

Citizens to Preserve the Reserve, Inc.

6001 Griffith Road • Laytonsville, Maryland 20882 • www.preservethereserve.org

November 2, 2005

Council Member
Montgomery County Council
100 Maryland Avenue
Rockville, Maryland 20850

RE: Policy Recommendations for the Agricultural Reserve and Private Institutional Facilities

Dear:

Last July, Citizens to Preserve the Reserve (“CPR”) submitted recommendations to the County Council (“Council”) about Private Institutional Facilities (“PIFs”) in the Rural Density Transfer (“RDT”), Rural, Rural Cluster, RE-2, RE-1, and RNC zones. CPR strongly endorses the position that the RDT zone not house new PIFs because agriculture must remain its primary land use.

CPR has refined its recommendations into a proposed legislative framework to resolve land use issues for the Agricultural Reserve (AR) and PIFs. CPR’s strategy would decouple the AR and PIF issues and address these critical issues through separate, yet complementary legislative policies. This letter reviews CPR’s position on certain water and sewer category change requests and presents our proposed framework for legislative action.

Water and Sewer Category Change Request

We appreciate the supportive comments by Council members about CPR’s recommendation regarding multi-use sewerage systems in the RDT zone. In particular, CPR recommends that the Council deny the request by Derwood Bible Church (DBC) to approve a multi-use water supply and sewerage system on its 225-acre property located deep within the AR. Denial would affirm the policy objective to prohibit PIFs from constructing facilities on agricultural land within the RDT zone. If the Council were to defer action on DBC’s request, it would send mixed signals to all PIFs that could ignite costly challenges in the future.

In previous correspondence and testimony before the Council, CPR argued against installing in the RDT zone multi-use sewerage systems designed to exceed 5,000 gallons per day (GPD) peak capacity. According to the staff document distributed at the Transportation and Environment Committee hearing on September 27, County staff estimate peak system flows for DBC’s proposed development at

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approximately four times (19,500 GPD) this ceiling. Use of extensive acreage for well and septic systems is detrimental to the AR because it takes land out of agricultural production. Extensive use of groundwater by PIFs may also harm existing residential wells. CPR strongly endorses the exclusion of any new PIFs from the RDT zone; however, if the Council allows new PIFs there we again advise the Council to adopt CPR's recommended 5,000 GPD peak-capacity as the maximum allowed. CPR would also urge the Council to codify this ceiling as the aggregate GPD flow regardless whether a PIF development is single or multi-phased.

Proposed Legislative Framework

CPR's mission is to promote good stewardship of the Agricultural Reserve. Our advocacy efforts aim to preserve the Reserve and ensure that agriculture remains an important component of the County's economic, social, and cultural fabric. CPR agrees that legislative efforts to address the AR and PIF policies should occur separately because combining the two creates an inappropriate win-lose environment. The AR and PIF policies may coexist together, but to correct the policy challenges that intersect them requires separating each for independent resolution.

Agriculture is the preferred use in the RDT zone.¹ 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.² 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 forever for agriculture and limit future construction on the land not governed by the easement to one (1) single-family dwelling per 25 acres. While the County, through the Council, did not contemplate PIF development in the RDT zone 25 years ago when it formed the AR, the County did contemplate the scope and scale of acceptable residential development.

It is a legal maxim that the express mention of certain things in laws and contracts implies the exclusion of anything not specified. As applied to a TDR Easement, it is indisputable that the County intended to exclude all but limited residential development on agricultural land.³ Had the County wanted to permit commercial or industrial development of RDT land, the terms of a TDR Easement would specify it. Alternatively, for argument's sake, if the County permitted commercial or industrial development on farmland governed by a TDR Easement, the easement lists strict scope and scale limitations.⁴

¹ Montgomery County, Maryland, Code at §59-C-9.23 (2005).

² Id.

