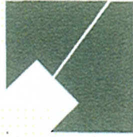


MONTGOMERY COUNTY PLANNING DEPARTMENT
THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

March 11, 2010

MEMORANDUM

TO: Montgomery County Planning Board

VIA: Glenn Kreger, Acting Chief GK
Vision Division

FROM: Callum Murray, Team Leader, Potomac and Rural Area (301/495-4733) CM
Vision Division

SUBJECT: Draft Zoning Text Amendments - Rural Density Transfer Zone
(A.) Lot Area Limitations and Cluster Provisions
(B.) Child Lot Standards

(This is a continuation of Item 9 from March 4, 2010)

STAFF RECOMMENDATION: Submit two draft Zoning Text Amendments (ZTAs) to the District Council with a request for introduction.

REPORT CHANGES SINCE MARCH 4, 2010

The Planning Board discussed the draft ZTAs at their evening session on March 4, 2010. Shortly before the discussion, eleven emails were received (see Attachment 1) (Previous Attachments 1-3 are now Attachments 2-4). One correspondent argued that child lots should not be restricted to children actively engaged in agricultural activity on the property. The Planning Board agreed, and the language in Child Lot Guideline Five has been amended to reflect that change.

Ten of the eleven writers vigorously opposed the lack of a residency requirement for child lots, espousing enforcement language to be included in the Zoning Text Amendment on Child Lot Standards. The Planning Board agreed, and instructed staff to prepare such language. (See 1-3 below.) Should the Planning Board agree with the concepts expressed, staff will draft a covenant to be included in the Child Lot Standards ZTA.

Vision Division, 301-495-4555, Fax: 301-495-1304
8787 Georgia Avenue, Silver Spring, Maryland 20910
www.MontgomeryPlanning.org

Staff recommends that the residency requirement be enforced as follows:

1. *The plat of subdivision must include an owner certification that the lot is being created for a child of the owner.*

2. *The deed for each child lot created must include a covenant, entered into and executed by both original grantor and child as grantee, enforceable by the Agricultural Preservation Advisory Board, that includes, at a minimum, the following provisions:*

    a) *Title must remain with the child/grantee for ten years from the date of recordation of the deed;*

    b) *Upon written request by either the grantor or grantee, the Agricultural Preservation Advisory Board may grant a written waiver of the 10-year restriction for certain hardships as determined by guidelines adopted by the Agricultural Preservation Advisory Board;*

    c) *In the event of a violation of the covenant, whereby title is transferred within the ten year period, an easement must be recorded on the parent tract extinguishing a buildable lot; and*

    d) *If a buildable lot is no longer available at the time of such transfer (or upon the discovery of such violation), the grantor and grantee shall be jointly and severally liable for liquidated damages based on the value of a BLT at the time of the transfer with pro-rata reduction for each year in the 10 year covenant. (For example, 100% value if the transfer occurs during the first year of the covenant, 90% for the second year, 80% for the third year and no less than 10% for the last year.)*

3. *Funds collected as liquidated damages must be deposited into Montgomery County's Agricultural Land Preservation Fund, provided that the Agricultural Preservation Advisory Board is reimbursed to cover any costs or expenses incurred to enforce the covenant.*

BACKGROUND

It is widely recognized that the agricultural productivity, distinctive character and natural beauty of the Agricultural Reserve are so outstanding that it is in Montgomery County's interest to safeguard them. The primary purposes of the proposed ZTAs are to promote sustainable agriculture by limiting fragmentation of farmland, to support local economic and social needs, and to conserve the natural beauty of the Reserve.

The landscape of the Agricultural Reserve has evolved through centuries of settlement and agriculture into a unique place, which often evokes strong feelings of remoteness from urban areas. The variety in landscape has been largely influenced by the underlying geology but also by the human activity of agriculture. The area continues to

be a living and working landscape where agriculture remains the primary land use despite increasing pressure from 'non-farming' interests. It would be a tragedy to diminish this wonderful and irreplaceable resource.

As the principal land use of the Reserve, agriculture has played a particularly important role in the development of the landscape. Without the continued stewardship by farmers and landowners, the characteristic landscape would be lost. A thriving agricultural economy must be encouraged and new agricultural and residential development must be considered. However, it is vital that any new development be a positive addition to the landscape, and not detract from the distinct qualities of the Reserve.

This staff report does the following:

1. Proposes a draft zoning text amendment (Attachment 2) to apply lot area limitations and cluster provisions in the RDT Zone for residences and non-agricultural structures to foster compatibility with the Agricultural Reserve and the retention of a working landscape.

2. Reviews the Planning Board's advice to the County Council from March 2007 relating to child lot standards, as articulated in draft ZTA 07-09. An alternative draft zoning text amendment (Attachment 3) is proposed for child lot policy provisions in order to achieve statutory clarity. The legislative intent of this ZTA is to encourage the continuation of the family farming unit and to facilitate the intergeneration transfer of the family farming unit by allowing children to live with their parents on the property.

Consultation with the Agricultural Community

The Ad Hoc Agricultural Policy Working Group (Working Group), appointed by the County Council in 2006, believed 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." The Working Group recommended that the Planning Department consider using existing agricultural advisory groups to help develop these strategies. The attached two draft zoning text amendments have been discussed with the Agricultural Advisory Committee (AAC), the Agricultural Preservation Advisory Board (APAB), and a sub-committee made up of members of both groups. The sub-committee reviewed the proposed Child Lot Standards ZTA on April 29, 2009, and the proposed Lot Area Limitations/Cluster Provisions ZTAs on September 4, 2009.

The AAC and APAB were vigorously opposed to the Child Lot Standards ZTA, believing that it would adversely affect their property rights. They requested that consideration of the ZTA on Lot Area Limitations and Cluster Provisions be deferred until a decision was reached on pending State Bill MC11-10 in the General Assembly to allow septic easements in the rural zones of Montgomery County. Planning staff have included the following amendments to preliminary drafts, based on constructive suggestions by members of both the AAC and APAB:

1. The maximum lot size for residential lots, including child lots, is increased from two to three acres.
2. For flag lots needed to preserve farming operations, the acreage of the flag stem is discounted.
3. Addition of a footnote that the Planning Board may waive the cluster provision for small numbers of units if the alternative is preferable for agricultural preservation.
4. Addition of a clause that the Planning Board may waive the minimum size of 25 acres for a farm lot if it finds that a smaller size would better implement the purpose of the zone.
5. Amendments to cluster development guideline language emphasizing priority of agricultural preservation.

Timeline

In April 2006, the County Council appointed the Ad Hoc Agricultural Policy Working Group (Working Group) to "provide comprehensive advice on ways to ensure the long term protection of the Agricultural Reserve and preservation of the agricultural industry." In particular, the Council charged the Working Group with addressing a number 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 (BLT) program, uses of sand mound technology, and technical tracking and use issues associated with the Transferable Development Rights (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.

On March 12, 2007, the Planning Board transmitted their recommendations to the County Council (Attachment 4) regarding the Working Group Final Report.

In March 2007, the Planning, Housing and Economic Development (PHED) Committee discussed the Report, including the Board's comments, and instructed Council staff to prepare draft policy instruments, including zoning text amendments, which would implement the Working Group's recommendations via a series of short, mid and long term steps.

In June 2007, ZTA 07-06 was introduced to clarify that child lots would be permitted in addition to market lots and in excess of base density for the RDT Zone. The Board did not recommend approval of ZTA 07-06. ZTA 07-09 was introduced at the request of the Planning Board as an alternative and supported the Board's position at that time that child lots would be allowed as long as the overall density of a parcel did not exceed the maximum residential density permitted in the RDT Zone (one dwelling unit per 25 acres). On July 19, 2007, the County Council held a public hearing on the alternative ZTAs but took no action on either.

RESIDENTIAL SUBDIVISIONS IN THE AGRICULTURAL RESERVE

The County Council legislative staff report to the PHED Committee of September 8, 2007, regarding the BLT Component of the TMX Zone stated:

> "Staff believes that the Planning Department should begin exploring strategies for making land in the Rural Density Transfer zone less attractive for residential development unrelated to farming, while still allowing for legitimate residential uses for farmers (e.g., limit the size of the residential portion of the lot, imperviousness, or house size in a way that discourages large estate homes)."

The Ad Hoc Agricultural Policy Working Group report included a recommendation that:

> "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."

The Working Group did not discuss specific options related to design strategies, but recommended that 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. The Group believed that, if developed properly, these strategies could be an important tool. If not developed properly, they could run counter to the underlying goal of reducing farmland fragmentation.

The proposed draft ZTAs are a response to these recommendations. In terms of the existing codes, 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. (Planning staff are also preparing a draft ZTA proposing Private Roads for Cluster and Minor Subdivisions in the RDT Zone.) Existing law requires that lots in the RDT zone be a minimum of 40,000 square feet. There is no maximum. The Rustic Roads Functional Master Plan recommends placement of buildings to protect view sheds.

