

MEMORANDUM

June 20, 2006

TO: Ad Hoc Agricultural Policy Working Group

FROM: Marlene Michaelson, Senior Legislative Analyst *MM*
Jeff Zyontz, Council Analyst *JZ*
Amanda White, Council Legal Analyst *AW*

SUBJECT: June 26 Meeting

Our next meeting is scheduled for June 26, 2006 from 4:00 p.m. to 6:00 p.m. in Room A at the Upcounty Regional Services Center.

Attached are the background materials for this meeting. These include the following:

- An agenda.
- Minutes from the last 2 meetings (since the Group did not approve the minutes from the first meeting when you met on the 12th).
- A staff Policy Paper on Child Lot Issues.

The date for the tour will be the morning on Saturday, July 15. Specific times will be set after we finish planning the route. Several Group members have contacted us with suggestions for sites to see on the tour. If you have any additional suggestions, please let us know.

AGENDA
AD HOC AGRICULTURAL POLICY WORKING GROUP

Monday, June 26, 2006
Upcounty Regional Services Center
4:00 to 6:00 p.m.

- 4:00 **Review and Approval of May 25 and June 12, 2006 Meeting Minutes**
- 4:05 **Child Lots**
- 6:00 **Adjourn**

**AD HOC AGRICULTURAL POLICY
WORKING GROUP MINUTES**

Thursday, May 25, 2006
4:04 P.M. to 6:15 P.M.

Up-County Regional Services Center Room A

PRESENT

Working Group Members

Lib Tolbert, Chair	Scott Fosler, Vice-Chair
Wade Butler	Margaret Chasson
Jim Clifford	Nancy Dacek
Jane Evans	Robert Goldberg
Tom Hoffman	Jim O'Connell
Michael Rubin	Pam Saul
Drew Stabler	Billy Willard
Wendy Perdue	

Montgomery County and State Staff

Nancy Aldous, County Council	Jeremy Criss, County Department of Economic Development
Justina Ferber, County Council	Marlene Michaelson, County Council
Karl Moritz, M-NCPPC	Amanda White, County Council
Jeff Zyontz, County Council	

ABSENT

Bou Carlisle

GUESTS

Council President George Leventhal Councilmember Nancy Floreen

Councilmember Nancy Floreen gave opening remarks thanking the working group members for serving on the group; and encouraging the group to work through the issues the Council identified in the resolution establishing the working group (Resolution 15-1395).

Council President George Leventhal gave opening remarks thanking the working group members for serving on the group; requesting group members listen to one another, especially during contentious and heated discussions; and expressing the Council's intent to rely on the group's findings and recommendations.

Working Group members and County staff gave introductions.

The group discussed and unanimously agreed that a bus tour of the Agriculture Reserve would be beneficial; and requested County staff make the necessary arrangements, including stopping at a few farms. Group members requested the tour show both farms and development in the Agriculture Reserve and include areas from both sides of the Agriculture Reserve.

The group discussed, but did not definitively decide, how the group should operate (e.g., should the group take official votes). The group contemplated whether it should adopt a policy statement that states the group supports the agricultural industry as a whole. The group did not decide whether or not to adopt a statement, but the sentiment of the group was that they supported the agriculture industry generally.

Ms. Tolbert reminded the group that members could request information regarding agriculture issues from County staff.

Working group members identified what they thought were the important issues facing the Agriculture Reserve. Group members identified the following different issues/perspectives:

- Protect the Agriculture Reserve. Are we planning for the facilities/uses that are encroaching on the Agriculture Reserve? Concern that in the future there will be an effort to open the Agriculture Reserve (especially if it is open space and not agriculture). How big is the threat to the Agriculture Reserve?
- Support the agricultural industry.
- Allow agriculture to evolve. Need to be able to use new technologies as they come out.
- Development: Prevent fragmentation of land. Need to get owners to participate in programs rather than selling lots for development. Find alternative ways to provide value of the land without subdividing (option for lease revenues). Must cluster development – not have 25-acre lots. Find ways to encourage moderate housing instead of “McMansions”.
- Planning: What was the intent of the Master Plan? Has the interpretation been consistent? How do agriculture issues fit into M-NCPPC’s planning framework?
- Need background on earlier decisions related to the Agriculture Reserve.
- How does the big picture relate to building lot termination and transferable development rights issues?
- Farmer/landowner equity and economics. Preserving agriculture. Need to maintain current farms. Need to keep agriculture economically viable.
- Land equity – it is unfair to implement policies that decrease equity.
- Educate the public. Many people do not realize the Agriculture Reserve exists. “Keep It Simple” - most people don’t understand the County’s zoning strategies.
- TDR issues.
- Sand mounds: They are sometimes necessary because owners cannot always get a perk, even on large tracts of land. Discussions about sewer, septic, and sand mound issues must involve the underlying policy goals. The answer to the sand mound problem is not a simple yes or no – must find a way to maintain large contiguous areas of land (with

smaller lots for development). There is a problem when land cannot perk and there are no options for septic, but too many sand mounds is also a problem.

- Rustic roads.
- Tech Way.
- Child lots: How many child lots are there?
- Natural resources.
- Different views of purpose of the Agriculture Reserve (open space v. agriculture). Sometimes these views are in harmony and sometimes they are not. The core of the Agriculture Master Plan was agriculture, but there are also goals for open space and environmental protection. Park and Planning should not own the whole western area of the County.
- Need to maintain support of entire County.
- Right to farm. What is the place of non-agriculture uses?
- Enforcement of existing laws.
- Don't keep doing things the same way if they are wrong.

The group discussed the frequency, time, and location of meetings and decided that subsequent meetings will be held on Mondays from 4:00 p.m. to 6:00 p.m., beginning June 12.

Audience members submitted the following suggestions:

- Develop a Growth Management Plan by 2040 – where the demands for housing is going to be influenced by an aging population, migration should be to smaller lots. Pressure will be reducing in the Agriculture Reserve and the threat may be over-stated. Focus on equity and compensation to reduce immediate threat to conversion as the community ages (urban services needs will dictate the growth pattern).
- Require education program for new residents of the Agriculture Reserve. The program should educate new residents on farming issues and farming practices in rural Montgomery County.
- County Charter Amendment to limit changes in zoning of the Agriculture Reserve (RDT).
- Local Right-to-Farm legislation is needed in the zoning ordinance.
- Set up a Policy like fire equipment where the County buys large agricultural equipment (combines, tractors, etc.) to be used by farmers (like the fire trucks).
- Montgomery County Economic Development Fund (a low interest revolving fund) that farmers can use for land, equipment, seed, etc.

Minutes written by: Amanda White, Council Legal Analyst

**AD HOC AGRICULTURAL POLICY
WORKING GROUP MINUTES**

Monday, June 12, 2006

4:00 P.M. to 5:58 P.M.

Up-County Regional Services Center Room A

PRESENT

Working Group Members

Lib Tolbert, Chair

Scott Fosler, Vice-Chair

Wade Butler

Margaret Chasson

Bou Carlisle

Nancy Dacek

Jane Evans

Robert Goldberg

Tom Hoffman

Jim O'Connell

Michael Rubin

Pam Saul

Drew Stabler

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Nancy Aldous, County Council

Jeremy Criss, County Department of
Economic Development

Justina Ferber, County Council

Marlene Michaelson, County Council

Karl Moritz, M-NCPPC

Doug Tregoning, Montgomery
Cooperative Extension

Amanda White, County Council

Jeff Zyontz, County Council

ABSENT

Jim Clifford

The Group discussed the General Principles staff summarized from the May 25, 2006 meeting and did not take any action, but may refer to the principles, or revise them, in the future.