³ The definition of "development right," means "the potential for the improvement of a parcel of real property, measured in dwelling units or *units of commercial or industrial space*, existing because of the zoning classification of the parcel"; therefore, the County contemplated then excluded the use of development rights for commercial or industrial purposes when it adopted the contractual terms of TDR Easements for AR land. Montgomery County Code, §59-A-2.1 (2005). (Emphasis added)

⁴ Montgomery County Code at §59-A-2.2 (2005). The County specifies in its zoning code that the terms of an easement control over the zoning code except where the easement terms are less restrictive.

There are inconsistencies within the current zoning code that put the AR at risk. For instance, the Code does not contain definitions for places of worship or PIFs. The County's water and sewer policy defines PIFs based on tax status rather than purpose, use, or scale of development. If the County permits PIFs in the AR by right, which arguably is a commercial use, it would contradict current law that agriculture is the preferred use in the RDT zone, which comprises most of the AR. CPR, therefore, offers an initial legislative framework in the attached chart to help guide the development of separate policies for AR and PIFs.

CPR looks forward to working with you and your staff, together with your Council colleagues, to develop legislative solutions for the AR and PIFs that lead to complementary, not conflicting, outcomes. If you have any questions or need more information about the proposed legislative framework, please contact me at 301.926.2131, or David Parkhurst at 301.873.7038.

Sincerely,

Phyllis Sterling,
CPR Vice President

Attachment

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Attachment One: LEGISLATIVE FRAMEWORK PROPOSED BY CPR

	AGRICULTURAL RESERVE (AR)	PRIVATE INSTITUTIONAL FACILITIES (PIF)
<i>Goals</i>	<ul style="list-style-type: none"> i. Preserve the economic, social and cultural role of agriculture in the County ii. Safeguard the environment and water supply by preserving farmland for agriculture iii. Prohibit incompatible development within the AR iv. Ensure consistent County zoning policy governing AR 	<ul style="list-style-type: none"> i. Encourage PIFs to provide services that benefit both the general public and complement certain social services provided by the County ii. County to support PIFs by helping identify sites for development suitable for the services provided, and that impose reasonable impact on the surrounding community (e.g. scope/scale; economic; infrastructure; environmental). iii. Avoid clustering PIFs in any single community or land use zone.
<i>Challenges</i>	<ul style="list-style-type: none"> i. No zoning code definition for "house of worship" or "PIF". ii. Current PIF definition tied to tax status, not purpose/use/scope or scale of proposed development. iii. Confusion about development limitations on AR land governed by TDR Easement. 	<ul style="list-style-type: none"> i. High cost of land down-County to meet growth projections for PIFs ii. Incompatibility (e.g. infrastructure; scope/scale; environmental) of PIFs in the AR iii. Need distinction in policy between existing PIFs and proposed PIFs (e.g. late-vesting property rights under Maryland law.)
<i>Policy Options</i>	<p><i>Desired Outcome:</i> Protect agriculture as the primary land use in sections of the County designated for agricultural preservation.</p> <p><i>AR Land - Governed by TDR Easement:</i></p> <ul style="list-style-type: none"> i. Terms of easement shall govern use, scope, and scale of permitted development. <u>MCC</u> at §59-A-2.2(c). ii. County zoning code is default policy governing land use absent a TDR Easement. <p><i>AR Land - All Other:</i></p> <ul style="list-style-type: none"> i. Permit agriculture, agricultural-related development, and approved residential development in RDT zone; require PIFs that seek to develop in all other rural zones to abide by special exception requirements. <u>MCC</u> at §59-C-9.23. ii. Water/sewer limit (5,000 GPD/aggregate limit) applied to non-agricultural development in all rural zones. Prohibit water extensions/sewer hookups to serve PIFs in rural zones outside water/sewer envelope. iii. Special exception zoning approval required for all accessory uses, including site plan review, community impact statement, environmental impact statement, 	<p><i>Desired Outcome:</i> Support PIF development on real property located within County's water/sewer envelope through policy and economic incentives.</p> <p><i>Zoning Code Definitions:</i></p> <ul style="list-style-type: none"> a. <u>Place of Worship (POW)</u>. (Proposed definition) "Place of Worship" is the physical facility where congregants assemble for the primary purpose to exercise their doctrinal beliefs. It shall also include accessory uses that are subordinate to and commonly associated with the primary purpose like parking, maintenance/storage building, and living quarters for clergy. Excluded are those uses not reasonably associated with the primary purpose of a place of worship. Requests for such uses require conformity to generally applicable special exception requirements. <p>(Reasoning) A POW is not a PIF, but a PIF may include a POW. While a POW is traditionally a permitted use in all zones, common sense (and legal precedent) does not support the argument that the shield of "permitted use" for POWs extends by right to all elements of a PIF's development plan simply because the plan includes a POW.</p> <p>CPR's proposed definition presumes POW/permitted use in all zones, subject to presumption that physical size limited to reasonable scope and scale of existing POWs within the host community (e.g. Laytonville contains about 260 residents; existing church facilities seat approximately 250 persons). Zoning code presumption that POW serves the community where located, but not all community residents are members because there are other facilities serving them. Zoning code amendment should place burden on PIF to demonstrate with specificity why it needs to construct a facility beyond the scope and scale of</p>

