

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 through 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'Connell⁷⁴

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 perms" 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.

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. Underdeveloped (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 MXPB 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. At 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 known 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 jurisdictions 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 compiled 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
<i>Blue Earth County, WI</i>	X		
<i>Boulder County, CO</i>	X		
<i>Buckingham Township, Buck County, PA</i>	X		
<i>Burlington County, NJ</i>	X		
<i>Dane County, WI- especially around urban areas (Madison)</i>	X		
<i>Lancaster County, PA</i>	X		
<i>Loudon County, VA</i>	X		
<i>Michigan State</i>	X		
<i>New Jersey Pinelands</i>			X
<i>Vermont State</i>	X		

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

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

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

Jurisdiction	YES	NO
<i>Blue Earth County, WI</i> - are not used to preserve farmland but more to help farmers sell more land and make more money	X	
<i>Boulder County, CO</i> - used as an incentive to conserve farmland and open space	X	
<i>Buckingham Township, Buck County, PA</i>	X	
<i>Burlington County, NJ</i> - only two municipalities have participated since late 1980s early 1990s. Used by open space landowners and not agricultural land owners	X	
<i>Dane County, WI</i> - does have a Farmland Preservation Program that gives tax credits to land owners that have their land zoned exclusively for agriculture		X
<i>Lancaster County, PA</i> - some townships have TDRs but TDRs do not cross municipal boundaries		X
<i>Loudon County, VA</i> - does have purchase development rights		X
<i>Michigan State</i>		X
<i>New Jersey Pinelands</i> - but difficult to implement because the commission does not have authority in townships and municipalities	X	
<i>Vermont State</i>	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 <i>Density depends on how the development is connected to certain types of sewage</i>	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 <i>Three development credits will be subtracted for each dwelling located on a parcel in the Agricultural Land Preservation District</i>	1 per 3 acres
King County, WA <i>Ranges depending on the zone</i>	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	<i>Does not mention the density</i>
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 <i>Up to 140 acres, 1 TDR may be retained</i>	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	<i>Transfer rates are not in zoning</i>
Charles County, MD	<i>Transfer rates are not in zoning</i>
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	<i>Transfer rates are not in zoning</i>
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	<p>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.</p> <p>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.</p>
Boulder County, Colorado	<i>None mentioned</i>
Cape Elizabeth, ME	<i>None mentioned</i>
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	<p>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.</p> <p>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.</p>

	<p>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.</p> <p>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.</p>
Township of Lumberton, NJ	<p>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.</p>
West Hempfield Township, PA	<p>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.</p>

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

involved in the agricultural operations so long as the Grantor first obtains permission from the Grantee.

In **Marin County, CA**, subject to the current applicable zoning regulations for the property and government approvals, the Agricultural Conservation Easement allows the property to be developed up to a density of a limited number of single family residential dwelling units (Development Rights). The Grantor retains one Development Right that is applied to the existing residence(s) and all other rights to develop are extinguished. If the allowable development for the property increases, neither the Grantor nor the Grantee may receive such a benefit.

Land Preservation Easements in **Harford County, MD** allow the Grantor, at any time, to request a two acre or less lot exclusion for the exclusive residence of the Grantor. The Grantor and a child of the Grantor, at any time, may request the right to construct, use, or occupy a two acre or less lot exclusion for the exclusive residential use of that child. The child must verify the intent to live in the dwelling that is excluded. The total number of such lot exclusions may not exceed one lot per 25 acres contained in the easement.

Agricultural Preservation Easements in **Frederick County, MD** expressly prohibit land that is under easement from being developed, subdivided, or used for residential, industrial or commercial purposes unless it is approved by the Board. A Grantor may request, by written application, a personal covenant that would release free of easement restrictions 2 acres or less for the purpose of constructing a dwelling house for use by only the Grantor or the Grantor's child. The total number of lots may not exceed 4 lots of two acres or less with a maximum of no more than one lot per fifty acres. The Grantor also has an option of granting one two acre or less lot to another but then the Grantor does not have the ability to create any additional child lots.

In **Fayette County, KY** the Grantor, its heirs and assigns retain the right to construct single family detached dwelling(s), subject to prior approval from the Grantee. The language of the easement does not expressly state the total number of dwellings allowed, however it references the zoning and building ordinances as the controlling authority for the property. The Grantor may then construct, maintain, or reasonably expand any permitted new residence(s).

In **Delaware**, the Agricultural Lands Preservation Easement prohibits rezoning or major subdivision for land that is subject to the easement. The easement language does allow for the residential use of real property for the Grantor, the Grantor's relatives, and agricultural employees. The restrictions placed on the construction of residences are that any dwelling unit must be limited to no more than one acre per each 20 usable acres of land owned by the Grantor and a maximum of 10 acres of the Grantor's land is allowed for dwelling units.

According to the Deed of Easement in **New Jersey**, the Grantor is restricted from constructing a residence on the land unless it is to replace any single family residence that existed at the time of the conveyance (must be approved by the Grantee and the Committee). The Grantor may reserve an agreed upon number of residual dwelling site opportunities, which are defined as the potential to construct a residential unit and other appurtenant structures on the premises. The Grantor may also use, maintain, or improve a residential dwelling that is in existence at the time of

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.