The Group requested a briefing on what economic viability means for farmers in the Agricultural Reserve.

The Group discussed potential "right-to-farm" legislation. The Group did not recommend the Council enact right-to-farm legislation because current county and state law provides farmers adequate protection from nuisance lawsuits. Additionally, data compiled by the Department of Environmental Protection indicate that there is not a widespread problem. Instead, the Group recommended the Council enact legislation requiring disclosure for homes being sold in agricultural zones informing potential homebuyers of current county and state law protecting farmers from nuisance claims.

The Group remained concerned that as development in the Agricultural Reserve increases, the number of complaints lodged against farmers is likely to increase. Therefore, the Group recommended exploring a variety of options to inform county residents when they enter the Agricultural Reserve (e.g., signs). Group members suggested recommending the Council consider passing a resolution affirming the right-to-farm in the Agricultural Reserve if the number of complaints continues to increase. If the Council opts to enact right-to-farm legislation, the Group opposed the use of grievance procedures because these procedures tend to favor homebuyers and disfavor farmers.

The Group discussed potential tour dates and, upon a vote, indicated a slight preference for July 15 (subsequently additional members expressed to Staff a preference for the 15th).

The Group discussed the schedule for future meetings and generally supported the staff proposal. Staff suggested the following order for issues the Group will discuss: child lots, TDR tracking issues; building lot termination (BLT) program (and other programs to limit or discourage full build-out), sewer and water strategies (sand mounds), review of pending legislation, identification of topics for further study, and review of the Group report. One group member preferred to discuss sand mounds before the BLT program. The Group also felt that some Group time should be devoted to the economic issues that farmers face. Some Group members felt that the Group should consider broad policy objectives and alternative options before addressing the specifics of the BLT program.

Minutes written by: Amanda White, Council Legal Analyst

STAFF POLICY PAPER
CHILD LOTS IN THE RDT ZONE
Agricultural Preservation Working Group
June 26, 2006 Meeting

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STAFF POLICY PAPER
CHILD LOTS IN THE RDT ZONE
Draft Date: June 16, 2006

ISSUE: Should the Zoning Ordinance or practices concerning child lots be changed?

PROBLEM STATEMENT

The Zoning Ordinance language on child lots in the RDT zone is unclear and subject to multiple interpretations. Questions have been raised on the wording and the intent of the Zoning Ordinance with regard to density and use. The Planning Board is discussing possible changes to the long-standing interpretations of the Zoning Ordinance's child lot provisions in the RDT zone.

There are no restrictions on the transfer of child lots to third parties after building permits are issued. Child lots created outside of the MALPF program are not restricted in any manner after a building permit is issued. The lack of restrictions on child lots could increase the number of houses in the RDT zone.

Child lots are currently part of a long-term landowner's land use opportunities. Restrictions on the creation of child lots or their use could result in less land value to qualifying owners.

EXISTING ORDINANCE OR REGULATION

The following section concerns the text of the Zoning Ordinance. It is an examination of the zoning code's child lot provisions, definitions, and rules of interpretation. It highlights how the Zoning Ordinance can be read. It is not intended to advocate a particular interpretation. The section thereafter describes how the provisions of the Zoning Ordinance have been put into practice. Policy options are then presented for your consideration.

How does the Zoning Ordinance permit the creation of child lots?

Child lots are a creation of the Zoning Ordinance.¹ There are two exemption provisions for creating child lots in the RDT zone. A child lot can be created through the Maryland Agricultural Land Preservation Program (MALPF).² A child lot can also be created directly in the process of subdivision.

¹ Child lots are not confined to the RDT zone. They are also allowed in the Rural Cluster and Rural Zones. Child lots are a "grandfathering" of development rights, for some long-time landowners whose property was down-zoned.

² Montgomery County Code §59-C-9.74 (a) The Maryland Agricultural Land Preservation Program, in existence since 1977, is one of the most successful programs of its kind in the country. Its primary purpose is to preserve sufficient agricultural land to maintain a viable local base of food and fiber production for the present and future

What is required for MALPF child lots by the Ordinance and state law?

The Zoning Ordinance for the MALPF child lots states:

The number of lots created for children in accordance with the Maryland Agricultural Land Preservation Program must not exceed the development rights assigned to the property.³

The Maryland Agricultural Land Preservation Program promotes the creation of easements on agricultural land through the Maryland Agricultural Land Preservation Foundation (MALPF). MALPF easements are more restrictive than zoning. The easement itself becomes the guiding document which details what permissible density there is (if any) and under what circumstances that density can be achieved.

The program permits lots to be released from the MALPF easements “only for the landowner who originally sold an easement, 1 acre or less for the purpose of constructing a dwelling house for the use only of that landowner or child of the landowner, up to a maximum of three lots.”⁴ For MALPF child lots, “the resulting density on the property shall be less than the density allowed under zoning of the property before the Foundation purchased the easement.”⁵ By regulations, child lots under MALPF also require approval of the county planning and zoning department.⁶ That approval is given through the subdivision process.

Under the negotiated easement sold by the landowner through MALPF, the transfer of a child lot to a third party is prohibited within five years from the release of the MALPF easement, unless a transfer is specifically approved. The reasons for approving a transfer, includes such things as death or bankruptcy.

What is required for RDT Zone child lots permitted by the subdivision process?

The Zoning Ordinance provision permits an “exemption” of lots “for use for a one-family residence by a child, or the spouse of a child, of the property owner”.⁷ There are conditions on the ability of a landowner to create these lots.

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

* * *

citizens of Maryland. The Program consists of two basic steps: the establishment of agricultural preservation districts, and the purchase of perpetual agricultural conservation easements. The Maryland Agricultural Land Preservation Foundation administers the easement program (MALPF). Hereafter the Maryland Agricultural Land Preservation Program will be referred to as MALPF.

³ Ibid

⁴ Maryland Code Agriculture §2-513 (b) 2

⁵ Maryland Code Agriculture §2-513 (b) 3 (i)

⁶ Code of Maryland Regulations 15 § 01.17 (c) 1 (c)

⁷ Montgomery County Code §59-C-9.74 (b) 4

(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.⁸

* * *

(4) A lot created for use for 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 Zone⁹;

(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.

The Zoning Ordinance treats the titled owners of property before the RDT zone was applied (January 6, 1981) differently than owners who purchased property with notice of the RDT standards. In order to qualify for child lots, the titled owner in 1981 must still be the titled owner of the property.¹⁰

The maximum number of child lots cannot be greater than the number of TDRs (development rights) retained on the site.¹¹ Child 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.”**¹² The Rural Density Transfer zone permits a density of one dwelling for every 25 acres. Property owners were assigned TDRs at the rate of one TDR for every five acres. Before the RDT zone, property was zoned Rural which had a density of one dwelling for every five acres.

What is different in the Zoning Ordinance between MALPF child lots and subdivision created child lots?