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		<p><u>Grandfather Clause.</u> Amended PIF policy shall not govern existing PIFs (i.e. constructed before adoption of this zoning amendment), as applied to existing facilities. It should apply to all new construction, not additions to existing facilities, requested by existing PIF after the date of enactment of this County zoning amendment.</p>
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and non-transferability of permits and approvals.

- iv. Impervious surface cap not greater than eight percent (8%) aggregate land parcel, including adjacent parcels proposed for later development to expand existing complex, exempting agricultural uses. Encourage dedication in perpetuity of remaining non-developable land for agriculture.
- v. Establish development review factor based on land quality to evaluate scope/scale of proposed development (e.g. higher quality/land for agriculture, the more disincentives applied to development).
- vi. Encourage County to purchase agricultural easements and execute TDR Easements.

POWs in the host community.

b. Private Institutional Facility. Defined in the Water and Sewer Plan as "building constructed" for a qualifying tax-exempt organization. This broad definition does not link zoning approval to any reasonable factors like primary purpose, use, or scale of development. Related, the County's zoning code already defines "Charitable or Philanthropic Institution" as "private, tax-exempt organizations whose primary function is to provide...religious...activities," but excludes specific uses defined elsewhere in the Code. MCC §59-A-2.1. Curiously, this definition excludes "places of worship" although the Code does not define it separately.

CPR questions whether there is a compelling need to maintain a separate zoning policy for PIFs because the common categories that comprise PIFs like places of worship, private schools, senior housing and day care facilities are either defined separately already or could be defined clearly in the Code.

If PIFs Retained: County-provided Incentives

- i. Land acquisition. Help identify and broker, where appropriate, available real property located within water/sewer envelope (e.g. infill; commercial/ industrial). Use Master Plan process to plan for POW sites.
- ii. Possible incentives/for-profit developers to include PIFs: credit enhancements for infrastructure development; redevelopment bond financing; reduced impact fees; property tax abatement; investment tax credit; PIF Zones (e.g. modeled after tax-increment financing districts).
- iii. Possible incentives/not-for-profit PIF developers: Waive requirement for separate zoning approval required for accessory uses where PIF develops on land within water/sewer envelope; reduced payment in lieu of taxes (PILOT) for infrastructure needs and public services (e.g. fire, first responder, police); credit enhancements for infrastructure development; reduced impact fees.

If PIFs Retained: Disincentives/PIFs in rural zones

- i. Water/sewer limitations
- ii. Impervious surface limits
- iii. Required dedication of remaining land for agricultural use
- iv. Required PILOT
- v. Required separate zoning approval for accessory uses. MCC at §59-C-9.23

Agricultural Preservation Advisory Board (APAB)
Fall 2005 Agricultural Initiatives Update

APAB will recommend one of three options:

- Endorse
- Endorse with Modification
- Oppose

Issue One: Limit Residential Development Activity in the Agricultural Reserve.

