that require that each child is only entitled to one child lot, regardless of the number of properties owned by the parent and that the construction of each child lot requires the use of a TDR. (ZTA)	M-NCPPC (DONE – Council Staff)
11	<b>CHILD LOTS:</b> A child lot may be created after the death of the owner if the owners' intent has been established through a will or other document admissible in probate. (ZTA & SRA)	M-NCPPC (DONE – Council Staff)

Short-term: In the next 6 months

Mid-term: By the end of calendar year 2007

Long-term: In 2008 or later

ZTA: Zoning Text Amendment

SRA: Subdivision Regulation Amendment

Ex. Reg: Executive Regulation

	<b><u>What Needs to be Done to Implement Working Group Recommendations?</u></b>	<b><u>By Whom?</u></b>
		Staff)
12	<b>CHILD LOTS:</b> Develop a complaint based enforcement mechanism to respond to complaints if a child lot home is prematurely leased. (Ex Reg)	DPS
15	<b>CHILD LOTS:</b> Amend the language in the Ten-Year Water and Sewerage Plan to allow public water (but not sewer) to child lots under certain limited circumstances: <ul style="list-style-type: none"> <li>• When the child lot can be served from an existing water main and service to the property would not provide the opportunity for service to other RDT properties.</li> <li>• 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.</li> </ul>	DEP (DONE)
	Require Council approval of any request for public water to a child lot in the RDT zone. (Water & Sewer Plan)	
17	<b>SAND MOUNDS:</b> Obtain written confirmation from the State that limitations on sand mounds do not conflict with State law.	Council Staff (DONE)
	<b>BLT PROGRAM:</b>	
20	Draft Executive Regulations for the BLT Program (note that most of the Group's recommendations relate to for program specifics that will be part of the Executive Regulations) (Ex. Reg)	County Executive (Draft submitted – not yet published in register)
21	Determine budget implications and funding strategies for FY08 and beyond.	County Executive
22	<b>RDT LEGISLATION:</b> Clarify that the development of RDT zoned parcels encumbered by TDR easements must be limited to single family houses and agricultural and agricultural related uses only. (ZTA)	Council (DONE)
24	<b>RIGHT TO FARM DISCLOSURE LEGISLATION:</b> Enact legislation requiring disclosure for homes being sold in agricultural zones to inform potential homebuyers of current County and State law that protects farmers from certain nuisance claims related to farming. (Bill)	Council (DONE)

Short-term: In the next 6 months

Mid-term: By the end of calendar year 2007

Long-term: In 2008 or later

ZTA: Zoning Text Amendment

SRA: Subdivision Regulation Amendment

Ex. Reg: Executive Regulation

## MID-TERM

	<u>What Needs to be Done to Implement Working Group Recommendations</u>	<u>By Whom?</u>
2	<b>TDRs:</b> Draft amendments to the Zoning Ordinance and Subdivision Regulations to require excess TDR receiving capacity in floating zones research and development, certain commercial, industrial, and mixed use zones (including the commercial portions of mixed-use zones). (ZTA & SRA)	M-NCPPC
5	<b>TDRs:</b> Develop inter-jurisdictional TDR programs with municipalities with appropriate incentives and/or penalties. (MOU)	M-NCPPC & Council
14	<b>CHILD LOTS:</b> Establish monetary penalties for violation of child lot provisions. (Bill)	Council