Both provisions for child lots caution that the lots created “must not exceed the number of development right assigned to the property.”¹³ There is no mention of the relationship between the “exempted” lots and overall density in either provision. However, only the subdivision created child lot provision states that child lots are specifically exempted from area and

⁸ Typically RDT zoned land was Rural zoned land with a permitted density of one dwelling for every five acres.

⁹ The approved date of the sectional map amendment is January 6, 1981.

¹⁰ Montgomery County Code §59-C-9.74 (b) 4 (i)

¹¹ Montgomery County Code §59-C-9.74 (b) 4 (iii)

¹² Montgomery County Code §59-C-9.74 (b)

¹³ Montgomery County Code §59-C-9.74 (a) and §59-C-9.74 (b) 4 (iii) “for the property” instead of “assigned to the property”

dimension requirements. MALPF child lots can never produce more lots than allowed by the underlying zoning density.

The Zoning Ordinance sometimes uses the word "children" and other times uses the word "child." The MALPF exemption is "for lots created for children". The subdivision exemption is for the residence "of a child". Some have questioned if the word difference means that a subdivision child lot could only be for one child. The subdivision child lot however permits a lot for each child.¹⁴ The Zoning Ordinance's rule of interpretation in any event would read the singular "child" as a plural "children".¹⁵

What does the Zoning Ordinance say about the density of dwelling units?

There is a separate section of the Zoning Ordinance that establishes the maximum density in the RDT zone.

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 in RDT zone.

Only one one-family dwelling unit per 25 acres is permitted. (See section 59-C-9.6 for permitted transferable density.) The following dwelling units on land in the RDT zone are excluded from this calculation, provided that the use remains accessory to a farm. Once the property is subdivided, the dwelling is not excluded:

- (a) A farm tenant dwelling, farm tenant mobile home or guest house as defined in section 59-A-2.1, title "Definitions."
- (b) An accessory apartment or accessory dwelling regulated by the special exception provisions of division 59-G-1 and 59-G-2.

Generally, the maximum density is one dwelling for every 25 acres of land.¹⁶ There are only two noted exclusions to that density: farm tenant dwellings and accessory apartments. The provision for child lots is not stated as exclusion to the density standard where the other exclusions are noted. However, the density requirements "**apply in all cases, except as specified in...the exemption provisions**".¹⁷ The exemption provisions include child lots. As noted above for subdivision created child lots, the only exemption specified within the exemptions section is from "area and dimensions," not density.

¹⁴ Montgomery County Code §59-C-9.74 (b) 4 (ii)

¹⁵ Montgomery County Code §59-A-2.2 (a)

¹⁶ Montgomery County Code §59-C-9.41

¹⁷ Montgomery County Code §59-C-9.4

The Zoning Ordinance is unclear on whether child lots can be in addition to the general permissible “market” density of one dwelling for every 25 acres. The Zoning Ordinance offers two methods to create lots: 1) exceptions to density (pre-existing parcels and child lots as a matter of practice) and 2) regular density (“market” lots - one dwelling for every 25 acres). If a land owner can use both methods of creating lots independent of one another than the land owner can get one lot for every child PLUS one lot for every 25 acres. (Example: On a 50-acre parcel of a long-term owner who has three children, this interpretation would permit 5 lots total. Three child lot plus 2 market lots equals five.) If a land owner may only use one method of creating lots to establish density, then the land owner would get either child lots OR market lots, whichever was greater. (Same example: On a 50-acre parcel of a long-term owner who has three children, this interpretation would permit 3 lots. The three lots from child lots are greater than two market lots.) If the child lot provision is only an exception for the purpose of area and dimensions, the density is limited to one dwelling for every 25 acres. (Same example: On a 50 acre parcel of a long term owner who has three children, this interpretation would permit two lots. The three child lots is greater than the two market lots.)

The Ordinance does not say that “excepted” dwellings are the exclusive way to develop. It is also true that the Ordinance does not explicitly state that development can use both methods of creating lots.

What does the Zoning Ordinance say about the “use” of child lots?

The Zoning Ordinance permits the creation of a child lot “for use for a one-family residence by a child, or the spouse of a child”.¹⁸ [Emphasis added.] The word “use” is defined in the Zoning Ordinance.

Use: Except as otherwise provided, the principal purpose for which a lot or the main building thereon is designed, arranged, or intended, and for which it is or may be used, occupied, or maintained.¹⁹

There is nothing in the Zoning Ordinance limiting the ownership of child lots, limiting the transfer of child lots to third parties, or requiring any notation on the record plat concerning child lots.

How has the Planning Board interpreted RDT density and use? How has the Planning Board interpreted child lot density?

Child lots in the RDT zone have been permitted to exceed the density of one dwelling for 25 acres. A Montgomery County Planning Board publication that attempts “to give a simple and accurate explanation of how TDR and other related land preservation systems affect property owners” makes this point clear. A Planning Board publication titled Plowing New Ground states:

¹⁸ Montgomery County Code §59-C-9.74 (b)4

¹⁹ Montgomery County Code §59-A-2.1

If the lots created are for the children of property owners of record before January 6, 1981, lots can be created at the density one dwelling per five acres of the previous Rural Zone, but there must be a TDR for each lot.²⁰

Child lots in the RDT zone have been allowed in addition to the density of one dwelling for 25 acres. (On a 50-acre parcel of a long-term owner who has three children, the Planning Board has permitted 5 lots total.) Planning Board staff confirmed that allowing child lots in addition to the lot permitted be one per 25-acre density has been the practice of the Planning Board since the application of the RDT zone in 1981.²¹

Specifically, the Board has constantly interpreted and applied the language in Division 59-C-9 as permitting child lots to be created in addition to the base zone density of one unit per twenty-five acres. An original tract owner (who meets the eligibility requirements) may create a lot for each child or the spouse of a child plus "market" lots up to the base density, provided the total number of lots do not exceed the number of TDRs (one per five acres) available for the original tract.²²

How has the Planning Board interpreted the "use" requirement for child lots?

When a subdivision application includes child lots in the RDT zone, the Planning Board requires an affidavit from the landowner.²³ The landowner is required to swear that any lot created is for their child or the spouse of a child. An affidavit is also required at record plat confirming that the building will be for the use of the children of the spouse of the children of the landowner. More recently, building permits are being checked to ensure that the permit is, in fact being issued to the child of the property owner. There have been instances where the County has refused to issue a building permit on a child lot to a non-child. (As noted in the attached materials, one citizen group has claimed that the Planning Board has approved child lots even when the property owner has not sworn that the lots are for his children.²⁴)

There have been no prohibitions or restrictions placed on the sale of child lots by the Planning Board at the time of subdivision approval. The Planning Board is discussing changing their practice.

ACTIVITY UNDER THE EXISTING ORDINANCE

What has happened with child lots since 1981?

Since 1981, 95 child lots have been created within 46 subdivisions in the RDT Zone. That equates to an average of two child lots per plan, whenever a subdivision plan has any child lots.

²⁰ Montgomery County Planning Board, "Plowing New Ground", page 10, 2001 revised edition

²¹ Planning Staff memo, Ganassa property, February 16, 2006

²² Planning Staff memo, Ganassa property, February 16, 2006, page 5

²³ This long-standing practice is not a literal requirement of the Zoning Ordinance.

