

POLICY ISSUES AFFECTING THE AGRICULTURAL RESERVE

INTRODUCTION

Because of the increasing affluence of the metropolitan area and the decreasing amount of undeveloped land close to the nation's capital, pressure for development in Montgomery County's Agricultural Reserve has increased. Many view the Agricultural Reserve as an area zoned for large lot residential development rather than as an area set aside for agricultural use in which one house may be built, if necessary, for each 25 acres of land. This pressure for development coupled with an increasing number of agriculture-related issues coming before them has led the County Council to establish an Ad Hoc Agricultural Policy Working Group. The working group was charged with providing comprehensive advice on proposals dealing with interrelated issues affecting the Agricultural Reserve.

Among the issues being dealt with by the working group are ways to preserve farm land, how to reduce the potential number of residences in the Agriculture Reserve, how to frame appropriate policy regarding the use of sand mound technology for sewerage disposal, how to resolve the concern about abuse of the child lot provision for the Agricultural Reserve, how to allow farmers to tap the equity in their land without selling to developers, how to perpetuate the practice of farming in the county and how to build public awareness and support for the Agricultural Reserve.

The working group has considered a number of options and will recommended a combination of programs as best meeting the needs of the county. No single option is expected to stand alone as the best policy; rather, the combination of options should allow the goals of the county to be realized.

TRANSFERABLE DEVELOPMENT RIGHTS

When the Agricultural Reserve was established in 1980 the principal land preservation tool, the Transferable Development Right (TDR) was introduced. In exchange for downzoning the land from one lot per five acres to one lot per 25 acres, a program of development rights was established with one allocated for each five acres of land zoned Rural Density Transfer (RDT). Since only one dwelling unit was permitted for each 25 acres, the excess rights were to be transferred to other areas of the county designated as receiving areas. An open market system developed to facilitate this exchange. When a record of the TDR was placed upon the land record for the parcel in the county land records, the TDR was said to be severed from the parcel and a serial number identified the TDR severed. At that time an easement was recorded on the deed of the entire parcel limiting the number of residential units allowed on that parcel. Some or all of the TDRs available to the parcel could be severed at any time.

A goal of the Agriculture Services Division of the Department of Economic Development has been to put 70,000 acres of land under agricultural easement. The TDR easement limits the number of residences that can be put onto a parcel of land, but it is silent on other uses that the land may be put to. In counting the land preserved for agriculture, properties that have TDR easements are included even though the TDR easement in most cases does not restrict the amount of residential development beyond the limit set by the zoning code and has loopholes for other types of development. The argument for counting TDR easements as land preserved for agriculture is that any council can change zoning while the easement is part of the land record and is more permanent.

A question has arisen concerning whether other uses permitted in the zone (such as churches) are allowed on land with TDR easements and whether they require a TDR. In December 2005 a Zoning Text Amendment was introduced in the County Council to modify the easement to prohibit development other than single family residential and agricultural uses on land bearing a TDR easement. It also extinguished TDRs on parcels developed for uses other than agricultural or residential. The issues involved were discussed by the County Council, but were referred to the working group for their further discussion. One question was whether a large parcel could sell a portion for a non-agricultural use and still retain TDRs on the remainder. Another question was whether a non-profit facility should require a TDR when it is built in the RDT zone. Present legislation only identifies TDRs for residential use. The working group discussed these questions and supported the concept of a more restrictive easement with the caveat that careful crafting of the wording was necessary.

During the rapid development of Clarksburg there was a surging demand for TDRs, and the price of a single TDR reached \$40,000. It has been the policy of the Agriculture Services Division to encourage landowners to retain the development (also called 5th) TDR, the one that permits the owner to build to the one per 25 acre residential density. Thus even though many TDRs were utilized in Clarksburg, the impact upon potential density in the Agricultural Reserve has not been great. Landowners have received compensation for the downzoning, without relinquishing the opportunity to build to the zoning limit.