	<u>What Needs to be Done to Implement Working Group Recommendations</u>	<u>By Whom?</u>
16	<b>CHILD LOTS:</b> Develop a monitoring mechanism to track how many child lots use public water. (Water & Sewer Plan)	DEP
18	<p><b>SAND MOUNDS:</b> Enact changes to the Ten-Year Water and Sewerage Plan to reflect the Group's recommendations on sand mound usage limits:</p> <p>One sand mound per 25 acres for the first 75 acres and, beyond that, one sand mound per 50 acres.</p> <p>Allow sand mounds under the circumstances listed below, for a parcel existing as of December 1, 2006.</p> <ul style="list-style-type: none"> <li>• Where there is an existing house and the sand mound would not result in the development of an additional house.</li> <li>• When it enables a property owner with approved deep trench system percs to better locate potential houses to preserve agriculture.</li> <li>• For child lots, provide that 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 provisions or approved under the Agricultural Easement Program (MALPF/AEP).</li> <li>• 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.</li> <li>• For any pre-existing parcel that is defined as an exempted lot or parcel in the zoning regulations.</li> <li>• For properties where there has been a significant investment in testing for sand mounds prior to the adoption of these new restrictions.</li> </ul>	DEP

Short-term: In the next 6 months

Mid-term: By the end of calendar year 2007

Long-term: In 2008 or later

ZTA: Zoning Text Amendment

SRA: Subdivision Regulation Amendment

Ex. Reg: Executive Regulation

	<ul style="list-style-type: none"> <li>• For any permitted agricultural use under the zoning regulations (e.g., farm market).</li> <li>• For the purpose of qualifying for a State or County easement program (including a Building Lot Termination program). (Water &amp; Sewer Plan and Ex. Regs)</li> </ul>	
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Short-term: In the next 6 months

Mid-term: By the end of calendar year 2007

Long-term: In 2008 or later

ZTA: Zoning Text Amendment

SRA: Subdivision Regulation Amendment

Ex. Reg: Executive Regulation

## MID TO LONG TERM

19	<b>SAND MOUNDS:</b> Draft guidelines to ensure that properties using sand mounds locate buildings to prevent fragmentation of viable agricultural land. (SRA and/or ZTA)	M-NCPPC
25	<b>EDUCATION:</b> Develop an educational strategy for County residents.	County Executive

## LONG-TERM

3	<b>TDRs:</b> Create a program by which TDRs on commercial and industrial properties will purchase buildable TDRs instead of excess TDRs. (ZTA) (See staff note regarding TDR deficit)	M-NCPPC
23	<b>RDT LEGISLATION:</b> Undertake further analysis to determine whether the presence of a PIF on RDT land should limit the number of TDRs available for sale. (Potential ZTA)	M-NCPPC
26	<b>WORK PLAN FOR ADDITIONAL ISSUES:</b> Develop a plan for undertaking the additional issues identified at the end of the report.	M-NCPPC
<b>ON-GOING</b>		
6	<b>TDRs:</b> Maximize the placement of TDR receiving areas during master plan review. (MP)	M-NCPPC & Council

Short-term: In the next 6 months  
 Mid-term: By the end of calendar year 2007  
 Long-term: In 2008 or later  
 ZTA: Zoning Text Amendment  
 SRA: Subdivision Regulation Amendment  
 Ex. Reg: Executive Regulation



**MONTGOMERY COUNTY PLANNING BOARD**  
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

March 12, 2007

Marilyn J. Praisner  
President  
Montgomery County Council  
Stella B. Werner Council Office Building  
100 Maryland Avenue  
Rockville, Maryland 20850

SUBJECT: Planning Board Recommendations regarding the Ad Hoc Agricultural Policy  
Working Group Report

Dear Ms. Praisner:

On a motion by Commissioner Wellington, seconded by Commissioner Robinson, the Planning Board on March 8 voted 3-0 (Commissioners Hanson, Robinson, Wellington; Commissioners Purdue and Bryant absent) to transmit the following comments to the County Council regarding the Report and Recommendations of the Ad Hoc Agricultural Policy Working Group. This was the Planning Board's second work session on the Working Group's Report, having taken straw votes on the major themes during its discussion of March 1, 2007. The planning staff memorandum for the March 8, 2007 work session is attached for your information. During the first work session, the Planning Board votes on all but one key theme were 5-0. The following comments therefore reflect the Planning Board's unanimous views on most of the major issues, with a vote of 4-1 on the sand mound issue.