- *Item: Reduce Development Potential in RDT Zone.*

APAB Recommendation: If the action item is to enlist a further down-zoning of the agricultural reserve, the APAB opposes the action item suggested in Issue one, Item one. There seems to be little recognition to the sacrifices farmers and rural landowners have already made in the name of farmland protection. If society determines that lower residential development is preferred, then we must provide incentives to reduce the development option. The APAB would endorse Issue one, action item one, if the action item focused solely on the adoption a zoning text amendments which will provide an incentive to reduce development potential. If the compensation mechanism is viable then buy in from the rural community could be achieved while achieving the goal of Issue one, action item one.

- *Item: Abuse of the "Child Lot" provision in RDT Zone.*

APAB Recommendation: Endorse with Modification. The report does not quantify the extent of abuses that have occurred, rather it suggests that " There seem to have been some abuses, but the number of subdivisions that can be categorized as abuses have not yet been quantified" The APAB is aware of some abuse and recommends provision B listed in the report as a viable solution. Provision B states: "Enact review standards for the provision so that any subdivision using this provision must guarantee that a home is built and lived in by the recipient for a designated period of time, and consider whether the recipient is employed in the family farm business"

- *Item: Use of "sand mound" septic treatment systems for residential development, authorized since 1980, and whether their general use is in conflict with the intent of the Master Plan.*

APAB recommendation: Oppose The Master Plan for the Preservation of Agriculture and Rural Open Space is a document of guiding principles, unfortunately, the Master Plan does not carry the same weight as an act of law. The report suggests that state and county opinions have some how changed that view sand mound systems in a different light and furthermore

their permitted use has come as a result of considering opinions on the validity of their use. What the report doesn't recognize that the use and approval of sand mound systems is vested as a matter of law as a conventional system. As a County we need to expect and plan for development that is permitted as a matter of right under zoning and not on perceived density based on archaic standards and site limitations. If the public is desirous of further limiting residential density in the agricultural reserve, then let the public sector pay for the land's protection. We should not use changes in policy or regulation as a form of de-facto zoning to further erode vested property rights.

Furthermore, if environmental protection is one of the high values we place on the protecting the agricultural reserve, we should look carefully at how advances in technology can aid in environmental protection. Some of these newer technologies as well as the newer conventional systems have proven to be better environmentally. If one of the reasons we are protecting the ag reserve is based on environmental protection then we should not close the door on new technologies that can make these systems work better environmentally. Simply put, we should not limit technical advancements where the environmental efficiency and application of systems like these are dramatically improved.

- *Item: Public road requirements in rural subdivisions are detrimental to rural character.*

APAB Recommendation: Endorse

- *Item: Design of residential development authorized by right in the RDT Zone.*

APAB Recommendation: Endorse with Modification The report suggests a philosophical conflict between proponents of clustering development in the agricultural reserve and those who advocate larger lot subdivisions for the purpose of creating working farmsteads. The report's recommended action advocates "**the Planning Board adopting agricultural preservation design standards for residential development in the RDT Zone.**" The APAB recommends that any design standards that are discussed should focus on incentives and other inducements over mandatory guidelines. One size does not fit all circumstances or needs, the County must provide the landowner maximum flexibility and viable options for equity protection as well as from a production agricultural point of view.

Issue Two: Appropriate Type and Size Non-Agricultural Uses in the RDT Zone

- *Item: Impact of large institutional uses in the RDT Zone.*

APAB Recommendation: Endorse with Modification. Aside from obvious denial of water and sewer service recommended within the report, the County must also look at the PIF use as non agricultural and therefore, it should be viewed as development. Point in fact, a private institutional facility from a permitting and code perspective must meet the same standards as a commercial facility. A commercial use is looked upon as development, and so should any private institutional facility.