The lot area limitations and cluster provisions have been produced to encourage those proposing and/or designing new agricultural/residential/non-residential developments to carefully consider their impact on the landscape. The open landscape of much of the Reserve means that new development can be particularly intrusive unless careful attention is paid to site location and design.

The main purposes of the Lot Area Limitations and Cluster Provisions ZTA are:

1. To minimize the size of residential lots unrelated to farming.
2. To balance the functional needs of new development with the need for minimal fragmentation of farmland and minimal intrusion on the landscape.
3. To encourage farmers, owners, and their agents to design new development so that it can be practically integrated into the working landscape.

Draft Guidelines

Staff suggests the adoption of a set of guidelines following a public hearing, which can be published to guide applications and staff review.

1. Locate development to preserve a substantial contiguous portion of the tract containing prime or productive soils appropriate for farming or pasture use.
2. Locate development to minimize fragmentation of farmland.
3. Maximum lot size for residential lots unrelated to farming – three acres. (For 'flag lots', discount the area of the flag stem.)
4. Minimum lot size for agricultural lots – 25 acres (unless waived by the Planning Board).
5. Minimize the size of other non-agricultural lots (e.g. for special exceptions).
6. Reduce as much as possible the potential for nuisance or conflict between residential and agricultural uses (both within the tract and in relation to existing uses on adjoining or nearby tracts) by providing a substantial setback or buffer between designated farm fields and residential building sites.
7. Identify all important resources and related buffer areas that need to be preserved, as located on the required NRI/FSD and including location of prime and productive soils.
8. Avoid wetlands and stream valley buffers.
9. Limit the physical impact of any new roads on the natural and historic environment to the minimum extent possible. Roads should run with the contours of the land, rather than across slopes, and extensive cutting through wooded areas should be avoided.
10. Carefully consider the orientation and location of new buildings. Even if a building is well designed, it is likely to have a significant detrimental effect on the landscape if poorly sited. Avoid ridgelines, plateaus and sites where buildings may visually dominate the landscape.
11. Take advantage of any existing natural screening, such as natural depressions, hills or woodlands.
12. Locate building pads and roads to preserve scenic vistas and rural character to the maximum extent possible (especially along rustic or exceptional rustic roads). Where necessary to protect vistas, existing woodland buffers along the road should be preserved.

PLANNING BOARD POLICIES ON CHILD LOTS

In 2007, the Planning Board, while generally agreeing with the Working Group on the building lot termination and expanded TDR programs, arrived at different conclusions on the issues of child lots. At that time, the Planning Board recommended amending the language related to the child lot exemption in the RDT Zone to include the same provision that is in the Rural Zone, which limits the overall density of the property including all child lots to no more than the maximum density allowed in the zone. In order to implement this recommendation, the Planning Board submitted Zoning Text Amendment 07-09 to the District Council for introduction in June 2007. A public hearing was held on the ZTA, but no action was taken by the County Council.

The main substance of ZTA 07-09 added language to § 59-C-9.74(b)(4), to limit the overall density including child lots to no more than one dwelling unit per 25 acres. The proposed language was similar to the language that exists in § 59-C-9.71(d)(3), which limits the overall density of a property in the Rural Zone including child lots to no more than one dwelling unit per five acres.

The Planning Board stated in its March 12, 2007 letter to the Council President that the practice of interpreting the RDT Zone to allow child lots above the maximum density in the zone was contrary to the intent of the zone with regard to density, protection against fragmentation of the critical mass of agricultural land, and, especially, with regard to giving primacy to agricultural uses. ZTA 07-09 was intended to clarify and promote the intent of the RDT Zone by limiting the overall density, including child lots, to the maximum density allowed in the zone—one dwelling unit per 25 acres. The Planning Board recommended that the practice of allowing child lots above the maximum density in the zone be discontinued and stated its intention to do so in its review of applications for subdivisions that included child lots.

Rationale for New Child Lot Standards

The Planning Board's last formal position, as articulated by the previous ZTA 07-09, is that the inclusion of child lots on land in an Agricultural Reserve essentially increases lot yields, compromises zoning as an effective land use management tool, and compromises preservation objectives for the area. At that time, the Board's position was supported by over 60 organizations and individuals, but was opposed by the agricultural community, the Ad Hoc Agricultural Policy Working Group, Executive staff, and by County Council legislative staff. After a public hearing, no action has been taken by the County Council.

A resolution to this impasse would be to restrict the number, size and placement of lots created for children, paralleling the evolution of child lot policy and law of the Maryland Agricultural Land Preservation Foundation (MALPF). The legislative MALPF Task Force determined several years ago that the original intent of child lots under the State program – to encourage the continuation of family farming operations by allowing grown children to live and work on the farm – had become somewhat outdated, and that the provision was increasingly subject to subdivision for purposes other than long-term occupancy by members of the family farm.

The Task Force determined, and the legislature subsequently established, that the total number of family (child) lots allowed on otherwise preserved farms should be limited to a maximum of three: one for the first full 20 acres and one per full 50 acres thereafter, up to the maximum of three. It was also decided that the number of family lots could not exceed the number of lots that would have been allowed under County zoning at the time the easement was purchased; upon selling an easement, the owner of a farm with two development rights can never exclude more than two family lots. The idea was that development rights eliminated by the easement would be replaced by family lots up to a fairly stringent limit that would not subject the land to a residential presence that compromised the goals of the Program. Much of this reasoning was based on the fact that, ultimately, the owners and occupants of what were originally child lots will no longer be the children of the owners of the working farm.

MALPF easements restrict the number of child lots on any parcel to three, their location is subject to MALPF approval, and they must be no more than one acre in size. Although MALPF easements constitute a voluntary contractual agreement for compensation, staff suggests that they provide a successful and well accepted model on which to base zoning guidelines. It is both reasonable and proportionate. Staff suggests the following minor modification: a limit of one child lot for properties with a minimum of 25 acres in size, two child lots for properties with a minimum of 70 acres in size, and a limit of three for properties over 120 acres. The purpose of child lot provisions is not simply to allow a house for each child, regardless of the child's interest (or lack of it) in farming. While it is conceivable, it is highly unlikely that all children of farmers want to stay in the agricultural business. Such an outcome would run directly counter to several generations of evidence.

Approved Child Lots

101 child lots have been recorded by plat in the Rural Density Transfer (RDT) zone between 1980 and 2010. Eleven plans with child lots have been received and reviewed by staff or the Planning Board since September 2007, and five child lots have been recorded.

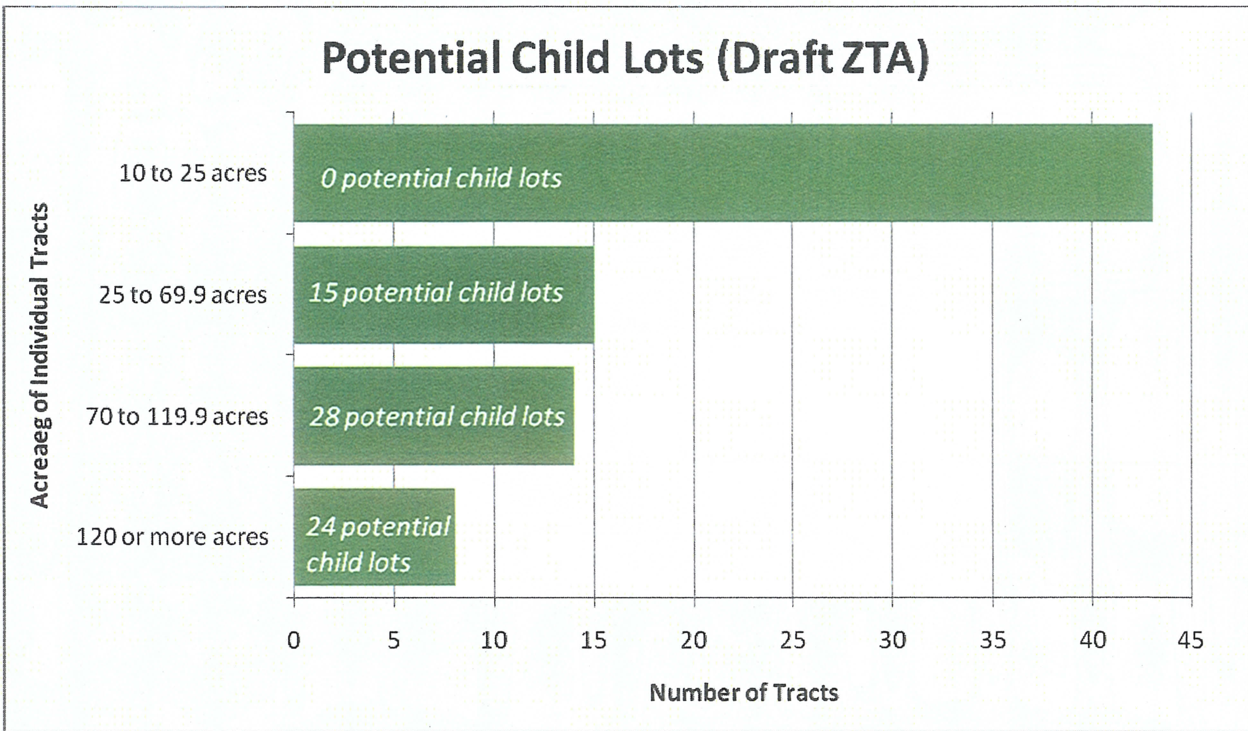
- Four pre-preliminary plans have been reviewed by staff and may be resubmitted at some point (Gladhill - 3 child lots, Cavanaugh - 2 child lots, Lechlider - 1 child lot, Keshishian – 2 child lots).
- One plan is pending (Ganassa - 5 child lots).
- Five plans have been approved (Kiplinger - 2 recorded child lots, Bruchie - 2 child lots, Allnutt - 1 child lot, Dufresne - 3 recorded child lots, Duck's End - 2 child lots).
- Two plans have been denied (Copenhaver - 5 child lots, Jones - 1 child lot).