The working group addressed finding ways to eliminate some of the rooftops in the Agricultural Reserve including recommendations of the 2003 TDR Task Force. (See the LWVMC Fact Sheet June-2003). Many of these recommendations were adopted in the detailed 2003 LWVMC consensus position of support for:

The Transferable Development Rights (TDR) program and its goals of conserving farmland, compensating rural land-owners for down-zoning and consolidating growth (2002) through:

- a. **Improving the master plan process for determining potential receiving areas through more intense review of the land and community characteristics prior to designation of receiving areas**
- b. **The planning staff developing a mechanism for designating receiving areas in CBD, transit stations and town centers**
- c. **Adopting a planning goal of no-net-loss of receiving areas**
- d. **Implementing an improved system for tracking TDR activity and assigning responsibility for compliance with the steps of the process.**
- e. **On-site afforestation for TDR receiving areas - Opposing off-site alternatives in TDR receiving areas**

Since 2003, the Park and Planning staff has developed a tracking strategy for TDRs. Some 9688 TDRs have been severed and 5890 of those are associated with some preliminary plan for development. The estimate is that 2624 TDRs have not been severed from the land under TDR easement. A determination has not yet been made as to how many of these represent dwelling units in existence on the properties, how many represent potential dwelling units and how many are only transferable rights. There are also parcels in the RDT that have all development rights intact.

Providing enough receiving areas for TDRs has been an ongoing challenge for county planners. When the 183-acre Crown Farm was annexed to the City of Gaithersburg, the county lost receiving capacity for a proposed 300 TDRs. None of the TDR capacity planned to be used when the King Farm was developed became available because the land was annexed to Rockville. TDR receiving capacity is routinely lost when parcels of land are annexed to municipalities that have their own zoning powers, such as Rockville and Gaithersburg. Recommendations have been made for the county to negotiate agreements with these cities to require the use of TDRs when designated receiving areas are annexed.

The zoning ordinance permits additional dwelling units beyond the base zoning in TDR receiving areas on the basis of one single family dwelling unit or two apartment units per TDR. The working group discussed allowing “development” TDRs, those which represent a potential building lot, to be assigned a value in terms of floor area space for commercial, office and R&D uses. This would make them relatively valuable. The TDR that permits building in the RDT zone has not been valued differently from those which carry no building right. To reduce density in the RDT zone, a method for attracting the transfer of these rights is needed.

While the use of TDRs to gain increased density in the receiving areas for residential use is optional for the developer, the working group has discussed **requiring** TDRs for residential development beyond the density of the zoning map for land developed using floating zones. These developments are generally relatively large and contain a mix of uses. The County Council must approve these development plans. (See the LWVMC-May 2006 Fact Sheet for more information about development using floating zones.)

EASEMENT PROGRAMS

In addition to the Maryland Agricultural Land Preservation Foundation (MALPF), the Maryland Environmental Trust (MET) and the state Rural Legacy Program (RLP), all supporting the preservation of agricultural land, the county provides the Montgomery County Agricultural Easement Program (AEP) and the Legacy Open Space programs. Details of these programs are given in the LWVMC May 2002 Fact Sheet. All are designed in whole or part to protect agricultural land from development.

To oversee these programs and assure that the easement programs are properly administered, Montgomery County established an Agricultural Preservation Advisory Board (APAB), comprised of five members, three farmers and two non-farmers, each serving a five-year term. The APAB sets priorities for acquiring easements, gives guidance to the county government for program policies and makes recommendations on proposed regulations and their implementation.

These responsibilities involve the APAB in a number of significant issues as they work to preserve farmland and keep farming and farmers productive in Montgomery County. Identifying the location where houses may be placed when building rights are retained under the easement programs is a responsibility of this board. Estimating the value of easements is another of the more difficult policy issues the APAB faces. For example, if a property has not transferred all of its TDRs, the farmland is eligible to participate in the AEP program. As originally implemented the policy was not providing a fair and equitable value compared to the state programs. This has now been corrected, although there has been minimal activity to date. Further change is under consideration that will alter the method of calculating property values so that landowners who have retained TDRs will not be penalized when they sell easements on their farms through the AEP program.

As property values skyrocket, tax assessments also climb on homes, but the agriculture assessment has remained fairly stable. Higher taxes do impact the farmers' ability to continue farming. The APAB believes that assessments on acreage protected by agricultural and conservation easements should be frozen because no additional governmental services will be needed on land that is not developed. Furthermore, APAB is concerned about the impact of the energy tax on farmers as the cost of energy also increases dramatically. Our LWVMC position already supports "policies to ensure the viability of agriculture in Montgomery County, including ... d) a tax policy for agricultural land including the agricultural assessment, the agricultural land transfer tax and fuel and energy tax reductions".

The AEP program is a principal tool for obtaining easements on land in Montgomery County to preserve farmland. The compensation for easements is generally less than the value of the farmland for development, but does function to compensate landowners for giving up some development rights for land being farmed. When the county places an AEP easement on a parcel of land, it covers the entire parcel.