²⁴ "Abuse of Children's Lots in the Rural Transfer Zone", September 29, 2005, Page 8.

There have been a total of 532 lots created by 162 RDT zoned subdivisions since 1981. Child lots represent 18% of the total number of lots created in the zone.

More than half of the subdivisions that contained a child lot (27) included only one child lot. No subdivision created more than five child lots. Thirteen subdivisions created between three and five child lots.²⁵

<u>Number of Child Lots Created</u>	<u>Number of Subdivisions with Child Lots</u>	
1	27	(55%)
2	9	(18%)
3	5	(10%)
4	5	(10%)
5	3	(6%)

Why are there allegations of abuse?

The accusations of child lot “abuse” relate to differing interpretations of the Zoning Ordinance. These interpretations have tried to ascertain the “intent” of the Ordinance. The following paragraphs are intended to illustrate the spectrum of interpretations.

There are property owners who firmly believe that the child lot provision should not require the child to live in a home on the property. Some believe that “use” can include selling the lot or building a home and selling the improved property to third parties. (Since the zoning ordinance’s definition of “use” includes the words “use, occupy or maintain”, it appears that occupancy is not the sole meaning of use.²⁶) Some believe that child lots were part of the bargain in agreeing to the RDT down zoning. Meeting the qualifying conditions for child lots (ownership since 1981, the possession of TDRs and children) are the only conditions that should apply. Others claim that the original intent was to provide a home for a child who intended to continue farming or support their parents with their presence on a family estate.

Some people recognize that landowners in the RDT include non-farmers who qualify for child lots. These people would say that there is an implication in the Zoning Ordinance that a child lot is abused whenever it does not result in a child of a long-term landowner, living on the lot.

Other people believe that the Ordinance requires more than being a long-term landowner, having TDRs and having children. They believe that promoting agriculture is the key intent of the Zoning Ordinance and therefore child lots should only be available to land in farming production. To some, anything other than a child of a farmer, living on the farm as a long-term member of the agricultural community is an abuse of the child lot provision.

What is currently before the Planning Board?

A subdivision application is pending before the Planning Board that involves a large family seeking child lots (Ganassa Property subdivision number 1-2004064). The applicant uses what

²⁵ Memo from Judy Daniel to Faroll Hamer, “Child Lot Statistics Summary – Updated” February 7, 2006

²⁶ Montgomery County Zoning Ordinance 59-A-2.1

has been the standard interpretation since 1981, of child lots plus the “market” allowable density. On a parcel of 81 acres, the applicant is requesting 5 child lots plus 3 “market” lots for a total of 8 lots. The interpretation that child lots are allowed in addition to the one per 25-acre “market” lots is being challenged. The decision was deferred at the request of the applicant after a lengthy discussion before the Planning Board.²⁷ The Planning Board discussions have centered on interpreting the intent of the Zoning Ordinance from the words of the Ordinance. There has been little focus on the merits of changing their long-standing interpretation.

The Planning Board staff has made recommendations to the Planning Board on changing the child lot provisions in the RDT zone.²⁸ The Council has not received the Planning Board’s recommendation on the staff proposal. The Planning Board has deferred further consideration of the child lot issue in deference to the work of this committee.

These Planning Board staff recommendations are included for information purposes for the Working Group. The recommended changes are intended to clarify ambiguities in the existing language, codifying established policy, strengthening enforcement provisions, and establishing some new policy. In summary they:

1. Clarify that child lots may be exempted from the density requirements of the RDT Zone
2. Establish that child lots may be created for the child or the spouse of a child of the property owner – but not both, and require that child lots be restricted to properties that are agriculturally assessed
3. Establish a minimum age of 18 to receive a child lot
4. Establish requirements to aid enforcement (*reflecting long standing practice*) related to affidavits, beneficiaries, and building permits
5. Establish eligibility for child lots (*reflecting existing practice*) in situations where two or more family members hold an undivided interest in a property
6. Establish a definition for the term “property owner” (*reflecting existing practice*) as used for the child lot provision
7. Establish a density policy for child lots that allows continuation of the current practice (child lots plus market lots) for one year; then a new policy that limits future child lots density (child lots that exceed market lots)
8. Establish a new “sunset” provision for the creation of child lots in the RDT Zone of five years from the adoption of that clause
9. Establish a new requirement that any child lots be approved during the lifetime of the property owner
10. Establish a new residency requirement of five years for recipients of child lots
11. Establish new standards for the design of child lot subdivisions designed to preserve the agricultural potential and environmental features of the property
12. Add minor technical language modifications to Section 59-C-9.74(a)(2) and (3)

²⁷ Planning Board agenda February 16, 2006

²⁸ Memo from Judy Daniel to Montgomery County Planning Board, December 2, 2005

Expected future activity under current interpretation

The Planning Board staff and the Department of Economic Development staff have developed an inventory of RDT properties eligible for child lots. The best available information suggests that there are 99 RDT zoned properties, 10 acres or more in size, that have not transferred ownership since January 6, 1981.²⁹ There are 4,993 acres within those parcels. **More than half of those properties (53) are less than 25 acres.**

The number of owner's children limits the number of possible child lots. Based upon the experience of the program to date, the average number of child lots per owner is two. Two times the 99 (the number of properties) equals **198 possible child lots.**

The property owners that had legal title since 1981 are now approaching retirement age or are likely already retired. An increase in the number of subdivisions including child lots is foreseeable in the future. At some point, however, the child lots will be a self-extinguishing phenomenon. The continuous owners of property since 1981 are a set of individuals that will diminish to zero over the course of time. The number of children from that set of owners will peak at some point in time (if it has not done so already). There is still an open question on whether a child lot can be created by a will (after the death of a long time owner) when property is owned with rights of survivorship. Given the existing text of the Ordinance, this question will be answered by an interpretation of the phrase "title". Can the survivor of jointly owned property or an estate, meet the requirement to have had "title" to the property in 1981?³⁰ The Planning Board has not been presented a subdivision with the issue of child lots created after the death of an owner.³¹

ALTERNATIVES

- 1) **Do nothing**
- 2) **Eliminate the provision for creating more child lots**
- 3) **Modify the existing text in the Zoning Ordinance in the following areas: (Modifications can be made either to codify established policy or to establish new policy.)**
 - a) Clarify the maximum density of subdivisions with child lots by choosing from one of the following alternatives
 - (i) Child lots plus one dwelling per 25 acres – **existing practice**, or;
 - (ii) The greater of child lots or one dwelling per 25 acres, or;
 - (iii) One dwelling per 25 acres
 - b) Clarify conditions or restriction on using child lots (More than one of these alternatives can be selected.)
 - (i) Require an affidavit at subdivision and check at building permit – **existing practice**

²⁹ A property smaller than 10 acres is not entitled to create a child lot.

³⁰ Montgomery County Code §59-C-9.74 (b) 4 (i)

³¹ This issue was raised in a staff proposed zoning text amendment.