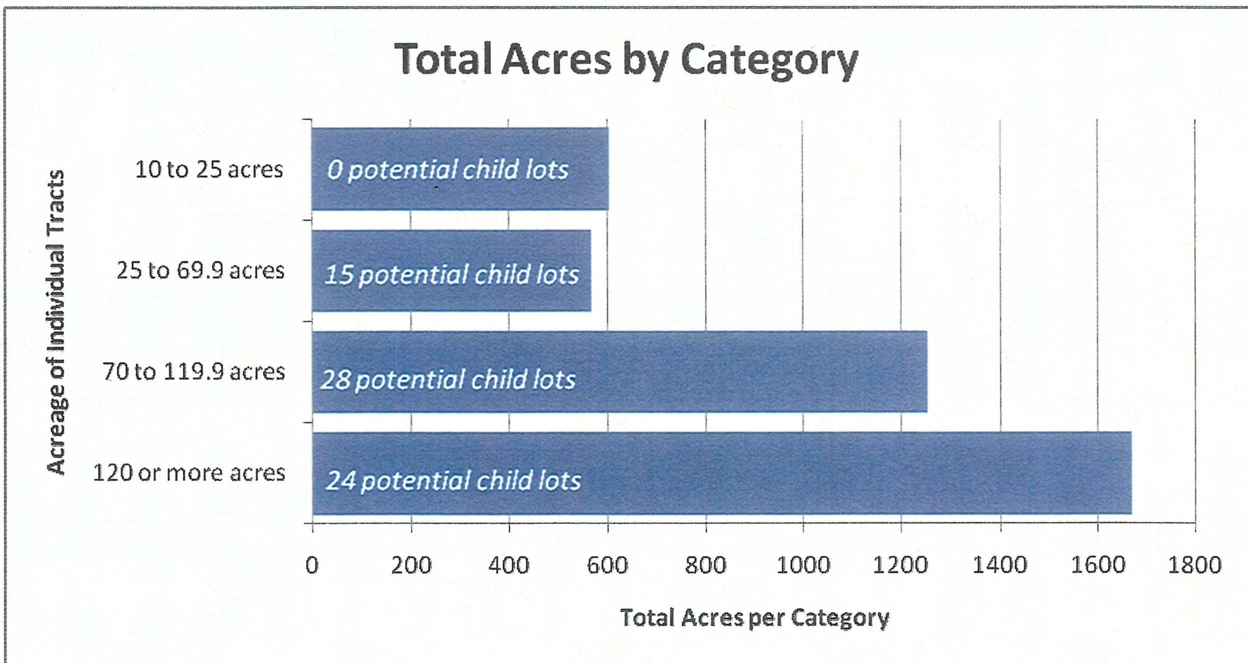
Assuming all approved plans receive plat approval, there will be a total of 106 child lots in the RDT zone.

Potential Child Lots

In 2006, planning staff and the Department of Economic Development, Agricultural Services Division, reviewed County property tax records and agreed upon a list of 99 properties with the potential to develop with child lots. This list contained all properties in the Rural Density Transfer zone, 10 acres or more in size, which had not transferred ownership since January 6, 1981. Nineteen of the properties have subsequently transferred ownership, and staff's preliminary findings, again in coordination with the Agricultural Services Division, show that 80 of the 99 properties remain in the same ownership as in 1981.

Of the 80 properties, 43 are between 10 and 25 acres, 15 are between 25 and 70 acres, 14 are between 70 and 120 acres, and 8 exceed 120 acres. Historically, an average of two child lots per property have been created by those eligible properties. Assuming no change in policy, the potential therefore exists for a further 160 child lots. The variables include property size, the number of market lots, the size of child lot, the size of market lot, and the size of the remainder parcel (if any).





If the standards proposed by the new draft ZTA are adopted, the maximum number of child lots which could be generated from these properties would be 67. If one child lot were added for all parcels between 10 and 25 acres within the same ownership as in 1981, the potential child lot yield would rise by 43, for a maximum of 110.

After review of all properties in the same ownership since 1981, fragmentation due to multiple lots on small parcels (10 to 25 acres) is a significant possibility. Some may argue that these small parcels are not productive, and that their subdivision represents a negligible impact on agriculture. Emphasis on protecting a majority of land for agriculture does not adequately address the problem of fragmentation of small properties. If child lots continue to be awarded in addition to base density for small parcels, a maximum lot size requirement for both child and market lots is essential to reduce the potential for further fragmentation of the Agricultural Reserve. Assuming approval of all potential child lots, the loss of farmland for properties over 120 acres would be a maximum of 72 acres (24 lots @ 3 acres) out of 1667 acres (4.3 percent.) Conversely, the loss of farmland for properties from 10 to 25 acres would be a maximum of 129 acres (43 lots @ 3 acres) out of 605 acres (21.3 percent).

The child lot should be a minimum of one acre and a maximum of three acres. Child lots should not be permitted on parcels on which the owner has no house. The Board's policy is that sand mounds or other technologies are acceptable for approved child lots if the lot cannot be created with a trench system.

The location should be carefully regulated per the following draft guidelines so that the child lot essentially supports the agricultural use of the land. This suggests reviewing its relationship to the existing farmstead, avoiding prime soils, and restricting the size of the lot to minimize fragmentation and loss of agricultural land; this has been the Planning Board's practice in reviewing recent applications.

As stated above, a number of preliminary plan applications including child lots are currently pending. Several owners are awaiting clarifying language from the County Council following the recommendations of the Ad Hoc Agricultural Policy Working Group on the issue. Staff suggests the adoption of a set of guidelines, following a public hearing, which can be published to guide applications and staff review of child lot cases.

Draft Child Lot Guidelines

1. The farm must have been owned by the applicant's family and continuously farmed by them since before 1981.
2. The farm must not have significantly changed in its configuration since before 1981 and must not have been fragmented with market rate lots.
3. A subdivision to create smaller (one- to three-acre) child lots must leave a larger remainder agricultural parcel to include the main farm house.
4. If the number of child lots exceeds the base density of the parcel, all surplus TDRs not reserved for the approved lots should be severed. Severance shall be by TDR easement or agricultural easement.
5. A subdivision application must include a written declaration by the titled landowners that child lots are only for the use of their children.
6. No child lots on property without an existing farm house. If an eligible farm with a farm house consists of two or more qualifying parcels, (contiguous or confronting) the child lots must be placed on the parcel with the least detriment to the farming operation.

7. Child lots must not exceed one acre unless it is necessary for septic capacity. In such cases the child lot must not exceed three acres. For 'flag lots', the area of the flag stem will be discounted. The first child lot requires a full twenty five acres. The second lot requires a full seventy acres. The third lot requires a full one hundred and twenty acres.
8. Child lots must be located to protect the farmable area and in scale with the main farmhouse. Lots may not be created for the same children on multiple properties. If the number of child lots plus the existing farmhouse equals or exceeds one per 25 acres, all remaining TDRs must be severed.
9. Child lots must be created during the 1981 owner's lifetime.
10. If there are joint owners, each with children, the number of child lots is as per Guideline #7, and limited to 1, 2 or 3 for the tract, not 1, 2 or 3 for each owner.

CM: ha G:\MURRAY\Draft ZTAs MCPB 3-18-10 final staff report.doc

Attachments:
1. Correspondence received on March 4, 2010
2. Draft Zoning Text Amendment - RDT Zone – Lot Area Limitations and Cluster Provisions
3. Draft Zoning Text Amendment - RDT Zone - Child Lot Standards
4. March 12, 2007 letter from the Planning Board to Council President Praisner

ATTACHMENT 1

Coleman, Joyce

From:	Anne Cinque [ajcinque@mindspring.com]
Sent:	Thursday, March 04, 2010 8:20 PM
To:	MCP-Chair
Cc:	dolores; gary v; caroline
Subject:	Child Lots

RECEIVED
0205
MAR 05 2010
OFFICE OF THE CHAIRMAN
THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

Dear Members of the County Council,

Thank you for your consideration of the child lot issue in the Agricultural Reserve. We appreciate the time you have spent to try to maintain this incredible "Central Park" of Montgomery County.