- *Item: Appropriate non-agricultural uses in rural areas.*

APAB Recommendation: Endorse The County must recognize that non-agricultural uses, like campgrounds and Quasi-Agricultural uses (Ag tourism/entertainment) should be permitted as a matter of right. These uses provide opportunities to down county residents to fully appreciate their role in the public policy decision to protect these lands. It also provides a mechanism to implement the open space vision captured within the Master Plan.

- *Item: Should use of a "development right" be required for uses other than dwellings in RDT Zone? There are other non-agriculturally related uses that reduce potential agricultural production but are not required to "use" a development right. Does this meet the intent of the Master Plan?*

APAB Recommendation: Endorse with Modification Chapter 59 of the County Code defines a development right as "Development rights: The potential for the improvement of a parcel of real property, measured in dwelling units or units of commercial or industrial space, existing because of the zoning classification of the parcel" If the use is non-agricultural and meets the definition as outlined in Chapter 59, then the use must be defined as development.

- *Item: Increase support for equestrian activity in the Agricultural Reserve.*

APAB Recommendation. Endorse with Modification The report outlines establishing trail riding easements when subdivisions are created. The APAB recommends this item be modified to require The County should acquire all trails and their connectivity through in fee purchase and not through easements. These very public uses should be conducted solely on public lands. There are too many examples of trespass issues that involve property and crop damage resulting from public impact as well as exposing the landowner to potential liability.

Issue Three: TDR Program Support

- *Item: The TDR 2/3- use requirement may inhibit use of TDRs in certain circumstances.*

APAB Recommendation Endorse

- *Item: TDR use may conflict with afforestation requirements.*

APAB Recommendation Endorse

- *Item: Establishing new means to create TDR receiving capacity.*

APAB Recommendation Endorse

- *Item: Reduce development pressure in the "outer" and more rural areas of the RDT Zone by allowing "internal" transfer of TDRs to "edge areas" (near developed areas or rural villages) or areas on or adjoining major highways or transit routes (near MARC train stations in the RDT Zone).*

APAB Recommendation Endorse

- *Item: Does an increasingly limited supply of TDRs generate the need for means to establish more TDRs?*

APAB Recommendation Endorse with modification Any process that advocates the use of incremental TDRs must also provide a mechanism to track the properties any partial TDR is created. This may require the development of a separate tracking system over and above the one currently in place.

- *Item: TDR receiving sites only set through Master Plans, but floating zones that increase density can be proposed outside the Master Plan process.*

APAB Recommendation Endorse

- *Item: Updated TDR Tracking System Ongoing Maintenance.*

APAB Recommendation Endorse

- *Item: TDR receiving sites can be located within municipalities in the county.*

*APAB Recommendation **Endorse** This will require the execution of specific inter-jurisdictional agreements with the County and municipalities addressing TDR use.*

Issue Four - Economic Development For Agriculture

- ***Item:** Assuring the continued viability and profitability of agriculture in Montgomery County. Concepts are needed to support the evolution of agriculture to meet the 21st Century challenges and opportunities in a largely urban and suburban region.*

*APAB Recommendation **Endorse** The report identifies a research report being compiled by MNCPPC staff identify issues and opportunities for the continued viability of agriculture in the county. APAB recommends working closely with MNCPPC staff to ensure any recommendations proposed considers recent trends of agriculture in the County*

- ***Item:** What role should the Montgomery County Agricultural Reserve play in the emerging issue of regional food security?*

*APAB Recommendation **Endorse with Modification** The County must continue to employ the rationale that land is protected to maintain an agricultural base, but allows the industry and other economic forces to guide the direction of the industry itself. Proposing specific types of uses to ensure agriculture's survival may sound good, but in reality not all farmers possess the knowledge or the equipment for such transitions.*

Unlike Florida and California, the County's agricultural industry for mass fruit and vegetable production is somewhat limited by our own climate, as we can't supply a steady stream of fruits and vegetables during the winter months. Some citizens have presented their preference for a transition to more organic operations. While these have worked on a small scale basis, advocates of organic farming do not fully understand the high input costs and lack of adequate labor to make operations like these cash flow on a large scale basis. The APAB recommends working with MNCPPC and others to better understand the trends, technological advances, and opportunities which may further encourage the agricultural use of the land.