There are occasional conflicts between agricultural preservation programs and other county programs such as the Green Infrastructure Program. Some of the land under agricultural easement may not be in active agricultural production and may be inappropriate for such use (such as steep slopes or along streams). Park and Planning may desire to use some of this land as small public parks, as greenways important to wildlife, or for forest preservation. Farm organizations fear that the easement programs may be used as a back door method to reduce the price of land to be purchased for parks. The agriculture community is also concerned about trespassing on farmland because users of park land adjacent to farms frequently do not distinguish between crop land and public space and cause damage to crops by walking or riding through fields. There may even be liability issues for activity occurring on the farm land. The question being debated currently is whether the county should buy land already under an agricultural easement for these park purposes.

Several citizen advisory boards oversee the Green Infrastructure Program. The money comes from county land transfer fees (0.05%). Under consideration now are an extension of Little Bennett Regional Park, an extension of Capitol View Park in Kensington, areas in the Shale Barrens near the Potomac and an area in Clarksburg. All properties in this program are small; almost all are along streambeds, and they are open to the public for specified recreational uses. This is a land acquisition program and is different from conservation easements. Providing for recreational needs is important, but the primary use of the Agricultural Reserve defined by the Functional Plan is agriculture.

The Building Lot Termination Program

When the Crown Farm was sold for development and annexed to Gaithersburg, the agricultural transfer tax was paid as the land's zoning changed from agricultural to residential. This transfer tax is available to the county for agriculture easement use for a period of three years. If it is not spent, it reverts to the state. The county's fiscal year 2007/8 budget contains \$14 million in the Agricultural Conservation Capital Improvement Program. Several proposals have been put forward as appropriate ways to expend this money.

The working group discussed a program to reduce the density of housing in the Agricultural Reserve using these funds. Since agricultural easements have been a major tool in preserving farmland, the working group refined one of the easement proposals for reducing the building potential of retained development TDRs. This easement program would be based not only upon the number of TDRs retained to permit building on a parcel, but also upon actual ability to build as determined by approved septic capability. This Building Lot Termination (BLT) Program is an easement program that differs from already existing programs by requiring proof of a buildable lot. A development TDR and the use of an identified septic site that has been approved by the Department of Permitting Services would be relinquished as a BLT easement is placed upon the parcel. Because the price of the easement would be determined by the number of buildable lots to be terminated, the cost of the easement is expected to be substantially greater than in existing easement programs. The features of the BLT easement are given in the table below.

Attribute	Proposed BLT
Funding	Publicly funded via the agricultural transfer tax.
Maximum value	Annual adjusted price representing a percent of appraised/comparable market value of permitted residential lot rights on land in the RDT zone – established by the County Executive
Determination of value per lot	BLT easements will be based on landowner's accepting the annual adjusted price
Soil	50% of land USDA Class I-III or Woodland Class I and 2
Ability to perc	Successful perc test required for participation. (No payment for theoretical lots allowed without percs.)
Participation in other easement programs	May not participate in BLT if land is under another easement except TDRs as noted below
Priority	Order of receipt Size of parcel
Agricultural use	All permitted including farm markets
Residential use	Not permitted on lots under BLT easement. Permitted at 1 per 25 acres on reserved lots that are not terminated
Other uses (commercial, PIF, etc.)	Not Permitted
Existing TDRs	Owner will create, serialize and convey the TDRs associated with the permitted residential rights terminated (the 5 th TDRs) to the county Excess TDRs must be serialized.
Disposition of development TDRs	Terminated by the county.
Parcel size	Minimum of 25 acres or contiguous to other land under agricultural or conservation easement.
Zoning	RDT
Sewer and water	Outside water and sewer categories 1, 2 and 3
Title	Property owner or contract purchaser.
Timing	Purchase period set by APA board subject to funding (application cap)
Data	Complete property description and title report Surveys and plats if available Letter from DPS identifying perc sites to support the number of lots offered for termination

SEWER POLICY

The authors of the Functional Plan recognized that the soil characteristics of the county vary from west to east and that not all land is suitable for conventional septic tank sewerage treatment. They relied upon this fact to limit the development in the Agricultural Reserve. The plan calls for the county to deny public water and sewer service to areas designated for agricultural preservation that comprises the RDT Zone. It also calls for the county to deny private use of alternative individual and community systems in those areas.

The county's sewer policy is spelled out in the Ten-Year Comprehensive Water Supply and Sewerage Systems Plan. When the plan was adopted in 2003, it carried forward a provision that allowed the council on a case by case basis to permit the extension of sewer to properties in the RDT Zone that were 501.c.3 organizations. Churches were the principal beneficiaries of this provision. However, on November 29, 2005 the County Council voted to amend the plan and deny extension of sewer into the RDT Zone for those organizations and subsequently voted to limit the size of multi-use septic systems. This change in policy, which the LWVMC supported, was to prevent large-scale development in the Agricultural Reserve.