However, many in the Agricultural Reserve have been shocked to learn that there might be no 5 year ownership requirement for child lots as agreed upon by the Ad Hoc Working Group.

Is the inability to enforce really the issue? That's so hard to believe, considering that it's so easy to trace land sale records.

Respectfully,
Anne Cinque

Coleman, Joyce

From:	Anne Davies [annedavies@intairnet.com]
Sent:	Thursday, March 04, 2010 4:32 PM
To:	MCP-Chair
Cc:	Murray, Callum; Caroline@mocoalliance.org Taylor
Subject:	Child Lot Residency Requirement

RECEIVED
0202
MAR 04 2010
OFFICE OF THE CHAIRMAN
THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

Dear Royce,

Since you were there at the birth of the Ag Reserve, you must know better than I, that the child lot provision was to provide a way for farm children to live on the family farm and continue to help their parents farm. It was never meant to be just another lot that the farmer could sell off to anyone, although many, many landowners consider the child lot to be part of their "equity." The residency requirement is meant to embody the spirit of the law in the letter of the law. In fact, five years is a rather short time, but it was a compromise amongst the members of the working group. I served several years on the Ag Preservation Advisory Board, and we had many discussions about how to let a child out of the residency
requirement: job relocation or divorce being two. I believe the residency requirement can be made reasonable and can certainly be enforceable. Put it in the deed or the land records. Your lawyers know how to do it, and it does not have to be hard or opaque. Good luck making child lots more like what they were meant to be.

Anne Davies
305 Old Bucklodge Lane
Boyds, MD 20841
301-972-9138

Murray, Callum

From: Fremont, James [James.Fremont@ee.doe.gov]
Sent: Thursday, March 04, 2010 12:08 PM
To: MCP-Chair; Murray, Callum
Subject: Please keep the child lot ownership requirement

Dear Members of the Planning Board:

I am writing to ask that you please oppose dropping the Agricultural Reserve child lot ownership requirement in the Zoning Text Amendment and support the language recommended by the Ad Hoc Working Group requiring a 5-year residency. Wouldn't dropping the residency requirement be counter to allowing child lots as a means of preserving agriculture in Montgomery County? Wouldn't dropping the child lot ownership requirement only increase density and sprawl?

I ask this because I am extremely concerned about preserving open space in Montgomery County and maintaining the integrity of the Agricultural Reserve. Please respect the intent of the Reserve, not just for preserving farmland, but because the Reserve provides an important escape from hectic urban life and is a critical habitat for wildlife in the County.

Thank you for your time and consideration.

Best regards,

Jim Fremont
2421 Evans Drive
Silver Spring, MD 20902

Coleman, Joyce

From: r.n.goldberg@att.net
Sent: Thursday, March 04, 2010 11:39 AM
To: MCP-Chair
Subject: Draft Zoning Text Amendments - Rural Density Transfer Zone

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MAR 04 2010
OFFICE OF THE CHAIRMAN
THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

March 4, 2010

Dr. Royce Hanson
Chairman, Montgomery County Planning Board
8787 Georgia, Avenue
Silver Spring, MD 20910

Dear Chairman Hanson:

I am pleased to learn that the Planning Board is moving forward with draft ZTAs to clarify the Child Lot Standards and Lot Area Limitations and Cluster Provisions. I am also pleased to read that "The primary purposes of the proposed ZTAs are to promote sustainable agriculture by limiting fragmentation of farmland, to support local economic and social needs, and to conserve the natural beauty of the Reserve." In this regard, I am in agreement with the Planning Board's position that child lots would be allowed as long as the overall density of a parcel does not exceed the maximum residential density permitted in the RDT Zone (one dwelling unit per 25 acres).

As you are aware, problems with child lots arose because of an earlier, poorly worded ZTA. Also, and most importantly, there was no provision to prevent the "flipping" of a newly created child lot onto the market – a direct contradiction of the very intent of the child lot concept. I offer two suggestions that would preserve this original intent:

1. Children must be the real children of the property owner seeking a child lot. This would not allow child lots for corporate or business partner "children."

2. The Ad Hoc Agricultural Policy Working Group, on which I served as a member, recommended a five year holding period before a newly created child lot could be sold. This would go a long way in preventing the flipping of a lot. Could this holding period be realized by requiring an appropriate covenant in the deed that creates the child lot and/or by a sworn statement? Clearly, exceptions could be made for hardship cases – death, bankruptcy, etc.

Please share my correspondence with the other members of the Planning Board.

Sincerely,

Robert N. Goldberg

21404 Davis Mill Road
Germantown, MD 20876
Telephone: 301-540-2915
E-mail: r.n.goldberg@att.net

Coleman, Joyce

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MAR 04 2010
OFFICE OF THE CHAIRMAN
THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

From: Pamela Lindstrom [pamela.lindstrom@gmail.com]
Sent: Thursday, March 04, 2010 11:29 AM
To: MCP-Chair
Subject: child lots in ag reserve

Dear Planning Board members:
I understand that your discussion of child lot regulations will include a staff proposal to delete the residency requirement for offspring of farmers. This is a shocking proposal - you know how many times landowners have tried to build more lots for dubious children, even with the current rules. Removing the limit on residency, added to the weakening of BLT purchase requirement in the CR zone, will surely lead to more mansionization of the ag reserve. This will in turn raise its elitist image and reduce its value to county residents in general.

The ag reserve is worth your trouble to protect! You must not just throw up your hands because it is difficult.

Thank you for your consideration,
Pamela Lindstrom

RECEIVED
0194
MAR 04 2010
OFFICE OF THE CHAIRMAN
THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

From: Bill M1 [BillM111@msn.com]
Sent: Wednesday, March 03, 2010 8:48 PM
To: MCP-Chair
Subject: Comments on Draft Zoning Text Amendments - Rural Density Transfer Zone

To: Royce Hanson, Chairman

The following are my comments on the Zoning Text Amendments (ZTA's) dated Feb. 25, 2010:

1. The ZTA's and accompanying documents are so problematical that all the problems with them cannot be discussed in a short form. The Board should provide an additional opportunity for the public to participate in the process of developing the amendments and accompanying documents before submitting them to the County Council.

2. The ZTA's and accompanying documents attempt to morph agriculture preservation into promotion of landscape voyeurism. The authority under which the Board is working provide for preservation of agriculture, not preservation of landscape or "scenic vistas." The latter is inherently subjective, and, indeed there can be tension between the two goals. The best way to preserve agriculture may involve structures in locations that do not satisfy the Planning Board staff's conceptions of "the natural beauty of the Reserve."

3. The clustering proposals go far beyond the original intent of the agricultural preservation zone, which left the landowner relatively free to utilize his property within the density limitations of the zone. Under the proposed "guidelines" the location and orientation of buildings and roads will be dictated by the Board according to subjective, aesthetic considerations. The Board should not be placed in such a dictatorial role in derogation of the rights and views of the property owners who are responsible for the agricultural activity. If this degree of control is desired, the County should purchase the property outright and make it a public park.

4. Residential lot size of 3 acres is supposedly permitted, but the Board may require a smaller lot size if the lot can be approved for well and septic. Thus, in actuality a 3 acre lot size only applies if exhaustive and expensive perc testing proves to the satisfaction of the Board that septic cannot be used. Use of sand mound technology and suitable lot size should not be limited to those cases where it is dictated by septic requirements. Apparently, a de facto preclusion of sand mound technology is being attempted.

5. Page 2 of your transmittal letter states, "1. The maximum lot size for residential lots, including child lots, is increased from two to three acres." However, the table on page 13 lists 3 acres as the <u>minimum</u> lot size. Thus, your documents are internally inconsistent. The intended meaning is not clear.

6. The meaning of "but only until the property is subdivided" in relation to tenant dwellings in 59-C-9.41 is not clear.

7. The imposition of a minimum lot size of 25 acres is onerous and unjustified. (Presumably this is for nonresidential lots, but that needs to be clarified.) This requirement precludes small farm operations which may be future of agriculture in the Reserve for the sake of an old fashioned conception of agriculture.

8. Newly inserted requirements for Minimum lot width, Yard requirements for a main building, Yard requirements for an accessory building, Maximum Lot Coverage, Maximum building height, and Additional Development Requirements do not have the specifications filled in. Thus, your proposal is so incomplete that it is not sufficient for public comment or Board action.

9. The requirement of 59-C-9.491.2 Guidelines "(e) The plan of cluster development must minimize the impacts on scenic vistas and rustic roads" and a similar provision in par. (f) inject a novel, subjective,

vague, and highly intrusive element into the specifications of permitted activities in the zone and are mainly not aimed at preserving agriculture. Any development will be subject to the whim of the Board. The description in your transmittal letter that amendments to cluster development guideline language emphasize priority of agricultural preservation is incomplete at best. You did not reveal that scenic vistas and rustic roads were emphasized.

