



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

MCPB
Item # 10
9/11/08

September 8, 2008

MEMORANDUM

TO: Montgomery County Planning Board

VIA: Glenn Kreger, Acting Chief, Community-Based Planning Division *JK*

FROM: *CM* Callum Murray, Potomac and Rural Area Team Leader
Community-Based Planning Division (301-495-4733)

SUBJECT: Bill No. 39-07 Montgomery County Code Chapter 2B – Agricultural Land Preservation – Amendments

STAFF RECOMMENDATION: APPROVE transmittal to the Montgomery County Council of recommended Planning Board amendments to Bill No. 39-07, as detailed in red in Attachment 1.

In April of 2007, the Maryland General Assembly enacted House Bill 1331, which established several new procedures for administering the Agricultural Land Preservation Program in the State. The passage of HB 1331 necessitates that Montgomery County amend Chapter 2B of the Montgomery County Code – Agricultural Land Preservation, in order to be consistent with State law. Bill No. 39-07 is the proposed legislation addressing this matter. The stated purposes of the Bill are to:

- (1) Conform County law to the requirements of State law concerning the purchase of agricultural easements; and
- (2) Generally amend County law governing the purchase of agricultural easements.

Given the extensive nature of the proposed changes, the County Executive has recommended that Montgomery County Code Chapter 2B Agricultural Land Preservation, be repealed and re-enacted. This staff report provides recommendations on additional amendments to Bill No. 39-07 in order to support a County Building Lot Termination easement (BLTE) program. The report briefly outlines agricultural trends affecting the County's Agricultural Reserve, including the threat of fragmentation of farmland via residential subdivision, and details the proposed BLTE program recommended by the Ad Hoc Agricultural Advisory Working Group (Working Group).

Attachment 1 (Pages 1-22) is the language which is recommended to be repealed. Page 22 is where the County's amendment begins. The Code amendments recommended by planning staff are in red.

Attachment 2 is an extract of the Working Group Report, January 2007, (Chapter 4 - Building Lot Termination Program), and Attachment 3 details the Planning Board's recommendations regarding the Working Group Report.

Attachment 4 is a proposed Project Description Form (PDF) No. 788911 for the Capital Improvements Program – Agricultural Land Preservation Easements – Building Lot Termination, prepared by the Department of Economic Development (DED). A draft of Montgomery County Executive Regulation 31-07 on Agricultural Land Preservation Easement Purchases, also prepared by DED, is Attachment 5. It should be noted that the County Attorney has recommended that these Regulations not be published until the enabling legislation Bill 39-07 is adopted.

A County Council public hearing on Bill 39-07 was held on January 15, 2008, and a Planning, Housing and Economic Development (PHED) Committee work session is scheduled for September 29, 2008. In an effort to obtain consensus, or at least minimize policy differences, staff undertook extensive discussions with the Department of Economic Development (Agricultural Services Division), the Office of the County Attorney, the Office of the County Executive, and a farmer/attorney member of the Ad Hoc Agricultural Advisory Working Group before finalizing recommended amendments. County Council legislative staff members were also apprised of proceedings.

The various parties agreed that Bill 39-07 is an appropriate vehicle for clarifying that a BLTE is a type of agricultural easement and specifying certain components of the BLTE program, including the account into which “development approval fees” will be deposited. The goal can be accomplished primarily by adding some new definitions to Chapter 2B and a new Article IV to Chapter 2B (see Attachment 1, Pages 22-52).

INTRODUCTION

Farming in Montgomery County's Agricultural Reserve is productive and extraordinarily important. As a major industry, agriculture plays a key role in the County's economy and it is vital to our sense of community. Farming helps define cultural values and a rural way of life, just as farmland defines a working landscape.

The Agricultural Reserve is vital, not just for food production, but for many other reasons. It is vital to the County's environment, because well-managed farmland provides crucial water filtering. It feeds the groundwater supply and supports a variety of habitats, including some of the forests essential for diverse wildlife and clean water. From a regional viewpoint, restoring the health of the Chesapeake Bay will be difficult without ensuring a healthy agricultural economy.