Standard and Sand Mound Septic Systems

There has been debate both by the planning board and the County Council on the appropriate use of sand mound technology as an alternative to the standard septic tank sewerage treatment.

The standard system involves an underground waste collection tank using bacteria working over the material; solids/sludge settling to the bottom; and effluent seeping/oozing out over time into an adjacent gravel trench dispersal area. Septic systems generally work well, but sometimes fail because the tank has become overloaded with solid material or the field has become saturated with too much effluent.

The sand mound technology was developed in Wisconsin in the mid-1970s and involves the construction/building of a carefully designed mound of layered materials near the septic tanks. There is a primary tank similar to that of a standard system in which most of the solid waste settles to the bottom and a secondary tank/pumping chamber. A time-activated pump is installed to move the secondary tank contents/waste up into the mound. The intermittent feeding in of the effluent through the mounded dispersal field, preferably long and narrow in shape, allows waste to be acted upon by anaerobic bacteria to decompose material in the effluent.

It should be noted that, in both methods, regular maintenance is necessary to remove the sludge from the bottom of the septic tank and to prevent the dispersal field from becoming clogged.

Sand-mound designers are trained to plan site-specific systems for each client, considering such surface conditions as: high water table; bedrock; soil type; soil permeability; slope; fill land; flood plain; proximity to other systems; trees; boulders; and such family/user practices affecting waste as: household activity and perhaps family size; water conservation; septic tank bacteria/biologics; and the like. It is extremely important that everyone who utilizes a proposed sand-mound system be properly educated and informed and all must avoid unproven design modifications. This is not a one-size-fits-all project.

Sand Mound Utilization in the Agriculture Reserve

In 1994 the County Council sitting as the Board of Health authorized the use of sand mounds to replace failed septic systems where a standard system could not be installed. When the executive regulation No 28-93am was written, it was couched in a more general form and declared sand mounds to be conventional systems. The state does allow sand mounds to be used as standard systems in certain situations, but does not pre-empt the ability of the county to restrict or prohibit the use of sand mounds. The major concern relative to sand mounds is that using that technology allows houses to be constructed in areas that could not be developed for housing with conventional septic methods, thus taking land from agricultural use in the Reserve. While the Functional Plan calls for the study of the use of sand mounds in rural open space, the plan distinguishes between the Agricultural Reserve and the Rural Open Space area.

The working group recognized the potential impact of development using sand mounds in the western part of the county, where the conditions are not generally suitable for conventional systems. An analysis of the actual potential for development using sand mounds indicated that there are some 17,500 acres that could be developed with this technology. The working group was most interested in preserving large tracts of farmland and felt that development on small properties offered less threat to viable agricultural practice than development on large tracts. As a pragmatic solution to the problem of bringing the plan and regulation together, it determined that allowing currently existing small parcels (less than 100 acres) to install up to three sand mounds would result in approximately 150 additional dwellings.. The standard would be one per 25 acres, and approximately 50 parcels would be eligible for this designation. For larger tracts, allowing one sand mound per 25 acres for the first 75 acres and one per 50 acres beyond that would result in approximately an additional 150 to 250 dwelling units. This policy would probably result in a total of between 300 and 400 dwelling units. The working group appears ready to accept this compromise.

CHILD LOTS

The historic concept of the family farm entails a family and its children working together to produce farming products. As an outgrowth of this concept, the idea of providing a lot on the farm for the child to build a home has carried over into agricultural preservation programs. The MALPF program currently permits a participant in the program to reserve up to three lots in the parcel for child lots, depending upon the size of the parcel. The value of the easement is reduced by one acre for each child lot. Changes are also under way in the administration of the child lot program under the MALPF. Any release from the requirement that a child lot may not be transferred for five years will require approval of the APAB or a lender providing notice of a foreclosure. The Functional Plan recognized the MALPF program and makes a provision for child lots.

In implementing the Functional Plan the county zoning ordinance permits an exemption from the area and dimensional requirements of the code for a one-family residence for a child, or the spouse of a child of the property owner. This exemption applies only to property owners who had legal title to a property prior to the adoption of the sectional map on January 6, 1981. It is limited to one lot per child and a TDR must be available for each child lot. The park and planning staff has interpreted the ordinance to provide a lot for any eligible child **in addition to** the number of lots otherwise permitted under the zoning.