10. The requirement proposed to be inserted in 59-C-9.23 that the intent is to allow child lots for children involved in the farming operation with their parents is problematical in various ways. Do the children have to participate in their parents' farming operation or can they have their own operation? What if the parents die? What if the child takes a job elsewhere? This requirement has no place in a zoning regulation.

11. The requirement of devoting a TDR to a child lot is contrary to the entire rationale for child lots.

12. The requirement that surplus TDR's be "severed" if the number of child lots exceeds the base density of
the parcel, apparently would require the land owner to sign a TDR easement. The last time I inquired, these easements contain a provision requiring the signer to pay the County's attorneys fees for enforcement, without limitation and forever. Such terms are unacceptable to the well advised and thus preclude the cautious from signing such an agreement.

Respectfully submitted,

William R. Moser
10804 Rochester Dr.
Damascus, MD 20872
301-253-4128

Murray, Callum

From: mary reardon [mareardon3@yahoo.com]
Sent: Thursday, March 04, 2010 3:51 PM
To: mcp-chair@mncppc.-mc.org; Murray, Callum
Subject: child lots

Regarding the ZTA on child lots, it is absolutely a no-brainer to require 5 years of ownership of a child lot. Please accept the recommendations of the Ad Hoc Working Group and include this provision. It's difficult to see how this would not be enforceable.

Mary Reardon
Silver Spring

Murray, Callum

From: WILLIAM J. ROBERTS, ESQ. [LAWPOOL@VERIZON.NET]
Sent: Thursday, March 04, 2010 12:36 PM
To: Murray, Callum
Subject: Fw: Child Lot residency requirement in Ag Reserve recommended to be dropped.

Callum:

Haven't communicated with you in a while.

Dolores Milmoe sent me an email this a.m. about the proposed RDT ZTA which does not incorporate any residency requirement for child lots.

I responded with some thoughts of my own-- admittedly rough.

Thought you might find them interesting/helpful.

Regards,
WJR

----- Original Message -----
From: WILLIAM J. ROBERTS, ESQ.
To: Dolores Milmoe
Sent: Thursday, March 04, 2010 12:21 PM
Subject: Re: Child Lot residency requirement in Ag Reserve recommended to be dropped.

Actually, Callum is probably correct, in terms of practicalities. I wouldn't say it would be "unenforceable" under all circumstances, but it would require substantial technical language in the text amendment dealing with a myriad of possibilities, such scenarios as involuntary transfers, involving death, bankruptcy, foreclosure, etc.

At a minimum, I think at least the requirement for agreements to be recorded in the land records as a condition of record plat approval, under the penalty of perjury, from the parent property owner and child [or spouse of a child] affirming, attesting and agreeing to the following:

1. The lot has been created for the benefit of the child [or spouse of the child] to be used as their residence in accordance with the ZO.

2. The parent owner shall not sell or offer to sell or otherwise transfer to any third party the lot created thereby.

3. Only the child or spouse shall take title to the lot.

4. In the event of a violation of 2 or 3 above, the subdivision approval for <u>that lot</u> shall be void *ab initio* and the property represented by that lot shall accrue back to the parent tract or parcel.

5. In the event of 4 above, DEP shall issue no permits for the construction of a dwelling on the property evidenced by the former child lot absent an approved resubdvision of the property.

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This is kind of stream of thought, but would be a relatively simple mechanism to put a little teeth into the purposes of child lots in the first instance.
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And on the subject of purposes, I will reiterate what I have repeatedly said before: I am EXTREMELY troubled by the notion that child lots should ONLY be available for children actively engaged in agricultural production on the property. That was NEVER the intent in the 1st place. And that's not just my opinion, that is FACT.

That notion that only kids who milk the cows, for example, should be entitled to a child lot overlooks, diminishes and discounts the very important societal benefit of the preservation of the family unit to be served by parents who may want their children and grandchildren close, and children who may want to be close to care for their elderly parents. Simply because that child may work in an office in Rockville rather than shoveling manure during the day really shouldn't make a difference.

And, in that respect, if Staff's concern is with 'enforceability' of terms [which is a legitimate concern], what the hell is the standard for a child or spouse of a child being 'actively engaged' in agriculture on the property? 50 hours a week? 20? 10? How about if they just handle the books?

Just some ramblings from this dumb country lawyer.

