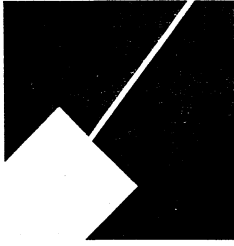


M-NCPPC



**MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING**

THE MARYLAND-NATIONAL CAPITAL  
PARK AND PLANNING COMMISSION

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December 2, 2005

**MEMORANDUM**

**TO:** Montgomery County Planning Board

**VIA:** John A. Carter, Chief *JAC*  
Community-Based Planning Division

**FROM:** Judy Daniel, Rural Area Team Leader (301-495-4559)  
Community-Based Planning Division *JD*

**SUBJECT:** Zoning Text Amendment – Modifications to Child Lot Provisions in the RDT Zone

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**RECOMMENDATION:** Approval to transmit to Montgomery County Council.

Transmit a zoning text amendment intended to rectify certain ambiguities and provide tools to assist in the regulation of child lots in the RDT Zone, including the following major elements:

1. Improved enforcement tools
  - a. Requiring notation on the record plat of lot ownership and development rights used
  - b. Requiring proof of relationship and submittal of an affidavit at time of application for subdivision
  - c. Establishing a five year ownership requirement
  - d. Clarifying that only one lot is allowed per child anywhere in the county
  - e. Defining ownership criteria and proportionate ownership provisions
  - f. Establishing the Department of Permitting Services as the agency charged with enforcing the ownership requirement
2. Establishing a farmland preservation review standard
3. Establishing a sunset provision for the creation of child lots in 2011
4. Clarifying that child lots are exempt from density requirements of the RDT Zone

**INTRODUCTION**

A child lot provision, granting preferential density for the children of property owners, was included in the creation of the Rural Density Transfer (RDT) Zone. It virtually duplicates the child lot provisions in the prior Rural Zone. There is no specific language in the Master Plan regarding the intent for the child lot policy, but the staff believes that the generally accepted intent of such provisions is to allow children of land owning families to live "on the land" as an extended family unit; not as a means to avoid the density intended for the zone for the purpose of creating for-profit subdivision lots for family members.

Child lot provisions are not a recent development. The County Council (and the predecessor of the M-NCPPC in the rural area - the Upper Montgomery County Planning Commission) included provisions in the Zoning Ordinance regarding "downzoning" of property to allow property owners who acquired their property before the zoning change to create lots for their children under the area and dimensional requirements of the prior zoning classification. The staff believes that this was based on farming family traditions of creating lots off the primary farm to allow younger families to remain nearby to help with the farming operation even if it was not their full time employment.

The lack of specific language in the Zoning Ordinance clarifying the intent for the provision has caused increasing concern and confusion in recent years. The ambiguous language has always caused concern that this privilege would be abused by a few, and that concern has increased. The primary concern has been property owners who have "flipped" these lots – deeding them to their children who then immediately sold them as building lots, rather than building their home on the family land. Another perceived problem has been that loose enforcement has led to families getting more lots than should have been allowed. There have been a few cases of documented problems with approved subdivisions (in particular the 1999 Wooden Property case); but several other proposed subdivisions that have caused concern were ultimately not approved.

While research on the history of the child lots is important (and underway), the staff believes that it is more important to modify the regulations for the future than to wait until research is complete on past subdivisions. In preparing these recommendations, the staff has considered the intent of this provision regarding density, and what regulations are needed to better enforce these subdivisions. It must be clearly established whether child lots are exempted from the base density of the RDT Zone; and, if so, whether restrictions should be placed on that exemption.

The Research and Technology Center is working with the Development Review Division to document the number of child lots that have been created since the adoption of the RDT Zone. They are being added to a database created to track child lot subdivisions including the size of the divided property, the number of development rights on the property at time of subdivision, the number of lots created, the name of the "child" receiving the lot, and the number of development rights assigned to the subdivision and the number of development rights remaining on the property after subdivision.

The records from 1981 to 1999 have been confirmed, and research on the residual records is underway. As noted in the attached report on child lot history, research to date indicates that 36 subdivision plans containing child lots, contained 77 child lots out of 142 total lots that were approved in the 18 years between 1981 and 1999, as compared to 127 total subdivision plans representing 389 lots approved in the RDT Zone in that period.