The threats facing the Agricultural Reserve are real, and none is more pressing than that posed by farmland loss via the retention and use of residual development rights that were created at the rate of one for each 25 acres. This simple fact is often overlooked. The farming representatives on the Ad Hoc Agricultural Advisory Working Group, in Comment 3 on page A-10 in Appendix II of their Final Report, accurately state that, “. . .our most precious resource (is) our land.” Without the very well intentioned down-zoning of the agricultural area by the County Council in 1980 and the introduction of the Transferable Development Rights (TDR) program as an offset, there can be little argument that there would be very little resource to discuss today.

Despite its value as a precious resource for the region, the Agricultural Reserve faces severe pressure and fragmentation from the region's rapidly increasing population, discussed below. Since the best farmland tends to have the most productive, well-drained soils, with moderate slopes and mostly-cleared land, it is also the land most commonly favored for development.

Agricultural Trends

In the past 30 years, there has been a dramatic reduction of land in farms in Maryland, declining from 2.6 million acres in 1978 to about 2 million acres in 2002. Similarly, the number of farms in the state declined from 14,776 in 1987 to 12,198 in 2002. In Montgomery County, the number of farms declined from 680 in 1986 to 577 today. From 1978 to 2002, there was significant urban encroachment of both agricultural and forested land in the County. During that period, the land area in farming declined by more than 40,000 acres, or around 13 percent.

The average size of farms has varied among counties and across decades throughout the state. In 1978, the average farm size in Maryland as a whole was 168 acres. Montgomery County experienced the most profound decline in average farm size of all metropolitan counties, with farm size declining from 173 acres in 1978 to 130 acres in 2002. The County also witnessed a sharp increase in the percentage of farms between 10 and 50 acres in size, while the percentage of farms exceeding 500 acres declined.

Rapid development and urban growth have both spurred the proliferation of small farms and led to the loss of large farms in the County, with many small farms benefiting from proximity to urban markets. These changes in farm size indicate significant changes in the nature of farming in Montgomery County. On the one hand, there is increased significance to grain and crop production from remaining large farms. Conversely, farming is adapting to urban development with the increased reliance on small farm production and recreational farming that supplies the urban consumer. The County now has 350 horticultural enterprises, with gross sales of \$125 million annually. These enterprises include nurseries, landscaping companies, arborists, sod farms, lawn care firms, and greenhouse businesses. Twenty percent of Maryland's horticultural industry is located in the County, which ranks second in the State in the total number of horticultural firms.

Equine operations have evolved into a major component of the agricultural industry in the County, with more than 700 operations stabling approximately 12,000 horses, more than the combined population of all other livestock.

In recent years the New Urbanism, Smart Growth, and Green Building movements have dramatically reshaped how communities are conceived, sited, and constructed. The emerging Sustainable Agriculture and Local Food movements are making organic foods mainstream and farmers markets are now a common urban and suburban amenity. "New Ruralism" is emerging as a key new strategy for bridging Smart Growth and Sustainable Agriculture. In essence, the strategy aims to advance a framework for linking sustainable metropolitan development with sustainable urban-edge agriculture and local food systems.

Among other forces, urban development has greatly affected the value of agricultural property in Maryland. Statewide, agricultural real property totaled approximately \$8.3 billion in 2005, compared with \$1.9 billion in 1986. In Montgomery County, real agricultural property values (in 2005 dollars) rose from just under \$100 million in 1986 to approximately \$450 million in 2005. These augmented market values offered farmers significant incentives to dispose of their farms for urban development and put additional strain on local government and land conservation groups aiming to purchase agricultural easements.

If the economic margin for farming gets thinner and profitability shrinks, more farmers leave farming, facilitating the conversion of farmland to development. Farmland conversion also occurs as a result of significant outside economic pressures, again resulting in farmers leaving their farms.