Criticism of the implementation of the child lot provision has resulted from this interpretation because density is always greater than that allowed by the zoning. In some cases the lots have been created as child lots, but a child of the owner has never lived on the lot. The lot is “flipped” to the market and sold. Nothing in the current ordinance prevents this. While the number of eligible parcels now is small, it is estimated that perhaps 200 lots beyond the zoned density could be created under this provision. Currently a case is pending in which an owner desires to create five child lots in addition to the three market lots that would be permitted by zoning on the parcel. The entire parcel would be developed for housing and no farmland would remain.

One criterion suggested for approval of child lots is a demonstration of how the lot would contribute to the farming enterprise through its location on the property. Another is that the restrictions of the plan be applied so that the density of one dwelling unit to 25 acres could be exceeded for child lots, but not for market lots. Since the provision has been in existence for 25 years, there have also been suggestions to terminate the program either immediately or at some set future date.

A majority of the working group agreed that the current policy of allowing child lots in addition to the zoned density should be continued because the practice has been in place for so many years. However, concerned about the practice of flipping lots, the working group may stipulate that there should be a requirement that the child hold title to the child lot for a period of 5 years. The group considered a number of options for limiting the number of child lots such as requiring that some fixed percentage of the parcel be retained for agricultural use, but reached no consensus. The question of extending water to a child lot, an option available in the current Ten-Year Plan, was also discussed, and a policy that allows water to be extended to child lot abutting a water main may be recommended.

PREVENTING FRAGMENTATION OF FARMLAND

In the discussions of the use of sand mounds and of child lots, suggestions for including some incentive to produce conservation design were brought up. Generally this was left to the guidance of the planning department to recognize the overarching concept that the RDT zone is an agricultural zone and development should be constrained by the goal to maximize the retention of large tracts of farmland.

The current LWVMC consensus position supports a policy that considers preservation of productive farmland to be a primary design consideration for development in the RDT zone. The preservation of large, contiguous tracts of farmland was a goal frequently articulated by the working group. One method for accomplishing this

goal is called conservation design. The Connecticut River Valley is one example of this process for allowing development while preserving farmland. Dwelling units are grouped so that they do not have more than one acre of land per dwelling unit on average and at least 50% of the parcel must remain open space. Under the bylaw, 50% of the land must be retained as residual farmland and further subdivision is generally prohibited.

Currently farmland in the RDT zone in Montgomery County may be subdivided under the Minor Subdivision Procedure, a process that can be administered to provide conservation design. Up to five lots are permitted provided that the average lot size does not exceed five acres unless approval is given by the planning board in reviewing a pre-preliminary plan for the subdivision. The pre-preliminary plan includes location maps, a sketch plan and other information necessary for written approval of proposed septic areas to be granted by the Department of Permitting Services. All easements must be recorded for the balance of the property noting density and TDRs that have been utilized for the new lots.

When this procedure is used for small subdivisions an outlot of some size may be created. Its use would be restricted by the number of development TDRs remaining. It may become a small farmstead with a single dwelling unit. Even if no further building is permitted, the land may continue to be farmed or may be sold to a person desiring to enter farming at a lower price than land with building rights would bring. It has been suggested that a quasi-public agricultural land conservancy could acquire land that might otherwise be subdivided when a landowner seeks to retire from farming. The conservancy could extinguish development rights in excess of those needed for the farmstead, grant a perpetual easement to a land trust and then sell the land to a buyer interested in keeping it in agricultural uses. Such an organization could prevent development of 25-acre McMansions in the Reserve.

Clustering is another option for preserving large tracts of farmland supported by the current LWVMC consensus. While the rural cluster zone is specifically designed to accommodate this type of development, clustering is also used by landowners in the RDT zone to group development in lots of usually two to five acres, sometimes on a private road, to retain the balance of the property for farming. There is concern, however, that clusters can resemble subdivisions and detract from the rural character of the land. Limiting the size of the cluster seems to be the key to using that technique in the RDT zone.

CONSENSUS QUESTIONS

TDR: Should the TDR easement be modified to permit only agricultural and single family residential uses on land under TDR easement? Should the development TDR be designated as one for use in commercial, office and R&D development? Should TDR use be **required** for some residential density increase?

BLT: Should the county buy easements on agricultural land based upon the building lots offered to be terminated? If yes, how should priority be set in selecting such parcels – order of application, size, productivity, other?

Sand Mounds: Should the use of sand mound technology for sewerage disposal be restricted in the RDT zone? Should the county require notice of sand mound use to purchasers of the property and/or a schedule of maintenance?

Child Lots: Should the child lot provision be modified or terminated? Should a limit be placed on the time before the title to a child lot can be transferred?

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