WJR
~~~~~~

Murray, Callum

From: Caroline Taylor [caroline@mocoalliance.org]
Sent: Thursday, March 04, 2010 1:39 PM
To: MCP-Chair; Murray, Callum
Cc: board@mocoalliance.org
Subject: Tonight's Item #9 - Draft Zoning Text Amendments - Rural Density Transfer Zone

Importance: High

Prior to forwarding the RDT ZTAs - Please consider this correspondence.

Dear Chairman Hanson and Board Members,

First, Montgomery Countryside Alliance applauds the ongoing effort to properly tighten language in the child lot, clustering and, eventually, sand mound standards. It has been a lengthy, difficult - yet fruitful process. Understanding that tonight's discussion is intended to address the staff request to forward ZTAs to the Council, I nonetheless would like to make the following recommendation with regard to the proposed Child Lot ZTA:

Provide that a requirement not to sell the lot for a period of 5 years be recorded in the land records as a condition of record plat approval, of a deed. Qualifying language that addresses hardship circumstances as exemption may be incorporated.

This important, enforceable, requirement was recommended by the Ad Hoc Working Group in their final report and provides needed assurance that the lots are truly for the purpose supporting an ongoing family farming operation. We were, quite frankly, stunned at at the absence of this provision aimed at solving a widely recognized problem. Without the requirement, child lots may easily be flipped on the open market - counter to the stated aim of the ZTA.

Thank you for addressing this omission, prior to sending the Draft ZTA to the Council.

Respectfully submitted,

Caroline Taylor, Executive Director
Montgomery Countryside Alliance
P.O. Box 120, Boyds, Maryland 20841
301-349-5021 ~ 301-461-9831 (c)
http://mocoalliance.org/

"Whether we and our politicians know it or not, Nature is party
to all our deals and designs, and she has more votes, a larger memory,
and a sterner sense of justice than we do." ~ Wendell Berry

Murray, Callum

From: Bev Thoms [thoms.bev@gmail.com]
Sent: Thursday, March 04, 2010 11:59 AM
To: MCP-Chair; Murray, Callum
Cc: caroline@mocoalliance.org
Subject: Agricultural Reserve Issues - Briefing Update and Draft Zoning Text Amendments concerning Lot Area Limitation and Cluster Provisions, and Child Lot Standards

The child residency requirement, in a house constructed on a child lot, should NOT be dropped. It is enforceable with tax records, easily. To drop it will allow, and indeed, encourage lot development for profit - further destroying the integrity of the agricultural preserve. There should be **a five year residency requirement for each child lot, at least.**

Thank you for your consideration in this matter.

Bev Thoms
Dickerson, MD

Murray, Callum

From: Gary Valen [gvalen4@verizon.net]
Sent: Thursday, March 04, 2010 1:28 PM
To: MCP-Chair; Murray, Callum
Cc: Caroline@mocoalliance.org; 'Anne Cinque'; 'Anne Sturm'; 'Betsy Lyman'; 'Carol Oberdorfer'; 'Chris Kendrick'; 'Dolores Milmoe'; 'Ellen Gordon'; 'Eric Cronquist'; 'Gary Valen'; 'George Miller'; 'Gil Rocha'; 'Jane Hunter'; 'Jay Cinque'; 'Jim Brown'; 'Jim Evans'; 'Julia Bellet'; 'Libby Lawbaugh'; 'Richard Hill'; 'Tina Brown'; 'Tom Proctor'
Subject: Child lot Ownership Requirement

To: Dr. Royce Hanson
Chairman, Montgomery County Planning Board

From: Gary L. Valen
President, Sugarloaf Citizens' Association

Re: Child lot Ownership Requirement

Date: 3-4-10

As you know, SCA promotes the use of land in the Agriculture Reserve for growing food and fiber rather than being used for new urban development. We are pleased that the Planning Board is dealing with the vague matter of "child lots" as originally written in the rules that govern the Agriculture Reserve. We have seen housing developments built in the Reserve using the child lot exception as a means to build houses that are immediately sold on the open market.

As the new regulations are formulated, we urge the Planning Board to adopt more specific language in regard to child lots.

1. Child lots must be used by the actual children of the land owner.
2. There should be a five year holding period before a child lot dwelling could be sold to someone other than the owner's children.

The adoption of these standards will preserve the ability of the original land owners to pass on land to their children as promised in the legal action that created the Agriculture Reserve but end the use of these provisions to build housing developments on land that was intended for agriculture use.

Thank you for considering these provisions.

ATTACHMENT 2

Zoning Text Amendment No: 10-
Concerning: Rural Density Transfer – Lot Area Limitations & Cluster Provisions
Draft No. & Date: 2/3/10
Introduced:
Public Hearing:
Adopted:
Effective:
Ordinance No:

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT WITHIN MONTGOMERY COUNTY, MARYLAND

By:

AN AMENDMENT to the Montgomery County Zoning Ordinance for the purpose of:

- modifying the lot area requirements in the Rural Density Transfer Zone; establishing cluster provisions for certain development in the Rural Density Transfer Zone; and
- generally amending Rural Density Transfer Zone provisions.

By amending the following section of the Montgomery County Zoning Ordinance, Chapter 59 of the Montgomery County Code:

DIVISION 59-C-9 "AGRICULTURAL ZONES"
Section 59-C-9.4 "Development standards"
New Section 59-C-9.491 "Cluster development-- Rural Density Transfer zone.

EXPLANATION: ***Boldface*** *indicates a heading or a defined term.*
Underlining indicates text that is added to existing laws by the original text amendment.
[Single boldface brackets] indicate text that is deleted from existing law by the original text amendment.
Double underlining indicates text that is added to the text amendment by amendment.
[[Double boldface brackets]] indicate text that is deleted from the text amendment by amendment.
** * * indicates existing law unaffected by the text amendment.*

ORDINANCE

The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District in Montgomery County, Maryland, approves the following ordinance:

Sec. 1. DIVISION 59-C-9 is amended as follows:

DIVISION 59-C-9. AGRICULTURAL ZONES.

* * *

Sec. 59-C-9.4. Development standards.

The following requirements apply in all cases, except as specified in the optional standards for cluster development set forth in sections 59-C-9.5 and 59-C-9.57 and the exemption provisions of section 59-C-9.7.

59-C-9.41. Density and TDRs - [in] RDT zone.

(a) Any dwelling unit in this zone must have a retained transferable development right. Only one one-family dwelling unit per 25 acres is permitted. (See section 59-C-9.6 for permitted transferable density.) A farm tenant dwelling, farm tenant mobile home, or guest house, as defined in Section 59-A-2.1 on land in the RDT zone is excluded from this calculation, but only until the property is subdivided and provided that it remains accessory to a farm. An accessory apartment or accessory dwelling regulated by the special exception provisions of division 59-G-1 and 59-G-2 is excluded from this calculation, but only until the property is subdivided, and provided that it remains accessory to the farm. A dwelling unit on a lot created for a child in accordance with Section 59-C-9.74(b)(4) is excluded from this calculation .

(b)

	Rural	RC	LDRC	RDT	RS	RNC	RNC/TDR
59-C-9.42. Minimum net lot area.							
[No main building,	5 acres	5 acres	5 acres	40,000	2	25,00	25,000 sq.

together with its accessory buildings, shall be located on a lot having a net area of less than] **59-C-9.42.1. A lot created for a one-family dwelling**				sq. ft.[7]	acres[4]	0 sq. ft.	ft.
59-C-9.42.2. A lot created or a parcel reserved for a farm, including a main building together with its accessory buildings		25 acres	25 acres	25 acres			
59-C-9.43. Maximum net lot area.							
59-C-9.43.1. A lot created for a child under Section 59-C-9.74.				1 acre[8]			
59-C-9.43.2. A lot created by subdivision for one-family dwellings that is not a farm lot under 59-C-9.42.2 or a child lot under 59-C-9.43.1				3 acres[9]			
59-C-9.[43] 44. Minimum lot width (in feet):							
* * *							
59-C-9.[44]45. Yard requirements for a main building (in feet):							
* * *							
59-C-9.[45]46. Yard requirements for an accessory building or structure (in feet).							
* * *							
59-C-9.[46]47. Maximum Lot Coverage.							
* * *							
59-C-9.[47]48. Maximum building height, except that there is no height limit for agricultural							

buildings (in feet)							
* * *							
59-C-9.481. Additional Development Requirements							
* * *							

7 In any subdivision containing 3 or more lots with lot sizes ranging from 40,000 square feet to 3 acres, the lots must be clustered in compliance with the requirements of Section 59-C-9.491. The Planning Board may waive this requirement for small numbers of units if the alternative is preferable for agricultural preservation.

8 Or the minimum area necessary for approval of well and septic, but in no case greater than 3 acres. For 'flag lots', the area of the driveway stem will be discounted.

9 The Planning Board may require a lot smaller than 3 acres if the lot can be approved for well and septic.

* * *

Sec. 59-C-9.491. Cluster development-- Rural Density Transfer zone.

59-C-9.491.1. Purpose.

The purpose of the cluster method of development is to promote agricultural preservation by retaining large areas of contiguous property suitable for agricultural and related uses.

59-C-9.491.2. Guidelines.

The following guidelines apply to all cluster development in the RDT zone:

(a) The cluster development must locate and arrange the residential development to protect, to the maximum extent reasonable, those portions of the tract most appropriate for agricultural and agricultural related uses listed in section 59-C-9.3.

(b) The plan of cluster development must indicate an arrangement of residential development to reduce as much as possible any nuisance, jeopardy, or conflict between the residential and the agricultural uses both within the tract and in relation to adjoining or nearby tracts.

(c) The cluster development must be laid out to protect the natural environment, including streams, forest, and trees, and to minimize the adverse environmental impacts of clearing and grading.

(d) The minimum size of a farm in the area reserved for farming, as provided in section 59-C9.42.2 above, must be 25 acres unless the planning board finds that a smaller size would better implement the purpose of the zone and the guidelines of this section.

(e) The plan of cluster development must minimize the impacts on scenic vistas and rustic roads.

(f) The planning board will consider criteria in the following order of priority in reviewing a plan of cluster development:

(1) The potential for substantial diminution of agricultural activity;

(2) Potential threats to the natural integrity of environmentally sensitive areas;

(3) Loss or substantial diminution of significant scenic vistas identified in the Rustic Roads Functional Master Plan or any Area Master Plan.

59-C-9.491.3. Development standards.

Cluster development density must not exceed one unit per 25 acres. All requirements of Section 59-C-9.4 apply except as specified in the exemption provisions of Section 59-C-9.7.

Sec. 2. Effective date. This ordinance takes effect 20 days after the date of Council adoption.

This is a correct copy of Council action.

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Linda M. Lauer, Clerk of the Council

ATTACHMENT 3

Zoning Text Amendment No: 10-
Concerning: RDT - Child Lots Standards
Draft No. & Date: 2/3/10
Introduced:
Public Hearing:
Adopted:
Effective:
Ordinance No:

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND SITTING AS THE DISTRICT COUNCIL FOR THAT PORTION OF THE MARYLAND-WASHINGTON REGIONAL DISTRICT WITHIN MONTGOMERY COUNTY, MARYLAND

By:

AN AMENDMENT to the Montgomery County Zoning Ordinance for the purpose of:

- amending the density calculations in the RDT Zone to clarify the number of child lots allowable; and
- generally amending the conditions for creating a child lot in the RDT Zone.

By amending the following section of the Montgomery County Zoning Ordinance, Chapter 59 of the Montgomery County Code:

DIVISION 59-C-9 "Agricultural Zones"
Section 59-C-9.23 "Intent of the Rural Density Transfer Zone"
Section 59-C-9.74 "Exempted lots and parcels-Rural Density Transfer zone"

EXPLANATION: ***Boldface*** *indicates a heading or a defined term.*
Underlining indicates text that is added to existing laws by the original text amendment.
[Single boldface brackets] indicate text that is deleted from existing law by the original text amendment.
Double underlining indicates text that is added to the text amendment by amendment.