In addition, the County must strengthen the partnership with the University of Maryland. Agriculture must be raised to a higher level of importance by our land grant university (U of MD). The lack of commitment by the University to Cooperative Extension (the educational outreach arm of the university) has severely fragmented extensions effectiveness in serving agricultural producers. If you want farmers to learn and implement new practices and technologies, then extension must be there to teach. This is one aspect of agricultural support the State and County is sorely lacking.

Issue Five – Agricultural Preservation Awareness and Education

- *Item: The County's Agricultural Farm Park is currently underutilized. A plan for expanded use of its facilities and potential is needed.*

*APAB Recommendation: **Endorse with Modification.** Any recommended use at the farm park must focus on promoting agriculture today and not on the romantic view of what agriculture was here in the County. More emphasis must be placed on using the facility to promote education outreach and demonstrations for securing a future and not Romanizing its past.*

- *Item: Create a specific brochure and website location for information about the Agricultural Reserve and its resources for the community.*

*APAB Recommendation **Endorse.** The County can always do better in promoting agriculture. Many of the programs DED/CED/SCD are involved which, target students as our future leaders with agricultural knowledge and relative importance. The problem is most urban landowners, even when provided the information, do not fully appreciate the magnitude of the sacrifices farmers have already made in the name of agriculture and farmland protection*

November 8, 2005

Memorandum

TO: Judy Daniel, Rural Area Team Leader
Maryland-National Capital Park & Planning Commission

FROM: Jeremy V. Criss
Agricultural Services Manager
Department of Economic Development

SUBJECT: Agricultural Reserve Issues Report "challenges and opportunities":
Comments from the Agricultural Community

The purpose of this memorandum is to explain to you the status and progress of several agricultural organizations regarding the above referenced subject. We are appreciative for your time in presenting the Agricultural Reserve Issues Report to the following agricultural organizations:

<u>Date of Presentation</u>	<u>Agricultural Organizations</u>
10-4-05	Montgomery County Farm Bureau
10-11-05	Agricultural Preservation Advisory Board
10-14-05	Montgomery County Soil Conservation District Board
10-18-05	Agricultural Advisory Committee

As you know, these organizations meet monthly, and it is important to understand that our staff reports summarizing the discussions and comments from these meetings need to be brought back and presented to each organization to ensure the comments and recommendations accurately reflect the views and perspectives of each organization. I realize this presents a challenge for the deadline that was imposed upon you by the Planning Board. However, as I explained to the Planning Board on September 22, 2005, the fall harvest time represents the second busiest time of the year for farmers behind the spring planting season and the public process must be sensitive to this fact. Furthermore, I also explained to you that while this report represents an important issue for the farmers, we also have many other matters that challenge our work schedule each day.

At this point, the comments from the Agricultural Preservation Advisory Board have been completed and you have received them. I expect the Agricultural Advisory Committee comments to be completed following the November 15, 2005 meeting. The remaining

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organizations are also working to complete their comments and recommendations and you will receive them shortly. In the event that you run out of time and must move forward, I simply ask that you include this memorandum in your report to the Planning Board to illustrate that we are moving forward as quickly as possible given our staff resources and timing to meet with the agricultural organizations.

I must tell you that I am not confident the Planning Board will really care one way or the other regarding the views of the agricultural community on the report. This statement is made given the decision of the Planning Board last Thursday to ignore the recommendations of the agricultural community regarding agricultural uses that need to be exempt from the proposed impervious surface ZTA.

Please call me at 301-590-2830 if you have any questions.

cc: Agricultural Organizations

a:daniel(nov05)

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