The Planning Board commends the Working Group for producing a thoughtful report on the array of issues facing the Agricultural Reserve. That the 15 members of the Group addressed all of these complex and inter-related issues in the relatively short time frame set by the County Council speaks very highly of their dedication, knowledge, energy and motivation.

The Planning Board also appreciates that all members of the Working Group 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. The Planning Board shares these views, and while generally agreeing with the Working Group on the building lot termination and expanded TDR programs, we arrived at different conclusions on the child lot and sand mound issues.

All these issues are inextricably linked. Terminating the large number of buildable development rights is an important means of resolving or diminishing the sand mound and child lot issues. Reciprocally, resolving the other two issues will help address the issue of buildable lots.

### **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, except for one. Contrary to the Working Group's position, the Board recommends that sand mounds should not be used in determining the existence of a buildable lot. The objective of the master plan is to limit residential development in the Agricultural protection area of the Reserve to the natural holding capacity of the land. Thus, buildable lots are those that can be served by traditional deep trench septic systems rather than by any other sanitation systems, whether classified as alternative or conventional.

### **Expanded Transferable Development Rights Program**

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 endorsed several recommendations made by the 2002 TDR Task Force, and recommended several changes to the current TDR program. The Planning Board supports all of the following recommendations:

- Continue implementing a system that tracks the use of TDRs; submit annual TDR reports to the Council.
- Draft amendments to the Zoning Ordinance and Subdivision Regulations to require excess TDR receiving capacity in floating zones, research and development, certain commercial, industrial, and mixed-use zones.
- Create a program by which TDRs on commercial and industrial properties will purchase buildable TDRs instead of excess TDRs.
- Eliminate the requirement that receiving areas use 2/3 of the possible TDRs.
- Develop inter-jurisdictional TDR programs with municipalities.
- Maximize the placement of TDR receiving areas during master plan review.

## Child Lots

The first question in dealing with any land use matter is whether it furthers the goals of the Master Plan and the purposes of the zone. The existing exemption for child lots involves only the dimensional requirements of the RDT Zone. That each such lot requires the use of a development right does not, in itself, justify creating any lots, child or market, that exceed the base density of the zone (i.e. 1 residence: 25 acres.) 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. It recognized that in time, the excess family residence might be sold to someone outside the family, but by allowing a residence for a child to be built on an acre, the farm would not have to be divided among family members.

There is no justification for reading the ordinance, as it has been done, to allow densities in excess of 1:25, or to permit a lot per child, regardless of the number of children, in excess of, and in addition to, market lots at full density. As historically construed, this practice would permit an owner with 10 children and 100 acres to have 14 lots with a density of 1 residence for each 7.17 acres. This is clearly contrary to the intent of the zone with regard to density, protection against fragmentation of the critical mass of agricultural land, and, especially, with regard to giving primacy to agricultural uses.

The prime example of this in a recent case is the Copenhagen subdivision proposal, which would have placed five child lots on 42 acres, and have retained the rights to sell one additional market lot. While this subdivision was denied on grounds that the decedent owners had made no written statement of their desire to create the lots, it nonetheless illustrates the folly of the current practice. Another subdivision, which has been deferred indefinitely, would have created five child lots in addition to a permitted three market lots on 80+ acres, with an average residential density of 1:10 acres.

The fact that this practice has been permitted in the past is no justification for continuing it, a position endorsed in testimony before the Planning Board from 60 organizations and individuals. The practice has nothing to do with equity for farmers, as it discriminates against farm families that are not as procreative as others. Its purpose was to facilitate intergenerational transfer of the farm within the family, not to provide a windfall for owners with large families, by which they could increase the number of market lots, even if they have to wait five years to sell some of them.

The Working Group's proposal that the lot must be recorded in the child's name and the owner must file an affidavit swearing his/her intention to own the property for at least five years, is no assurance of fulfillment of the intent of the provision. Because of restraints on the alienation of property, ownership cannot be enforced, and even if it could be, the objective is not *occupancy* by a child, but participation in the farming enterprise. We appreciate the effort of the working group to try to find a measure that might restrain the "flipping" of child lots onto the market, but reluctantly conclude that such measures are more symbolic than enforceable.