[[Double boldface brackets]] indicate text that is deleted from the text amendment by amendment.
** * * indicates existing law unaffected by the text amendment.*

ORDINANCE

The County Council for Montgomery County, Maryland, sitting as the District Council for that portion of the Maryland-Washington Regional District in Montgomery County, Maryland, approves the following ordinance:

Sec. 1. DIVISION 59-C-9 is amended as follows:

DIVISION 59-C-9. Agricultural Zones.

Sec. 59-C-9.2. Purposes or intent of the zones.

* * *

59-C-9.23. Intent of the Rural Density Transfer zone.

The intent of this zone is to promote agriculture as the primary land use in sections of the County designated for agricultural preservation in the General Plan and the Functional Master Plan for Preservation of Agriculture and Rural Open Space. This is to be accomplished by providing large areas of generally contiguous properties suitable for agricultural and related uses and permitting the transfer of development rights from properties in this zone to properties in designated receiving areas.

Agriculture is the preferred use in the Rural Density Transfer zone. All agricultural operations are permitted at any time, including the operation of farm machinery. No agricultural use can be subject to restriction on the grounds that it interferes with other uses permitted in the zone, but uses that are not exclusively agricultural in nature are subject to the regulations prescribed in this division 59-C-9 and in division 59-G-2, "Special Exceptions-Standards and Requirements."

The intent of the child lot option in the Rural Density Transfer zone is to facilitate the continuation of the family farming unit and to facilitate the intergenerational transfer of the farming operation by allowing children to live with their parents on the property.

* * *

59-C-9.4. Development standards.

The following requirements apply in all cases, except as specified in the optional standards for cluster development set forth in sections 59-C-9.5 and 59-C-9.57 and the exemption provisions of section 59-C-9.7.

* * *

59-C-9.7. Exempted lots and parcels and existing buildings and permits.

* * *

59-C-9.74. Exempted lots and parcels—Rural Density Transfer zone.

(a) Each lot created for children in accordance with the Maryland Agricultural Land Preservation Program must **[**not exceed the**]** have a retained transferable development right**[**s**]** **[**assigned to the property**]**.

(b) The following 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 Rural Density Transfer zone.

(1) A recorded lot created by subdivision, if the record plat was approved for recordation by the Planning Board prior to the approval date of the sectional map amendment which initially zoned the property to the Rural Density Transfer Zone.

(2) A lot created by deed executed on or before the approval date of the sectional map amendment which initially zoned the property to the Rural Density Transfer Zone.

(3) A record lot having an area of less than 5 acres created after the approval date of the sectional map amendment which initially zoned the property to the Rural Density Transfer Zone by re-platting 2 or more lots; provided that the resulting number of lots is not greater than the number which were re-platted.

([4] c) A lot created for use for a one-family residence by a child, or the spouse of a child, of the property owner, is exempt from the density requirements of Section 59-C-9.41, provided that the following conditions are met:

(1) The property owner can establish that he had legal title to the entire tract on or before the approval date of the sectional map amendment which initially zoned the property to the Rural Density Transfer Zone.

(2) Each lot created for children must have a retained transferable development right.

(3) This provision applies to only one such lot for each child of the property owner.

(4) A maximum of three child lots can be established.

(5) To create one child lot, the lot must be created from a tract of land of at least 25 acres.

(6) To create two child lots, the lots must be created from a tract of land of at least 70 acres.

(7) To create three child lots, the lots must be created from a tract of land of at least 120 acres.

(8) A lot created for a child must be no greater than one acre, or the minimum area necessary for approval of well and septic but in no case greater than 3 acres. For 'flag lots', the area of the driveway stem will be discounted.

* * *

Sec. 2. Effective date. This ordinance takes effect 20 days after the date of Council adoption.

This is a correct copy of Council action.

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Linda M. Lauer, Clerk of the Council

ATTACHMENT 4

MONTGOMERY COUNTY PLANNING BOARD

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

March 12, 2007

Marilyn J. Praisner
President
Montgomery County Council
Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850

SUBJECT: Planning Board Recommendations regarding the Ad Hoc Agricultural Policy Working Group Report

Dear Ms. Praisner:

On a motion by Commissioner Wellington, seconded by Commissioner Robinson, the Planning Board on March 8 voted 3-0 (Commissioners Hanson, Robinson, Wellington; Commissioners Purdue and Bryant absent) to transmit the following comments to the County Council regarding the Report and Recommendations of the Ad Hoc Agricultural Policy Working Group. This was the Planning Board's second work session on the Working Group's Report, having taken straw votes on the major themes during its discussion of March 1, 2007. The planning staff memorandum for the March 8, 2007 work session is attached for your information. During the first work session, the Planning Board votes on all but one key theme were 5-0. The following comments therefore reflect the Planning Board's unanimous views on most of the major issues, with a vote of 4-1 on the sand mound issue.

The Planning Board commends the Working Group for producing a thoughtful report on the array of issues facing the Agricultural Reserve. That the 15 members of the Group addressed all of these complex and inter-related issues in the relatively short time frame set by the County Council speaks very highly of their dedication, knowledge, energy and motivation.

The Planning Board also appreciates that all members of the Working Group 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. The Planning Board shares these views, and while generally agreeing with the Working Group on the building lot termination and expanded TDR programs, we arrived at different conclusions on the child lot and sand mound issues.

8787 Georgia Avenue, Silver Spring, Maryland 20910 Chairman's Office: 301.495.4605 Fax: 301.495.1320
www.MCParkandPlanning.org E-Mail: mcp-chairman@mncppc.org

100% recycled paper

All these issues are inextricably linked. Terminating the large number of buildable development rights is an important means of resolving or diminishing the sand mound and child lot issues. Reciprocally, resolving the other two issues will help address the issue of buildable lots.

Building Lot Termination (BLT) Easement Program

The goals and purpose of a BLT program are to reduce potential development and prevent fragmentation of farmland in the Agricultural Reserve and to provide financial incentives that offer an attractive alternative to development.

After discussion with several members of the Working Group and County and County Council staff regarding criteria for eligibility, priority, compensation, funding and procedures, the Planning Board concurred with all of the Working Group's recommendations regarding the proposed Building Lot Termination (BLT) easement program, except for one. Contrary to the Working Group's position, the Board recommends that sand mounds should not be used in determining the existence of a buildable lot. The objective of the master plan is to limit residential development in the Agricultural protection area of the Reserve to the natural holding capacity of the land. Thus, buildable lots are those that can be served by traditional deep trench septic systems rather than by any other sanitation systems, whether classified as alternative or conventional.

Expanded Transferable Development Rights Program

On March 1, 2007, the Planning Board agreed that the identification of TDR receiving areas would be studied in the context of the Annual Growth Policy as well as individual Master Plans.

The Working Group endorsed several recommendations made by the 2002 TDR Task Force, and recommended several changes to the current TDR program. The Planning Board supports all of the following recommendations:

- Continue implementing a system that tracks the use of TDRs; submit annual TDR reports to the Council.
- Draft amendments to the Zoning Ordinance and Subdivision Regulations to require excess TDR receiving capacity in floating zones, research and development, certain commercial, industrial, and mixed-use zones.
- Create a program by which TDRs on commercial and industrial properties will purchase buildable TDRs instead of excess TDRs.
- Eliminate the requirement that receiving areas use 2/3 of the possible TDRs.
- Develop inter-jurisdictional TDR programs with municipalities.
- Maximize the placement of TDR receiving areas during master plan review.

Child Lots

The first question in dealing with any land use matter is whether it furthers the goals of the Master Plan and the purposes of the zone. The existing exemption for child lots involves only the dimensional requirements of the RDT Zone. That each such lot requires the use of a development right does not, in itself, justify creating any lots, child or market, that exceed the base density of the zone (i.e. 1 residence: 25 acres.) The purpose of the exemption was to permit a child that would participate in the farming enterprise to reside on the land with the owner-parent. It recognized that in time, the excess family residence might be sold to someone outside the family, but by allowing a residence for a child to be built on an acre, the farm would not have to be divided among family members.

There is no justification for reading the ordinance, as it has been done, to allow densities in excess of 1:25, or to permit a lot per child, regardless of the number of children, in excess of, and in addition to, market lots at full density. As historically construed, this practice would permit an owner with 10 children and 100 acres to have 14 lots with a density of 1 residence for each 7.17 acres. This is clearly contrary to the intent of the zone with regard to density, protection against fragmentation of the critical mass of agricultural land, and, especially, with regard to giving primacy to agricultural uses.

The prime example of this in a recent case is the Copenhaver subdivision proposal, which would have placed five child lots on 42 acres, and have retained the rights to sell one additional market lot. While this subdivision was denied on grounds that the decedent owners had made no written statement of their desire to create the lots, it nonetheless illustrates the folly of the current practice. Another subdivision, which has been deferred indefinitely, would have created five child lots in addition to a permitted three market lots on 80+ acres, with an average residential density of 1:10 acres.

The fact that this practice has been permitted in the past is no justification for continuing it, a position endorsed in testimony before the Planning Board from 60 organizations and individuals. The practice has nothing to do with equity for farmers, as it discriminates against farm families that are not as procreative as others. Its purpose was to facilitate intergenerational transfer of the farm within the family, not to provide a windfall for owners with large families, by which they could increase the number of market lots, even if they have to wait five years to sell some of them.

The Working Group's proposal that the lot must be recorded in the child's name and the owner must file an affidavit swearing his/her intention to own the property for at least five years, is no assurance of fulfillment of the intent of the provision. Because of restraints on the alienation of property, ownership cannot be enforced, and even if it could be, the objective is not *occupancy* by a child, but participation in the farming enterprise. We appreciate the effort of the working group to try to find a measure that might restrain the "flipping" of child lots onto the market, but reluctantly conclude that such measures are more symbolic than enforceable.