While there may have been a few instances of abuse of this privilege in the past, the modifications proposed combined with improved records will ensure this will no longer occur. That report also attempts to estimate the number of properties remaining where potential child lots may still be created, concluding that the number is approximately 148 parcels (it is not possible to determine the number of "children" within those families).

## BACKGROUND AND ANALYSIS

The Zoning Ordinance contains the following language regarding the child lot provision in the Rural Density Transfer Zone:

### *59-C-9.74 Exempted lots and parcels – RDT Zone*

- (a) The number of lots created for children in accordance with the Maryland Agricultural Land Preservation Foundation Program must not exceed the development rights 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 requirement of the zone applicable to them prior to their classification in the Rural Density Transfer Zone.*

\* \* \*

- (4) A lot created for use as a one-family residence by a child, or the spouse of a child, of the property owner, provided that the following conditions are met:*
  - i. The property owner can establish that he had legal title on or before the approval date of the sectional map amendment which initially zoned the property to the Rural Density Transfer Zone; and*
  - ii. This provision applies to only one such lot for each child of the property owner; and*
  - iii. Any lots created for use for one-family residence by children of the property owner must not exceed the number of development rights for the property.*

Very similar language is contained in the other agricultural zones (the Rural and Rural Cluster Zones). And Section 59-A-2.1 defines a child as *"..a legitimate child, an adopted child, and an illegitimate child. A child does not include a stepchild, a foster child, or a grandchild or more remote descendent."*

These provisions do not provide clarity as to the specific intent of the exemption. The staff believes that guidance in interpretation can be found in the "intent" clause for the zone (59-C-9.23) that states (emphasis added):

*The intent of this zone is to **promote agriculture as the primary land use** in sections of the County designated in the General Plan and the Functional Master Plan for the Preservation of Agricultural 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.***

The staff believes that the language in these sections leads to several conclusions. If agriculture is the preferred and primary land use, then it should follow that the primary rationale for the child lot provision is to allow farming families to stay together; not to provide all RDT property owners in 1981 with ability to circumvent the intent of the zone and the Master Plan and reap more profit from the sale of this land than otherwise possible – and particularly if the child lot provision renders the property in question realistically unusable for agricultural purposes. Current practices for child lots are:

- A. Affidavits from property owners attesting to the number of children in the family receiving lots and the existence of TDRs on the property for the lots are required prior to platting; but no proof of relationship has been required.
- B. The number of child lots being created is noted on the record plat.
- C. Density allowed reflects the base density plus child lots, for example, child lots are exempted from base density of the RDT Zone but are subject to the density limitations in the prior zone.
- D. The intent has been assumed to be for a child to build a home and live in it. A child applying for a building permit must provide an affidavit to the Department of Permitting Services attesting that the lot was created per the requirements in the Zoning Ordinance for a dwelling unit that the child will occupy. Other than this building permit oversight, little else has been done to ensure the child actually occupies the constructed house.

Extensive background information regarding the child lots has been supplied to the staff from the Conservation Federation of Maryland (CFM) and For A Rural Montgomery (F.A.R.M.) (attached to this report). The document outlines their concerns regarding the child lot issue and recommends implementation of a policy as a solution.

The staff appreciates this research and concurs with several of their recommendations for remedying the current concerns in regard to the need to preclude abuse of the child lot policy through “lot flipping”, although the staff concludes that a zoning text amendment is required instead of a policy. *Please note that in quoting from this report the staff has replaced the incorrect term “tot lots” with the legal term “child lots”.*

## DISCUSSION

The staff believes that it is important at this time to modify the text of the Zoning Ordinance to clearly define rules for the review of child lot subdivisions in order to remove ambiguity and establish enforcement methods that will ensure compliance with the intent of the provision. The staff believes the child lot provisions must clearly reflect the intent of the zone and the Master Plan. With this rationale, the staff recommends the following elements be incorporated into the Zoning Ordinance to regulate child lot subdivision of land (as shown in the attached proposed zoning text amendment):

### A. Clarification of Intent

The staff recommends that the initial clause for the child lot provisions be modified to clearly reflect that they are exempt from “*density*” rather than “*area and dimensional*” requirements. As discussed below, this is the only logical exemption given the lot size flexibility of the RDT Zone.