- (ii) Require child (or parent) ownership of the lot
- (iii) Limit the transfer of child lots to third parties (minimum holding period)
- (iv) Limit the creation of child lots to property owners whose land is in agricultural production
- (v) Limit the creation of child lots when they would interfere with agriculture
- (vi) Clarify if child lot can or cannot be created after the death of an of a long-term owner – **no existing practice**
- (vii) Establish at sunset date beyond which child lots would be permitted
- (viii) Clarify that each child in only permitted one child lot

In laying out alternatives, staff is giving the working group a path for its decision-making (particularly if the working group recommends modifications to the Zoning Ordinance). If either the wisdom of the committee is to recommend no changes to the Zoning Ordinance or to eliminate the child lot provisions of the Ordinance, there are no “details” to discuss. Modifications to the Ordinance will take the working group into specific details. Staff has tried to spell out some “obvious” advantages and disadvantages of the full range of alternatives as a starting point for your deliberations.

Advantages and disadvantages of alternatives

1) Do nothing

Advantages

- No legislative change is required
- Ordinance remains the same for interpretation
- No Council change to owner’s equity

Disadvantages

- Density and Use provisions will continue to be subject to different interpretations
- Planning Board interpretation may change
- Owner’s equity may be changed by the Planning Board through a different interpretation
- “Use” administration remains the same
- Existing interpretation and administration could increase fragmentation

2) Eliminate the child lot provision

Advantages

- Reduces additional houses surrounded by farm land
- Eliminates administrative burden
- Eliminates all future “abuse”

Disadvantages

- Reneges on what some landowners view as an equity bargain made at the time the RDT zone was applied
- Reduces land value of long time owners

3) Modify the existing text in the Zoning Ordinance in the following areas:

(a) Clarify the maximum density of subdivisions with child lots by choosing from one of the following alternatives:

- (i) Child lots plus one dwelling per 25 acres – **existing practice or:**
- (ii) The greater of child lots or one dwelling per 25 acres or:
- (iii) One dwelling per 25 acres

Advantages

- Removes ambiguity in the Ordinance
- Permits the Council to express current intent
- Allows the Council to direct Planning Board's interpretation
- Could reduce farmland fragmentation

Disadvantages

- Could reduce land owner equity
- Could lead to new issues of interpretation

(b) Conditions or restriction on using child lots (More than one of these alternatives can be selected)

- (i) Require an affidavit at subdivision and check at building permit – existing practice

Advantages

- Codifies existing practice
- Maintains landowner equity
- No change to administration

Disadvantages

- A failure to take more aggressive action leads to fragmentation
- May lead to residents in the Agricultural Reserve disconnected to agricultural production

- (ii) Require child (or parent) ownership of the lot

Advantages

- Enhances associations with the land
- Clarifies what is intended by the "use" definition in the Ordinance
- May reduce the number of future child lots
- Matches MALPF restrictions

Disadvantages

- Will probably reduce the equity of some landowners
- MALPF is a negotiated easement, this has no compensation for the restriction
- Requires additional administrative burdens
- Require provisions for death and bankruptcy

(iii) Limit transfer of child lots to third parties (minimum holding period)

Advantages

- Enhances associations with the land
- Clarifies what is intended by the “use” definition in the Ordinance
- May reduce the number of future child lots
- Matches MALPF restrictions

Disadvantages

- Could reduce landowner equity
- MALP is a negotiated easement, this has no compensation for the restriction
- Requires additional administrative burdens
- Require provisions for death and bankruptcy

(iv) Limit the creation of child lots to farms or owners of land in agricultural production

Advantages

- Promotes the agricultural industry
- Reduces the potential for further land fragmentation by child lots

Disadvantages

- Reduces land owner equity
- Adds to documentation required to subdivide

(v) Limit the creation of child lots when they would interfere with agriculture

Advantages

- Promotes the agricultural industry
- Reduces the potential for further land fragmentation by child lots

Disadvantages

- Reduces land owner equity
- Adds to documentation required to subdivide

- (vi) Clarify if child lot can or cannot be created after the death of a long-term owner – no existing practice

Advantages

- Aids in establishing expectations

Disadvantages

- Acting in a restrictive manner can create a “land rush”

- (vii) Establish a sunset date beyond which child lots would be permitted

Advantages

- Aids in establishing expectations

Disadvantages

- Acting in a restrictive manner can create a “land rush”

- (viii) Clarify that each child in only permitted one child lot

Advantages

- Aids in establishing expectations
- Conforms to MALPF limits

Disadvantages

- Acting in a restrictive manner can create a “land rush”

STAFF COMMENTS

1) Do nothing

The RDT provisions for child lots are models for ambiguous drafting. Doing nothing will permit the Planning Board to continue to divine the meaning of the Zoning Ordinance. Their interpretation is subject to change over time. Even if the Planning Board does not make any change to its interpretation, courts can be called upon to intervene to establish the meaning of the Ordinance. For the sake of clarity and consistent administration, amendments to the Zoning Ordinance appear warranted.

2) Eliminate the child lot provision

Eliminating the ability to create child lots would fail to recognize the balancing of equities achieved at the adoption of the RDT zone. Child lots have many parallels in the Zoning Ordinance. There are child lot provisions in other large lot zones. In general, permitting child lots is a form of “grandfathering” that continues prior rights for some landowners even though it changes those rights for “new comers”. Child lots may seem generous in maintaining the

density permitted under the prior zone particularly when there are several children. It is not generous, however, from the perspective of the landowner whose land was down zoned.

Eliminating child lots would reduce the dwelling unit potential in the RDT zone by approximately 200 dwelling units. Are the benefits of eliminating child lots worth the loss of good will? Staff would suggest that the juice is not worth the squeeze. There are other appropriate ways to tighten rules that might reduce the number of future child lots.

3) Clarify the Zoning Ordinance's treatment of child lots

Why clarify the Ordinance?

This review of the Zoning Ordinance highlights the areas open for interpretation. There is need for a clarifying amendment. Anyone who is in support of the existing interpretations of the Ordinance should want clarification to avoid a future "reinterpretation" of the ordinance. Anyone who believes that the current interpretation is "in error" can have those errors corrected by a clarification.

People argue about an "abuse" of child lot. The Zoning Ordinance should be clarified on its intent. There are any number of possibilities in making this clarification. Child lots could be pure increases in equity with no restrictions. Child lots could be better linked to agriculture (and be more limited in scope) if they could only be created on land in agricultural production. Whatever the policy, clarity is warranted.

What is the maximum density in the RDT zone with child lots?

When a qualifying owner has less than 25 acres for each child, then the number of child lots possible will exceed the maximum number of dwellings otherwise allowable. If child lots are not permitted to exceed the "market" density of the RDT, then there is no reason to have a separate zoning provision for child lots. As stated above, there are reasons for child lots that are consistent with the purpose of the RDT zone. If child lots have an economic value then they should be allowed more density than "market" density. At the same time, the Ordinance should be clear that only one lot is permitted per child or the spouse of a deceased child.

What happens when child lots exceed "market" dwelling units and market units are requested in addition to child lots? This is a harder question. It is difficult to derive the zoning basis for the Planning Board's past practice of permitting child lots plus "market" density. However, the Planning Board's past practice has been to permit market lots in addition to child lots. This past practice must be acknowledged. Even with the Planning Board's practice, there is an upper limit to density both due to the number of remaining properties/children and because the Zoning Ordinance does not permit more than one unit per five acres no matter how many children are involved.