The Planning Board believes that allowing a farm owner to build a home for a child remains a reasonable goal. Allowing the number of such homes to exceed the base density is not. It is a loophole for subdivision. ***The Planning Board recommends that the child lot exemption of the RDT Zone be amended to include the same provision that is provided in the Rural Zone (i.e. that the total number of lots created from a parcel, including child lots, must not exceed the density limitations of the zone.)*** The Planning Board strongly recommends that the current practice be discontinued and intends to do so in its review of applications for subdivisions that include child lots.

If the County Council does not concur with the Board on this proposal, it should, at a minimum, amend the ordinance to make it crystal clear that only child lots exceed base density, and that in no case should the ordinance allow the creation of any market lots if the number of child lots on a tract exceeds base density. Pages 3-5 of the planning staff memorandum of March 5, 2007, give a more detailed explication of this option, with an illustrative table and graphics.

The Planning Board disagrees with the Working Group's recommendations regarding the provision of public water service to child lots. We find no reason to extend water and sewer service into the Reserve, period. We recommend that the Ten Year Water and Sewerage Plan should be amended so that it is consistent with the Master Plan for the Preservation of Agriculture and Rural Open Space with respect to child lots.

## **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. All agreed on their use (or other alternative technologies to trench septic) for failing systems, tenant homes on a common lot, and to locate a residence on poorer soils to protect better agricultural soils.

By a 4-1 majority (Commissioners Hanson, Robinson, Perdue, Wellington), the Planning Board strongly recommends that all alternative technologies to trench systems should be prohibited in the Agricultural Reserve (RDT Zone) except for the following situations, and for parcels existing as of December 1, 2006: (Commissioner Bryant dissented, preferring the Working Group majority's position.)

- 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 houses to preserve agriculture.
- For child lots, which meet the Board's recommendations, above, and where they are approved under the Agricultural Easement Program MALPF/AEP.

- For bona fide tenant housing. Sand mounds should be approved for bona fide tenant housing if 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.

The Planning Board also recommends use of alternative technologies, when necessary, for agriculture-related commercial activities.

As discussed above, the Planning Board does not recommend sand mounds or other alternative technologies for the purpose of qualifying for the Building Lot Termination program; or for properties where there has been a significant investment in testing for sand mounds prior to the adoption of these new restrictions. There is no good reason for grandfathering holes in the ground.

The use of sand mounds instead of deep trench septic systems to produce residential subdivisions has had a pernicious effect on the Agricultural Reserve. It has reduced willingness to sell development rights for land that cannot meet perc tests for deep trench septic systems, and has inflated speculative land values in the Reserve, raising expectations that every acre should be valued at its development rather than its agricultural value. This impedes the ability of new farmers to buy farmland and, thus, works against sustaining farming in the Reserve.

The argument that inflated land values produced by the ability to build on sand mounds is part of the landowner's equity and, thus, must be protected is specious. Permitting sand mounds without restrictions provide a windfall to land owners by creating an expectation that every parcel might achieve its full zoning density.

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 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."

***The Planning Board strongly 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 cannot amend the Master Plan, it has been interpreted that way, and, at a minimum, it presents an inconsistency in County policy toward 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.

One issue raised concerning sand mounds is whether the County may provide more strict regulation of their use rather than the State; i.e., has the State pre-empted this arena of regulation by declaring that sand mounds are now "conventional" technology?