Fragmentation of the Reserve

Farmland losses have a way of being self-perpetuating. At the most basic level, successful farming requires a critical mass of resources and markets. A sufficient land base is the most crucial component. When a farm, in whole or in part, is sold for development and houses displace prime cropland, the resulting suburbanization tends to erode and fragment the working landscape. Logistics, such as moving farm equipment, become more difficult. New homeowners object to sights, sounds, smells and the long work hours inherent in the real world of agriculture. Land prices rise to match urbanization's values, posing further obstacles to continuing to farm the land.

There can be little doubt that but for the County's TDR program and easement purchase initiatives, the Agricultural Reserve would by now be highly fragmented. From 1971 to 1980, when the TDR program was created, an average of 2,700 acres of agricultural land was subdivided annually in the area later designated as the Reserve. From 1981 to 1998, after the TDR program was implemented, that figure declined to 460 acres per year. From January 1998 to 2007, 35 subdivisions totaling 3,988 acres, or 498 acres per year, have been approved in the Reserve. (It should be noted that many of these subdivisions retained substantial acreage in farming.)

The State Department of Planning strongly supports the County's initiative to minimize the potential for further subdivision and development of residential lots in the RDT Zone. In a 2007 communication to the Planning Board and County Council, Richard E. Hall, Secretary of Planning, stated that:

"Building lot termination is particularly important in this regard. If one building per 25 acres is ultimately subdivided throughout much of the zone on land that is otherwise preserved through the TDR program, it has considerable potential to undermine the long term success of the TDR program, and more broadly speaking, the County's long term commitment to preserve agricultural land and a diversity of profitable production options for the farmer.

These impacts would represent a considerable loss to Maryland, where Montgomery County has long been an example of effective rural land and resource conservation. Although the current status of the County's rural resource land is the best among Maryland's metropolitan counties, a considerable percentage of that land is still quite vulnerable, largely due to the potential for these lots."

More than 51,000 acres of the Agricultural Reserve's 93,000 acres are now protected through Transferable Development Rights easements. The Agricultural Easement Program, the Maryland Agricultural Land Preservation Foundation Program, the Maryland Environmental Trust, and the Rural Legacy Program protect another 17,000 acres. The goal of the Agricultural Services Division is to protect 70,000 acres by the year 2010. The task now is to maintain and enhance this national model of land conservation, and to prevent the development pressures that devastate farmland across the nation from eroding one of the most significant resources in the region. The equity interests of farmers and the viability of farming need to be reconciled with the public interest in protecting the 25-year investment in acquisition of development rights and in maintaining covenants with down-county citizens, who have accepted higher densities in exchange for land conservation in the Reserve.

Should the County support a Building Lot Termination (BLT) easement program to discourage fragmentation of farmland?

This issue was identified as critical by the Ad Hoc Agricultural Advisory Working Group (Working Group) appointed by the County Council. In their Final Report, published in January 2007, the Working Group stated:

“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..... 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.***

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).”

* (Now 51,489 acres)

Working 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.

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.”

The Working Group recommended that the Planning Department draft amendments to the Zoning Ordinance and the Subdivision Regulations to amend the TDR program to define an exchange rate for buildable TDRs (BLTs) in research and development and certain commercial, industrial, and mixed-use zones.

Steps in Response to the Ad Hoc Agricultural Advisory Working Group’s Recommendations

In 2007, County Council staff identified required tasks to implement the Working Group’s recommendations:

- Draft Executive Regulations for the BLT Program (Short term – 6 months)
- Draft amendments to the Zoning Ordinance and Subdivision Regulations to require excess TDR receiving capacity in certain commercial, industrial, and mixed-use zones (including the commercial portions of mixed-use zones). (Mid-Term – by end of 2007)
- Create a program by which TDRs on research and development, and certain commercial, industrial and mixed-use zoned properties will purchase buildable TDRs (BLTs) instead of excess TDRs. (Long Term – 2008 or later)

For various reasons, the schedule for these steps is coalescing. Agricultural Services Division staff were diverted from completing Executive Regulations by the major demands of implementing last year's drought relief program. For planning staff, it proved to be complex to coordinate the evolution of the TMX Zone in Twinbrook, White Flint and Germantown, (essentially a pilot zone for the BLT strategy) and potential other strategies for resolving BLT absorption issues, together with residential-to-office conversion calculations. The Planning Board discussed these issues on March 27 and May 8, 2008 and has discussed the TMX Zone on July 17, July 24, and September 4, 2008.