The number of child lots has no relationship to the size of the property that is creating those lots. Under present practice, a 25 acre farm whose long-term owner has 5 children can create 5 lots. After the creation of those lots, will there be any land remaining in agricultural production?

There are 53 RDT parcels under 25 acres with long term owners. The number of lots created is now limited to the lesser of the number of children of the number of TDRs. It is not presently limited by the ability of some part of the land to be involved in agriculture. Requiring some property to remain capable of agricultural production after the creation of child lots is a policy that has child lots supporting agriculture. The administration of this policy, however would present its own set of problems.

Limit transfer of child lots to third parties (minimum holding period)

A minimum residence requirement for child lots seems to be a missing piece of the puzzle. In the absence of a residence requirement, the intent for a child to use the property can be illusory. The Zoning Ordinance may be clear to some people that the "use" of the property does not include a use for economic gain alone. The MALP process includes a minimum time between the creation of a child lot and the time a child can transfer that lot to a third party.³² The application of the Zoning Ordinance by the Planning Board has required affidavits of intended use but no limitations on ownership or land transfer.

The following presents a line of reasoning that would result in additional restrictions to child lots. The purpose of the RDT zone is "to promote agriculture as the primary land use." Having children on site is an aid to the working farmer. This potential for farming to be aided by children makes child lots with children living on the lots, consistent with the purpose of the RDT zone. One may question if children will do farm work, but there is no question that they can better support their parents who are involved in agriculture when they are nearby.

Relating child lots to land in farm production will get the Working Group into an additional restriction to current law. **The Zoning Ordinance does not say child of a farmer; it identifies the owners of land as landowners since the adoption of the RDT zone.** Clearly, farmers are owners of RDT zoned land but not all owners of RDT zoned land were farmers when the Zoning Ordinance was adopted 25 years ago. When the Zoning Ordinance was written, it was referring to certain rights for landowners of RDT zoned land and not just farmers.

In any event, staff does not believe that it is advisable for the Zoning Ordinance to direct participation in agriculture by a child on a child lot. The administration of such a provision would be difficult at best. A residence requirement seems a sufficient tie to the support of agriculture.

The five-year requirement used by the MALPF seems a reasonable period of time to fulfill the expectations of many readers of the Zoning Ordinance. Staff notes that the entitlement for children's lots for MALPF is vested as a part of a contractual arrangement as a part of the easement acquisition process. The lots, which are reserved within the easement and the

³² The Maryland Agricultural Land Preservation Program is administered by the Maryland Agricultural Land Preservation Foundation (MALPF). MALPF deals with child lots in accordance with the Agricultural Article Title 5 § 2-513 (b)(2) of the Annotated Code of Maryland.

conditions for use, are negotiated between the landowner and the State. That is quite different from rights, which are permitted as a matter of right under zoning. Restricting the transfer period will be viewed as a change from the bargain for equity.

Should the ability to use child lots survive the owner of property?

The issue of permitting child lots after the death of a long-time owner is one of first impression. No subdivisions have presented themselves under those circumstances. If you view child lots solely an increment of land value to the owner, you would be inclined to permit a last will and testament to direct a subdivision. If you view child lots in a more limited fashion, you would want to curtail child lots.

The existing Ordinance is subject to interpretation. Clarifying the Ordinance would be helpful.

OTHER ISSUES

How do child lots relate to BLT's ?

Child lot could become part of the BLT program. If a landowner is entitled to a child lot, the lot can be treated just as any other building lot. This could provide an opportunity to compensate a property owner for a lost child lot if their child does not want to live on the property.

How do child lots relate to sand mound policy?

Child lots cannot be created in the absence of an approved subdivision. Each lot must be able to handle sewage treatment. Some soils are better at handling septic system than others. There are areas of the County where child lots cannot be approved in the absence of sand mound systems. Restrictions of sand mounds may also restrict the possibility of child lots.

ATTACHMENTS

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1

Montgomery County Zoning Ordinance

– Provisions dealing with child lots in the RDT Zone

Division 59-A-2. Definitions and Interpretation.

Sec. 59-A-2.1. Definitions.

In this Chapter, the following words and phrases have the meanings indicated:

* * *

Child: A child includes 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.

* * *

Development rights: The potential for the improvement of a parcel of real property, measured in dwelling units or units of commercial or industrial space, existing because of the zoning classification of the parcel.

* * *

Lot: A parcel of land occupied or to be occupied by a building and its accessory buildings or by group dwellings and their accessory buildings, together with such open spaces as are required under the provisions of this chapter, having at least the minimum area required by this chapter for a lot in the zone in which such lot is situated and having its principal frontage on a public street or public way.

* * *

Lot, record: The land designated as a separate and distinct parcel of land on a legally recorded subdivision plat filed among the land records of the county, but not including land identified on any such plat as an outlot.

* * *

Transfer of development rights: The conveyance of development rights by deed, easement or other legal instrument authorized by local law to another parcel of land and the recordation of that conveyance among the land records of Montgomery County, Maryland.

* * *

Use: Except as otherwise provided, the principal purpose for which a lot or the main building thereon is designed, arranged, or intended, and for which it is or may be used, occupied, or maintained.

* * *

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."

* * *

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 in RDT zone.

Only one one-family dwelling unit per 25 acres is permitted. (See section 59-C-9.6 for permitted transferable density.) The following dwelling units on land in the RDT zone are excluded from this calculation, provided that the use remains accessory to a farm. Once the property is subdivided, the dwelling is not excluded:

- (a) A farm tenant dwelling, farm tenant mobile home or guest house as defined in section 59-A-2.1, title "Definitions."
- (b) An accessory apartment or accessory dwelling regulated by the special exception provisions of division 59-G-1 and 59-G-2.

* * *

Sec. 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) The number of lots created for children in accordance with the Maryland Agricultural Land Preservation 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 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 replatting 2 or more lots; provided that the resulting number of lots is not greater than the number which were replatted.

(4) A lot created for use for 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;

(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.

(Legislative History: Ord. No. 10-69, § 5; Ord. No. 12-1, § 1; Ord. No. 12-76, § 1; Ord. No. 13-13, § 1.)

AFFIDAVIT

I hereby affirm under the penalties of perjury and upon personal knowledge that the following statements are true and accurate:

1. On _____, pursuant to Preliminary Plan # _____, the Montgomery County Planning Board approved the creation of Lot # ____ ("Lot") for use for a one-family residence for a child (or - or spouse of a child) of the property owner under Section 59-C-_____ of the Montgomery County Code.

2. The Lot is in the _____ Zone.

3. I acknowledge that the Lot was created under Section 59-C-_____ for use for a one-family residence by a child (- or - spouse of a child) of the property owner.

4. I own the Lot by virtue of a deed recorded among the Land Records of Montgomery County, Maryland at Liber _____ Folio _____.

5. I am the child of (- or - spouse of a child of) _____, the former property owner.

6. I am creating this Lot for my use for a one-family residence

7. I aver that all of the conditions of Section 59-C-_____ for the creation of the Lot have been met.

Signature (Seal)

Printed Name

SUBSCRIBED AND SWORN to before me, a Notary Public of the State of Maryland this _____ day of _____, 200__.

