ATTACHMENT 9

FINAL REPORT

OF THE

AD HOC AGRICULTURAL POLICY WORKING GROUP

MONTGOMERY COUNTY, MARYLAND

JANUARY 2007

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INTRODUCTION AND SUMMARY OF RECOMMENDATIONS

I. INTRODUCTION

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

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

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

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

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

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

GENERAL PRINCIPLES

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

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

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

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

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

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

KEY THEMES

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

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

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

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

THE NEED FOR ACTION

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

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

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

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

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

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

II. SUMMARY OF PRINCIPAL RECOMMENDATIONS

A. TRANSFERABLE DEVELOPMENT RIGHTS

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

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

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

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

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

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

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

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

B. CHILD LOTS

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

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

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

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

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

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

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

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

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

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

C. SAND MOUNDS

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

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

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

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

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

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

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

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

[7] *Id.*, at 62.

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

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

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

D. BUILDING LOT TERMINATION (BLT) EASEMENT PROGRAM

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

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

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

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

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

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

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

E. PENDING LEGISLATION

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

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

F. ADDITIONAL ISSUES

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

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

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

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

CHAPTER 1:
TRANSFERABLE DEVELOPMENT RIGHTS PROGRAM, INCLUDING TRACKING

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

I. RELEVANT LAWS AND REGULATIONS

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

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

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

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

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

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

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

II. ACTIVITY UNDER THE EXISTING LAW

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

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

III. GROUP RECOMMENDATION TO REMEDY THE PROBLEMS

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

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

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

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

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

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

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

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

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

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

IV. TDR TRACKING

A. INTRODUCTION

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

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

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

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

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

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

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

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

B. IMPROVED TDR TRACKING

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

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

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

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

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

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

C. GROUP DISCUSSION

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

V. NEXT STEPS

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

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

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

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

CHAPTER 2:
CHILD LOTS IN THE
RURAL DENSITY TRANSFER ZONE

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

I. RELEVANT LAWS AND REGULATIONS

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

A. MALPF CHILD LOTS

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

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

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

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

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

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

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

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

B. SUBDIVISION CHILD LOTS

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

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

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

C. DENSITY IN THE RDT ZONE

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

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

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

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

D. CHILD LOTS USE

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

III. ACTIVITY UNDER THE EXISTING LAW

A. CURRENT ACTIVITY

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

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

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

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

B. CURRENT PLANNING BOARD ZONING ORDINANCE INTERPRETATIONS

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

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

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

III. GROUP RECOMMENDATION TO REMEDY THE PROBLEMS

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

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

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

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

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

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

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

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

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

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

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

IV. PUBLIC WATER TO CHILD LOTS

A. RELEVANT LAWS AND REGULATIONS

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

B. GROUP RECOMMENDATION

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

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

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

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

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

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

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

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

V. NEXT STEPS

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

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

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

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

CHAPTER 3:
SAND MOUNDS

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

I. INTRODUCTION

A. GENERAL BACKGROUND

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

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

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

B. BACKGROUND ON SEWER-RELATED ZONING STRATEGIES

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

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

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

II. RELEVANT LAWS, REGULATIONS, AND POLICIES

A. STATE LAW/REGULATION

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

B. COUNTY REGULATION/POLICY

Ten-Year Comprehensive Water Supply and Sewerage Systems Plan

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

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

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

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

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

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

Montgomery County Regulations

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

C. REGULATORY HISTORY

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

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

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

III. ACTIVITY UNDER THE EXISTING LAW

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

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

IV. OPTIONS AND GROUP RECOMMENDATIONS TO REMEDY THE PROBLEMS

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

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

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

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

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

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

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

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

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

POTENTIAL SAND MOUND USAGE UNDER GROUP RECOMMENDATION

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

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

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

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

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

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

IV. NEXT STEPS

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

CHAPTER 4:
BUILDING LOT TERMINATION PROGRAM

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

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

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

I. ACTIVITY UNDER THE EXISTING LAW

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

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

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

Legacy Open Space
Conservation Reserve Enhancement Program
Forest Conservation Easements

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

II. GROUP RECOMMENDATION TO REMEDY THE PROBLEMS

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

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

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

A. ELIGIBILITY

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

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

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

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

B. PRIORITY

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

C. COMPENSATION

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

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

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

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

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

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

D. FUNDING

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

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

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

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

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

E. PROCEDURE

We recommend the following procedures:

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

III. NEXT STEPS

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

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

CHAPTER 5:
PENDING LEGISLATION

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

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

A. BACKGROUND

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

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

B. GROUP RECOMMENDATION

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

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

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

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

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

A. BACKGROUND

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

B. GROUP RECOMMENDATION

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

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

A. BACKGROUND

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

B. GROUP RECOMMENDATION

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

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

A. BACKGROUND

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

B. GROUP RECOMMENDATION

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

CHAPTER 6:
ADDITIONAL ISSUES

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

I. RIGHT-TO-FARM LEGISLATION

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

A. RELEVANT LAWS AND REGULATIONS

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

1. STATE LAW

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

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

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

2. COUNTY LAW

Zoning Ordinance

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

Air Quality

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

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

Erosion, Sediment Control, and Stormwater Management

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

Noise Control

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

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

Maximum Allowable Noise Levels in the Agricultural Zones[66]

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

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

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

Pesticides

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

Solid Waste

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

B. ACTIVITY UNDER EXISTING LAW

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

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

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

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

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

C. GROUP RECOMMENDATIONS TO REMEDY THE PROBLEMS

The Group discussed the following options:

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

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

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

D. NEXT STEPS

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

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[72] See discussion on pages 41 and 43.

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

II. EDUCATION STRATEGIES

A. GROUP RECOMMENDATION

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

B. NEXT STEPS

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

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

III. DESIGN STANDARDS

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

A. ACTIVITY UNDER THE EXISTING LAW

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

B. GROUP RECOMMENDATION TO REMEDY THE PROBLEMS

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

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

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

IV. ADDITIONAL AGRICULTURE ISSUES

A. GENERAL ISSUES

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

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

B. ZONING

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

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

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

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

C. TENANT HOMES

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

- Should the number of tenant homes be limited?

D. RUSTIC ROADS

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

E. ECONOMIC HEALTH OF THE AGRICULTURAL RESERVE

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

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

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

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