The Planning Board believes that allowing a farm owner to build a home for a child remains a reasonable goal. Allowing the number of such homes to exceed the base density is not. It is a loophole for subdivision. ***The Planning Board recommends that the child lot exemption of the RDT Zone be amended to include the same provision that is provided in the Rural Zone (i.e. that the total number of lots created from a parcel, including child lots, must not exceed the density limitations of the zone.)*** The Planning Board strongly recommends that the current practice be discontinued and intends to do so in its review of applications for subdivisions that include child lots.

If the County Council does not concur with the Board on this proposal, it should, at a minimum, amend the ordinance to make it crystal clear that only child lots exceed base density, and that in no case should the ordinance allow the creation of any market lots if the number of child lots on a tract exceeds base density. Pages 3-5 of the planning staff memorandum of March 5, 2007, give a more detailed explication of this option, with an illustrative table and graphics.

The Planning Board disagrees with the Working Group's recommendations regarding the provision of public water service to child lots. We find no reason to extend water and sewer service into the Reserve, period. We recommend that the Ten Year Water and Sewerage Plan should be amended so that it is consistent with the Master Plan for the Preservation of Agriculture and Rural Open Space with respect to child lots.

Sand Mounds

The Working Group's majority proposal would allow one sand mound per 25 acres for the first 75 acres, then one for each 50 acres thereafter. The minority recommended one mound per 50 acres. All agreed on their use (or other alternative technologies to trench septics) for failing systems, tenant homes on a common lot, and to locate a residence on poorer soils to protect better agricultural soils.

By a 4-1 majority (Commissioners Hanson, Robinson, Perdue, Wellington), the Planning Board strongly recommends that all alternative technologies to trench systems should be prohibited in the Agricultural Reserve (RDT Zone) except for the following situations, and for parcels existing as of December 1, 2006: (Commissioner Bryant dissented, preferring the Working Group majority's position.)

- 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 houses to preserve agriculture.
- For child lots, which meet the Board's recommendations, above, and where they are approved under the Agricultural Easement Program MALPF/AEP.

- For bona fide tenant housing. Sand mounds should be approved for bona fide tenant housing if 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 any permitted agricultural use under the zoning regulations (e.g., farm market).
- For the purpose of qualifying for a State or County easement program.

The Planning Board also recommends use of alternative technologies, when necessary, for agriculture-related commercial activities.

As discussed above, the Planning Board does not recommend sand mounds or other alternative technologies for the purpose of qualifying for the Building Lot Termination program; or for properties where there has been a significant investment in testing for sand mounds prior to the adoption of these new restrictions. There is no good reason for grandfathering holes in the ground.

The use of sand mounds instead of deep trench septic systems to produce residential subdivisions has had a pernicious effect on the Agricultural Reserve. It has reduced willingness to sell development rights for land that cannot meet perc tests for deep trench septic systems, and has inflated speculative land values in the Reserve, raising expectations that every acre should be valued at its development rather than its agricultural value. This impedes the ability of new farmers to buy farmland and, thus, works against sustaining farming in the Reserve.

The argument that inflated land values produced by the ability to build on sand mounds is part of the landowner's equity and, thus, must be protected is specious. Permitting sand mounds without restrictions provide a windfall to land owners by creating an expectation that every parcel might achieve its full zoning density.

The source of the problem is paragraph 2 of the Action section of Council Resolution 12-1503 of February 22, 1994, (Attachment 1) which, in part:

> "......encourages the Department of Health to exercise flexibility provided for in the regulation, and to explore with applicants ways in which particular site restrictions may be dealt with to allow development allowed by zoning to be constructed."

The same paragraph also requested that a statement attached to the resolution on the regulation of sand mounds be considered when applications for sand mounds were being reviewed. That statement of the Health Department Policy concluded that:

"It is the purpose and intent of the Health Department to render friendly and helpful assistance to citizen landowners to the end that they may use their property as permitted by zoning laws provided there is no significant health risk."

The Planning Board strongly recommends that Council Resolution 12-1503 of February 22, 1994, be amended to remove paragraph 2 and the attachment. Determining the density of a subdivision is not a function of the Department of Health or the Department of Permitting Services. It is the responsibility of the Planning Board in the approval of subdivisions to ensure that they are consistent with the Master Plan. While a subdivision must conform to the zone in which it is located, the density limitations of the zone are not an entitlement, but an upper limit, and each subdivision must conform to the Master Plan and meet any other applicable regulations. While the resolution cannot amend the Master Plan, it has been interpreted that way, and, at a minimum, it presents an inconsistency in County policy toward development in the Agricultural Reserve. To remove that inconsistency, the resolution should be amended to conform with, and to be consistent with, the Master Plan.

One issue raised concerning sand mounds is whether the County may provide more strict regulation of their use rather than the State; i.e., has the State pre-empted this arena of regulation by declaring that sand mounds are now "conventional" technology?

It has not. The leading case on Maryland pre-emption doctrine is *Ad+Soil, Inc. v County Commissioners of Queen Anne's County*, 307Md.307, 503 A.2d 893 (1986), which held that the State has not pre-empted local regulation unless the General Assembly has expressly occupied the field by prohibiting local legislation or has created a comprehensive regulatory scheme that clearly implies a legislative purpose to occupy the field, and preclude all local regulation. The legislation clearly does not pre-empt the field, contemplating instead substantial County participation in the regulatory scheme. First of all, the statute explicitly prohibits State regulations that would prevent counties from enacting greater or supplementary protections in its sanitary regulations:

> Any rule or regulation adopted under this subtitle does not limit or supersede any other county, municipal, or State law, rule, or regulation that provides greater protection to the public health, safety, or welfare. Md. Code § 9-502 (c) *Conflict with other laws, rules, or regulations.*

The law requires counties to submit their plans to the planning agencies with jurisdiction for review and comment, and that the planning agency "shall certify that the plan, revision, or amendment is consistent with the county comprehensive plan..." (Md. Code § 9-506.) A separate section imposes this duty on M-NCPPC in Montgomery County and Prince George's County (Md. Code § 9-516.) These statutory provisions strongly support the position that there was no legislative intent to occupy the field, but rather, that there a wide range of discretion, collaboration and cooperation has been afforded the counties in the development of plans and regulations governing sanitary policies.

The regulations adopted by the Maryland Department of Environment reinforce this view. The preface to the Department of Environment regulations governing water supply, sewerage, solid waste, and pollution control planning and funding states:

> "It is the intent of these regulations to require the governing body of each county and Baltimore City to develop water supply and sewerage systems so as to be consistent with county comprehensive planning."

Code of Maryland Regulations § 26.03.01.02A re-emphasizes the point:

> *"The objective of the county [water supply and sewerage] plan is to develop the water supply and sewerage systems in a way consistent with county comprehensive planning. The plan shall be used as a tool to implement the county development policy...."* (Italics added)

And § 26.03.01.02 D provides:

> "Every official planning agency having any immediate jurisdiction in a county, including those comprehensive planning agencies with multi-county or regional jurisdiction, shall be consulted by the governing body in connection with the preparation, amendment, or revision of county plans. A statement that the above agencies have been consulted shall be attached."

The State has not, therefore, either by statute or regulation, pre-empted county discretion in the use of sewerage technologies. Moreover, it has required that the water and sewerage plan be consistent with the County's comprehensive plan, since it is a means of implementing that plan.

From a planning perspective, if we can withhold the highest technology, public sewer, from an area, either temporarily or permanently, by placing it in Category 6, we surely can withhold other alternative technologies, as long as we provide for the use of measures that ensure the public health. Whether land is zoned RDT, RC, RE-2, RE-1, I-1, or R-200, it can be denied sewer or any other technology that would prevent it developing to the full capacity of the zoning envelope. All land is subject to a variety of regulations, of which zoning is only one. Environmental regulations may prevent development on slopes, flood plains, wetlands, or forests. Requirements of access and road dedications, provision of parks and school sites, or issues of compatibility with surrounding communities may also reduce the lot yield of a tract of land.

This is a long way of returning to the basic issue addressed in the Working Group report: Should sand mounds be regarded as "conventional" technology, equivalent to deep trench septic systems for purposes of serving residential development in the RDT Zone? Both the majority and minority of the Working Group have, by implication, answered in the negative. The majority would allow sand mounds to be used only on each additional 50 acres after one for each 25 acres of the first 75 acres. The minority

would limit their use to one mound for each 50 acres. The issue, therefore, is not whether to restrict their use, but to what degree? Both the majority and minority, however, tend to miss the central point of the Agriculture and Rural Open Space Master Plan and the RDT Zone. It is not a residential zone. It is an agricultural zone. Its purpose is not to facilitate residential development, but to protect agricultural land for present and future farming.

PENDING LEGISLATION

The Planning Board supports the Working Group recommendation that 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 should be limited to single family, and agricultural and agricultural-related uses only.

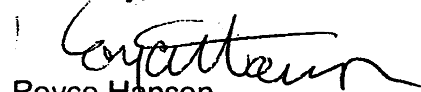
ADDITIONAL ISSUES

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. The Working Group considered that a broader comprehensive review of policies and laws related to the Agricultural Reserve was necessary and suggested a range of issues that should be considered, including some preliminary thoughts on right-to-farm legislation, education strategies, and design standards. The Working Group concluded their Report with an expanded list of other issues regarding zoning, tenant homes, rustic roads, and economic viability to be addressed in any comprehensive consideration of the sustainability and vibrancy of Montgomery County's Agricultural Reserve.

The Planning Board concurs that each of the above issues should be addressed in a comprehensive study of the Agricultural Reserve, and recommends that the most appropriate instrument would be an update of the 1980 Master Plan for the Preservation of Agriculture & Rural Open Space.

The Planning Board looks forward to working with the County Council on resolution of these critically important issues for the Agricultural Reserve.

Sincerely,



Royce Hanson
Chairman

cc: PHED Committee & Staff
Attachment: Staff Report
RH:CM:ha