Notary: _____

My Commission Expires: _____

5

MARYLAND CODE - CHILD LOTS CREATED BY MALPF

§ 2-513. Use of land for which easement purchased

(a) Provisions to be included in easement and county regulations. -- Agricultural land preservation easements may be purchased under this subtitle for any land in agricultural use which meets the minimum criteria established under § 2-509 of this subtitle if the easement and county regulations governing the use of the land include the following provisions:

(1) Any farm use of land is permitted.

(2) Operation at any time of any machinery used in farm production or the primary processing of agricultural products is permitted.

(3) All normal agricultural operations performed in accordance with good husbandry practices which do not cause bodily injury or directly endanger human health are permitted including, but not limited to, sale of farm products produced on the farm where such sales are made.

(b) Use for commercial, industrial, or residential purposes. --

(1) A landowner whose land is subject to an easement may not use the land for any commercial, industrial, or residential purpose except:

(i) As determined by the Foundation, for farm and forest related uses and home occupations; or

(ii) As otherwise provided under this section.

(2) Except as provided in paragraphs (3) and (6) of this subsection, on written application, the Foundation shall release free of easement restrictions only for the landowner who originally sold an easement, 1 acre or less for the purpose of constructing a dwelling house for the use only of that landowner or child of the landowner, up to a maximum of three lots, subject to the following conditions:

(i) The number of lots allowed to be released under this section, except as provided in paragraph (6) of this subsection, may not exceed:

1. 1 lot if the size of the easement property is 20 acres or more but fewer than 70 acres;

2. 2 lots if the size of the easement property is 70 acres or more but fewer than 120 acres; or

3. 3 lots if the size of the easement property is 120 acres or more.

(ii) The resulting density on the property may not exceed the density allowed under zoning of the property before the Foundation purchased the easement.

(iii) The landowner shall pay the State for any acre or portion released at the price per acre that the State paid the owner for the easement.

(iv) Before any conveyance or release, the landowner and the child, if there is a conveyance to a child, shall agree not to subdivide further for residential purposes any acreage allowed to be released. The agreement shall be recorded among the land records where the land is located and shall bind all future owners.

(v) After certifying that the landowner or child of the landowner has met the conditions provided in subparagraphs (i) through (iv) of this paragraph, the Foundation shall issue a preliminary release which shall:

1. Become final when the Foundation receives and certifies a nontransferable building permit in the name of the landowner or child of the landowner for construction of a dwelling house; or

2. Become void upon the death of the person for whose benefit the release was intended if the Foundation has not yet received a building permit as provided in this subparagraph.

(vi) Any release or preliminary release issued under this paragraph shall include:

1. A statement of the conditions under which it was issued, a certification by the Foundation that all necessary conditions for release or preliminary release have been met, and copies of any pertinent documents; and

2. A statement that the owner's or child's lot may not be transferred for 5 years from the date of the final release, except on:

A. Approval by the Foundation; or

B. Notwithstanding any conditions on transfers imposed under item 1 of this subparagraph, a lender providing notice to the Foundation of a transfer pursuant to a bona fide foreclosure of a mortgage or deed of trust or to a deed in lieu of foreclosure.

(vii) Any release, preliminary release, building permit, or other document issued or submitted in accordance with this paragraph shall be recorded among the land records where the land is located and shall bind all future owners.

(viii) The Foundation may not restrict the ability of a landowner who originally sold an easement to acquire a release under this paragraph beyond the requirements provided in this section.

(3) A landowner may reserve the right to exclude 1 unrestricted lot from an easement in lieu of all owner's and children's lots to which the landowner would otherwise be entitled under paragraph (2) of this subsection, subject to the following conditions:

(i) The resulting density on the property shall be less than the density allowed under zoning of the property before the Foundation purchased the easement;

(ii) An unrestricted lot may be subdivided by the landowner from the easement and sold to anyone to construct one residential dwelling;

(iii) The size of an unrestricted lot shall be 1 acre or less, except as provided in paragraph (6) of this subsection;

(iv) The landowner shall agree not to subdivide further for residential purposes any acreage allowed to be released, and the agreement shall be recorded among the land records where the land is located and shall bind all future owners;

(v) The right to the lot is taken into consideration in the appraisal of fair market value and determination of easement value;

(vi) The lot can be subdivided at any time and the location of the lot to be subdivided is subject to the approval of the local agricultural advisory board and the Foundation; and

(vii) If the property is transferred before the right to exclude the lot has been exercised, the right may be transferred with the property.

(4) (i) Subject to the approval of the Foundation, a landowner may construct housing for tenants fully engaged in operation of the farm.

(ii) Construction may not exceed 1 tenant house per 100 acres, unless the Foundation grants an exception based on a showing of compelling need.

(iii) The land on which a tenant house is constructed may not be subdivided or conveyed to any person. In addition, the tenant house may not be conveyed separately from the original parcel.

(iv) The Foundation shall adopt regulations for the size and location of tenant houses.

(5) Except as provided in paragraph (6) of this subsection, on request to the Foundation, an owner may exclude from the easement restrictions 1 acre per each single dwelling, which existed at the time of the sale of the easement, as an owner's, children's, or unrestricted lot to which the owner is entitled under paragraph (2) of this subsection, by a land survey and recordation provided at the expense of the owner. However, before any exclusion is granted, an owner shall agree with the Foundation not to subdivide further for residential purposes any acreage allowed to be released. This agreement shall be recorded among the land records where the land is located and shall bind all future owners.

(6) (i) The restrictions of paragraphs (2) and (5) of this subsection concerning maximum lot sizes are altered so that the maximum lot size is 2 acres if:

1. Regulations adopted by the Department of the Environment require a minimum lot size for a dwelling house of not less than 2 acres in areas where there is less than 4 feet of unsaturated and unconsolidated soil material below the bottom of an on-site sewage disposal system or in areas located within 2,500 feet of the normal water level of an existing or proposed water supply reservoir; or

2. Regulations adopted by the jurisdiction in which the land is situated require that a lot for a dwelling house be larger than 1 acre.

(ii) For exclusions provided under paragraph (5) of this subsection, the landowner shall pay the State for any acre or portion released in excess of the 1 acre per single dwelling that existed at the time of easement.

(7) Abrogated.

(c) Public not granted right of access or of use. -- Purchase of an easement by the Foundation does not grant the public any right of access or right of use of the subject property.

**Underlying Assumptions to Better Understand
The Child Lot Issue**
Prepared by Jeremy V. Criss

- **Why did the farmers support the down zone?**

The farmers acknowledge that the Montgomery County Council had the legal authority to down zone them with no compensation as the Baltimore County Council did to their farmers in 1976 and again in 1979.

In view of the answer and perspectives outlined above the Montgomery County farmers reluctantly supported the down zone in exchange for some level of compensation and the the County Government agreed to provide the:

- ability to create/sell TDRs into Receiving Areas
- child lot exemption from RDT Zone provisions

- **What does child lot exemption from RDT zone provisions mean?**

A. Child lots can exceed the base density of 1 lot per 25 acres.
(100 acres, 6 children = 6 lots)

B. Child lots are authorized in addition to the base density of the RDT zone 1 lot per 25 acres. (100 acres, 6 children + 4 RDT=10 lots)

- **What would the Farmers state as to the historical facts and commitments that were made to them by the County Government 26 years ago?**

The remaining AAC/APAB members from 1980 are outlined below:

They need to be interviewed and have them sign a Proclamation or Affidavit.