When the Rural Zone child lot provision was replicated for the RDT Zone, the staff believes that it was intended to allow the prior density (1 dwelling per 5 acres) to be granted to a property owner for the child, as that is the only logical extension since the RDT Zone allows flexible lot sizes. This is also the interpretation that has been consistently applied by the Planning Board since 1981.

Unfortunately, the Zoning Ordinance language reflects only the previously used “*area and dimension*” language which relates to zones based on lot size, rather than the actual “*density*” element that is pertinent for property in the RDT Zone and its flexible lot sizes. Reading it only as an exemption to the “*area and dimension*” requirements makes no sense in the context of the RDT Zone child lots because the prior Rural Zone<sup>1</sup> is more restrictive on lot size than the RDT Zone. Adding to the confusion is the language at Section 59-C-9.41 (Density in the RDT Zone) which does not expressly exclude child lots from the 1 dwelling per 25-acre density requirement.

Further, the staff recommends that the provision be clearly limited to only one lot per child – regardless of how many properties are owned. This has been the generally accepted practice, but it should be codified.

### B. Enforcement Tools

The staff recommends that the zoning language include stricter requirements for establishing ownership history, verifying relationship to the children who will be the recipient of the property, and establishing stronger enforcement tools to ensure that the child lot is actually used by the “child”. These modifications will provide better enforcement tools:

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<sup>1</sup> Minimum lot size in the Rural Zone is 5 acres, while the minimum lot size in the RDT Zone is only 40,000 square feet.

1. Requiring notation of the development rights used and the name of the child receiving the lot on the Record Plat
2. Establishing a definition of "property owner" for the child lot provisions
3. Requiring both affidavits and proof of relationship at time of application for subdivision
4. Establishing an ownership requirement of 5 years from the approved final inspection

**C. Proportionate Ownership Provision**

In order to clarify the number of lots that may be created, the staff recommends that if a property is owned jointly, it be assumed that ownership will be considered evenly split between the owners on an acreage basis unless specified otherwise in a will or other legal document. Allowed density for child lots will be determined according to the acreage ownership established. This provision would clear up ambiguities that have led to subdivision proposals that have seemed to distort the intent of the child lot provision.

**D. Length of Ownership Provision**

The staff believes that the regulations should reflect the relationship between the key phrase "*the use of*" in the exemption clause, and the stated intent of the zone. If child lots are allowed to be "flipped" to create a salable subdivision lot, then the only "use" the child would have would be monetary; and the staff believes that action is contrary to the intent of the zone and master plan for land in the RDT Zone. If the "child" actually "uses" the property to construct a dwelling and own it for an established period of time, then the staff believes that the intent is satisfied.

The staff further believes that it is appropriate to use the length of time for ownership of the dwelling established by the Maryland Agricultural Land Preservation Foundation (MALPF) for the creation of child lots on properties on which it holds easements. MALPF requires ownership of the lot for five years before selling<sup>2</sup>, unless: (1) MALPF approves an earlier release, or (2) a lender forecloses on a mortgage during that period.

Since the child lot provision grants higher density status as a privilege for pre-1980 property owners, the staff believes that there are also responsibilities to the public interest inherent in that privilege. A primary responsibility is that the lot created should truly be for the construction of a dwelling for the child of the property owner, not a windfall profit for those with many children.

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<sup>2</sup> The 5-year period commences upon release of the property from the easement, which requires proof of issuance of a building permit to the child for the construction of a dwelling.

**E. Farmland Preservation vs. Subdivision Creation**

Perhaps the most difficult provision to establish is the need to consider the impact of child lots, which can exceed the zone density, on the potential for agricultural use of the property. Since the Planning Board is still wrestling with the idea of how much land is needed to support farming, what types of farming are viable on smaller properties, and to what extent zoning and subdivision can support the potential for farming, it is very difficult to establish objective criteria.

But it is important to consider this element, because clearly there was not an intention to allow the elimination of farms through the child lot provision. While this consideration primarily would impact owners of smaller farms with large families, it must be taken into consideration because of the stated intent of the zone. Therefore, the staff recommends that a provision be added to the Zoning Ordinance establishing that a proposed subdivision using child lots that precludes, for all practical purposes, the reasonable ability to farm on all of the resulting lots, may be denied. This is necessarily a subjective provision, but since there is no agreed definition of how much land is necessary to viably engage in agriculture, it is not possible to set objective standards.