It has not. The leading case on Maryland pre-emption doctrine is *Ad+Soil, Inc. v County Commissioners of Queen Anne's County*, 307Md.307, 503 A.2d 893 (1986), which held that the State has not pre-empted local regulation unless the General Assembly has expressly occupied the field by prohibiting local legislation or has created a comprehensive regulatory scheme that clearly implies a legislative purpose to occupy the field, and preclude all local regulation. The legislation clearly does not pre-empt the field, contemplating instead substantial County participation in the regulatory scheme. First of all, the statute explicitly prohibits State regulations that would prevent counties from enacting greater or supplementary protections in its sanitary regulations:

Any rule or regulation adopted under this subtitle does not limit or supersede any other county, municipal, or State law, rule, or regulation that provides greater protection to the public health, safety, or welfare. Md. Code § 9-502 (c) *Conflict with other laws, rules, or regulations.*

The law requires counties to submit their plans to the planning agencies with jurisdiction for review and comment, and that the planning agency "shall certify that the plan, revision, or amendment is consistent with the county comprehensive plan..." (Md. Code § 9-506.) A separate section imposes this duty on M-NCPPC in Montgomery County and Prince George's County (Md. Code § 9-516.) These statutory provisions strongly support the position that there was no legislative intent to occupy the field, but rather, that there a wide range of discretion, collaboration and cooperation has been afforded the counties in the development of plans and regulations governing sanitary policies.

The regulations adopted by the Maryland Department of Environment reinforce this view. The preface to the Department of Environment regulations governing water supply, sewerage, solid waste, and pollution control planning and funding states:

"It is the intent of these regulations to require the governing body of each county and Baltimore City to develop water supply and sewerage systems so as to be consistent with county comprehensive planning."

Code of Maryland Regulations § 26.03.01.02A re-emphasizes the point:

*"The objective of the county [water supply and sewerage] plan is to develop the water supply and sewerage systems in a way consistent with county comprehensive planning. The plan shall be used as a tool to implement the county development policy...."* (Italics added)

And § 26.03.01.02 D provides:

"Every official planning agency having any immediate jurisdiction in a county, including those comprehensive planning agencies with multi-county or regional jurisdiction, shall be consulted by the governing body in connection with the preparation, amendment, or revision of county plans. A statement that the above agencies have been consulted shall be attached."

The State has not, therefore, either by statute or regulation, pre-empted county discretion in the use of sewerage technologies. Moreover, it has required that the water and sewerage plan be consistent with the County's comprehensive plan, since it is a means of implementing that plan.

From a planning perspective, if we can withhold the highest technology, public sewer, from an area, either temporarily or permanently, by placing it in Category 6, we surely can withhold other alternative technologies, as long as we provide for the use of measures that ensure the public health. Whether land is zoned RDT, RC, RE-2, RE-1, I-1, or R-200, it can be denied sewer or any other technology that would prevent it developing to the full capacity of the zoning envelope. All land is subject to a variety of regulations, of which zoning is only one. Environmental regulations may prevent development on slopes, flood plains, wetlands, or forests. Requirements of access and road dedications, provision of parks and school sites, or issues of compatibility with surrounding communities may also reduce the lot yield of a tract of land.

This is a long way of returning to the basic issue addressed in the Working Group report: Should sand mounds be regarded as "conventional" technology, equivalent to deep trench septic systems for purposes of serving residential development in the RDT Zone? Both the majority and minority of the Working Group have, by implication, answered in the negative. The majority would allow sand mounds to be used only on each additional 50 acres after one for each 25 acres of the first 75 acres. The minority

would limit their use to one mound for each 50 acres. The issue, therefore, is not whether to restrict their use, but to what degree? Both the majority and minority, however, tend to miss the central point of the Agriculture and Rural Open Space Master Plan and the RDT Zone. It is not a residential zone. It is an agricultural zone. Its purpose is not to facilitate residential development, but to protect agricultural land for present and future farming.

## **PENDING LEGISLATION**

The Planning Board supports the Working Group recommendation 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.


## **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 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.

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

The Planning Board looks forward to working with the County Council on resolution of these critically important issues for the Agricultural Reserve.

Sincerely,

  
Royce Hanson  
Chairman

cc: PHED Committee & Staff  
Attachment: Staff Report  
RH:CM:ha