The PHED Committee wants to ensure that it completes its review so that necessary changes to Chapter 2B (Agricultural Land Preservation) are in place to allow the proposed TMX Zone, the Twinbrook Sector Plan, and Executive Regulations related to the BLT program to be considered in the fall. Council staff has requested recommendations regarding legislation to enable the BLT program and this staff report is the response (Attachment 1).

The main components of the staff recommended amendments are as follows:

- Additional definitions (2B-1)
- Recordation of easements (2B-14)
- A new Article IV, BLT Easements (2B-17 through 2B-20)
 - Purpose of BLT easements (2B-17)
 - Requirements for purchase of BLT easements (2B-18)
 - BLT Account (2B-19)
 - Priorities for purchasing BLT easements (2B-20)

The staff recommended amendments (outlined in red) to Bill No. 39-07 are intended to clarify the intent of the BLT program, to enshrine in law the importance of preventing the fragmentation of the Agricultural Reserve through residential subdivision, to bolster and supplement Executive Regulations and to eliminate any ambiguities. They should be construed as 'friendly amendments' to Bill No. 39-07. The proposed amendments would also guarantee to the development community that funds would be spent for the purpose for which they were collected.

It should be noted that the language in Section 2B-10 (lines 793-800) was not included in Bill 39-07, as introduced, and was subsequently added to the Bill. Planning staff concurs with the language, and it is highlighted in red merely to show the difference from the original bill.

REMAINING ISSUES

Initially, planning staff had restricted the definition of a Buildable Lot to those that could be served by a deep trench septic system, and not by sand mounds, reflecting both the recommendation of the Master Plan for Preservation of Agriculture & Rural Open Space and the position of the Planning Board as articulated in Attachment 3. This proved to be a major issue for Executive staff, and planning staff believes the recommended definition finesses the issue. The debate will now move to a future Council decision on whether to rescind the resolution which was the genesis of the problem, as requested by the Planning Board.

Executive staff believes that Bill 39-07 could require the County Executive to adopt regulations establishing criteria that will be used to prioritize land that will be included in the BLTE program, but should not specify any specific criteria to be included in the regulations. Executive staff maintains that any “general” criteria governing prioritization, that are included in Bill 39-07, should apply to both regular agricultural easements and BLTs. Planning staff respectfully disagrees. As proposed, BLTEs are a distinct type of Transferable Development Right, and a special kind of agricultural easement, and should have some statutory standards to guide the Executive Regulations.

Lastly, Executive staff added one issue that was not discussed with planning staff. Executive staff believes that the County should be the grantee of a BLT easement. Planning staff concurs and have so amended Article IV, Section 2B-19. The Executive Regulations should make clear that donors should make the Maryland Environmental Trust (MET) a joint holder of the easement to qualify for Federal tax deductions and State tax credits.

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Attachments

1. Montgomery County Code Chapter 2B Agricultural Land Preservation (Proposed by Bill No. 39-07) (Pages 1-22)
Montgomery County Code Chapter 2B Agricultural Land Preservation (Recommended by staff) (Pages 22-52)
2. Building Lot Termination Program – Chapter 4 of the Ad Hoc Agricultural Advisory Working Group Report, January 2007
3. Letter dated March 12, 2007 from Planning Board Chairman to the President, Montgomery County Council. Subject: Planning Board Recommendations regarding the Ad Hoc Agricultural Policy Working Group Report
4. Proposed Project Description Form No. 788911 for the Capital Improvements Program – Agricultural Land Preservation easements – Building Lot Termination (Department of Economic Development)
5. Draft Montgomery County Executive Regulation 31-07 on Agricultural Land Preservation Easement Purchases (Department of Economic Development)