**F. Sunset Provision**

The number of property owners with an interest dating to before 1981 is declining, and will continue to decline over time. The zoning provision should reflect this reality and establish a "sunset" date for the child lot provision. The staff recommends that a 30-year timeframe is sufficient for any child lots to be created, and that a January 6, 2011 date for expiration of the child lot provision should be included in the Zoning Ordinance.

**G. Density Restriction for Child Lots**

The staff also considered the longstanding interpretation of the additional density provision, but has not recommended a modification of the established interpretation and practice, which has allowed child lots to be approved above the base density of the property.

In evaluating the density interpretation, the staff considered a report (attached) submitted to the staff from the Conservation Federation of Maryland (CFM) and For A Rural Montgomery (F.A.R.M) which contends that the property owner should only receive additional child lots that are above the base density of the zone, not any child lots in addition to the base density in the zone. These groups contend that the general exemption clause for the RDT Zone (Section 59-C-9.1) only specifically exempts a "farm tenant dwelling, farm tenant mobile home, or guest house", and that child lots cannot be included within that definition by inference from the language of Section 59-C-9.74. The report states (page 7):

*“While Section 59-C-9.74 (b)(4)(iii) does allow the number of [child] lots to exceed the regular density applicable to the RDT Zone, there is absolutely nothing that can be pointed to which would exempt [child] lots from the total mix of maximum allowed density in the event of future or simultaneous subdivision and marketing of additional lots of a particular property.”*

The Planning Board and staff have never interpreted these clauses in this way, and it is an important distinction. Under this interpretation, if the family clearly establishes that they have “X” children, they are entitled to 1 lot for each child (as long as they have sufficient TDRs on the property for each lot) – but not one lot for each child in addition to their 25 acre density lots.

For example, for a 100-acre property and a family with 6 children, this logic would allow up to 6 lots – either 4 market lots and 2 child lots or 4 child lots and 2 market lots - providing they have 6 TDRs available for these lots of the 20 that would be assigned to the property).

The report exposes certain ambiguities in the Zoning Ordinance, and questions the Planning Board’s longstanding application of the child lot provision. The staff seeks the Planning Board’s guidance concerning the interpretation of these provisions. The Planning Board can either confirm its current interpretation and practice, or consider the alternative interpretation forwarded by CFM and F.A.R.M., which would reduce the number of child lots allowed in certain instances. In either case, the staff recommends a change to the zoning language to clarify the intent regarding density and bolster the enforceability of the child lot provisions. If the Planning Board agrees with the conclusions of the CFM and F.A.R.M. interpretation, the following language would be substituted for clause 59-C-9.74 (C) (2)(v) in the attached zoning text amendment:

*The number of lots created as child lots are inclusive of the base density of the zone, not in addition to the base density;*

The staff notes that the current interpretation has allowed families to both subdivide at the base density and create additional lots for their children. It has allowed a substantial financial benefit to those with children. If the Planning Board wishes to include this modification it will limit the number of market rate lots that can be created by a property owner wishing to create child lots.



## **CONCLUSION**

The staff believes that the recommendations for zoning language changes will establish a proper regulatory framework for the creation of child lots in the RDT Zone, will clarify ambiguity in the current language, and will improve enforcement in the future. Many interested stakeholders have reviewed this policy during the meetings held during the past two months in conjunction with the review of other agricultural preservation initiatives, and the staff believes it important for the Planning Board to move forward on this recommendation.

While there has been general (if not universal) support for better regulation of the child lot provision; there will almost certainly be opposition to the proposed establishment of a more limited provision for allowing additional density than has been the practice in the past, and the provision to require all child lot subdivisions to be proposed based on the original 1981 configuration of the property.

JD:ha: j:\2005 staff reports\Child Lot ZTA Report

### Attachments

- Circle 11 Sample Child Lot Affidavit Form
- Circle 12 Sample Record Plat with Child Lot Note
- Circle 13 Staff Memo – RDT Child Lot Research
- Circle 15 CFM and F.A.R.M. Report
- Circle 28 Proposed Zoning Text Amendment