Drew Stabler

David Weitzer

William Anderson

Arthur Johnson

Gordon Keys

George Lechliden

Keith Patton

D. J. Willard, Jr.

- **Why have almost all property owners in the RDT zone retained TDRs for both RDT lots and child lots?**

Please refer to the attached Summary of A Montgomery County Planning Board Publication Plowing New Ground 1982 to 2001.

- **Has this issue been raised before?**

Yes, in 1996 the Bruce Wooden property proposed 9 lots on 103.4 acres (5 child lots + 4 RDT lots). This preliminary plan was referred from MNCPPC legal council to the County Attorney's Office and the preliminary plan was subsequently approved.

- **How can the County Government ignore the manner in which child lot preliminary plans of subdivisions have been approved over the past 26 years?**
- **How can the County change the rules of the game after 26 years?**
- **How can the legal practice and precedent of prior approvals be swept aside for a new interpretation of the law?**
 - No child lots have ever been denied.
 - 85% of Preliminary Plans approved represent cases where child lots met or exceeded the RDT base zone density of 1 lot per 25 acres.
 - The remaining 15% of Preliminary Plans were approved where the land owner requested a number of child lots were under the RDT base zone density.
- **Why is there a legal reference in the first place for child lots being exempt from RDT zone provisions?**
- **What does Royce Hanson say about the issue in his February 6, 2006 memorandum?**

The Family Member Lot Issue – The objective of the family lot provision in the Master Plan and zoning ordinance was to permit the creation, on a smaller lot than otherwise required, of a home for a family member that expected to remain on and participate in farming the land. It was limited to those that owned land in 1980 to prevent abuse by subsequent owners that bought farmland with the intent of converting it to subdivisions. In some instances-and an increasing number of them-owners have seen this not as a means of maintaining a family farm, but as a means of subdividing the land for market sale of residences, without so much as having a family member ever take title. The ordinance allows a family lot to be created for every child or spouse of a child, regardless of number, so long as there are still enough untransferred development rights available-one for every five acres. *The exemption for family lots is from the dimensional requirements of the zone, but as written, it permits such lots in excess of the density of 1 residence for each 25 acres so long as there are enough development rights available to provide a dwelling for each child. But there is nothing in the ordinance to support the idea that further market subdivisions of the farm are then possible if the allowable zoning density has been achieved, much less exceeded, by the family lots.* Thus, while it is possible to exceed the zoning density if a farmer has a large number of children, one cannot further fragment the property by selling another lot for each 25 acres. A currently proposed subdivision (Ganassa Property, Case No. 1200040600), for example, asked for 3 market lots on an 80+ acre parcel (the maximum allowed by zoning), and five family member lots, producing a 10-acre subdivision. This violates both the letter and spirit of the law.

- DED believes that Mr. Hanson's view may represent a double-standard that could be in conflict with the practical application of the law.
- No where is it written, in the 1980 Master, in the Plowing New Ground, or the law that child lots are approved for the child to participate in farming the land.
- The County deliberately intended the application of the TDR program at 1 TDR per 5 acres be universally applied to all RDT zoned land with no exceptions.
- The child lot exemption is also universally applied to all RDT zoned land as long as you are the original owner, have children, and you retain a sufficient number of TDRs.
- Mr. Hanson's view on the Child Lot provision may set up a discriminatory standard towards landowners whose families are small. A farmer who owns 100 acres and has 6 children may be permitted as many as 6 homes while a farmer who owns 100 acres and has 4 children may only yield a total of 4 homes. This negatively impacts and possibly discriminates against landowners with small families.

In addition, when you consider a farmer that purchases 100 acres in 1984 is not entitled to child lots, but could yield a total of 4 market lots if the TDRs are retained. This example demonstrates an inequity that would exist impacting landowners who have similar farm sizes and small families which are eligible for child lots under the provision, yet they would not be afforded any market lots depending on the size of the farm, how many children they have and when they purchased the farm.

An important question must be raised. How can a landowner who purchases a property after the down-zoning, be in a more advantageous position economically than a landowner who was subjected to the down-zoning and has maintained ownership? This could very well be the case if we accept Mr. Hanson's view.

- The County has interpreted the current practice of allowing children's lots in addition to market lots because it creates a base zone standard that is fair, equitable and treats all rural landowners equally without discrimination.
- **The only people that can truly attest to the spirit of law are the people that were directly impacted by the RDT down zone.**
 - It is important for you to understand what was taken away from the farmers 26 years ago. (Prior to January 6, 1981, 100 acres could yield

20 market lots) It is apparent that no one today wants to acknowledge this fact in understanding how we got to where we are today.

- **How many potential child lot properties are still out there as a matter of record?**
 - At a minimum 98 parcels totaling 4,960 acres.
 - This number of parcels does not include properties that were refinanced.
- **The DED believes it is time for the County Council to instruct the Planning Board as to the true meaning and intent of the law. This instruction should explain as to how rural landowners have made decisions based on the policies, prior approvals and publications from the Montgomery County Planning Board.**
- **If we cannot agree on the meaning of the existing law, we may need to amend the law for better clarification and meaning. This approach should be considered only if the Planning Board refuses to follow the instructions from the County Council.**
- **Removing the child lot exemption would represent a breach of commitment that was made to the farmers as a means of compensation for the down-zone. The District Council of Montgomery County is the only legal entity that can do this and not the Planning Board.**
- **If it is determined, changing the law to provide an opportunity to consider the residency requirement of the child it would help to address some of the abuse concerns being voiced within the community.**

E:\AgInitiatives\agassistprogs\childlotissue

**Understanding the Child Lot Situation
and How Landowners Make Decisions
Plowing New Ground**

A Montgomery County Planning Board Publication

<u>Copyright</u>	<u>Number Of Question</u>	<u>Page #</u>	<u>Referenced Sections pertaining to Child Lots</u>
1982	#8	2	<p>Are Lots for Children Exempt?</p> <p>Yes, but for each child a development right must be held in reserve for each house to be built on the property. The development rights for children reduce the total number that can be sold from the tract.</p>
1982	#24	5	<p>What Happens to Properties in the Agricultural Reserve which Do Not Now Conform to Provisions of the RDT?</p> <p>Prior to the enactment of the new Rural Density Transfer Zone, and Rural Cluster Zone, buildable lots were created in accordance with the regulations of the original zone. Rather than making these lots unbuildable by the new zones, the old lot is "grandfathered" and can continue indefinitely, governed by the laws under which it was originally established. Thus, the law allows any lot recorded, approved for recordation, or created by deed before January 6, 1981 (enactment date of Sectional Map Amendment), to be exempted from the provisions of the Rural Density Transfer Zone if it was less than 25 acres, and from the provisions of the Rural Cluster Zone it was less than five acres. <u>The final exemption, allowed in both zones, is the creation of one lot <i>only</i> for the child, or spouse of child, of a property owner having title to the property on or before January 6, 1981 (date of Sectional Map Amendment).</u></p>
1986	#8	2	<p>Are Lots For Children Exempt?</p> <p>Yes, but for each house to built on the property for the <u>offspring of the owner</u>, a development right must be held in reserve. The development rights used for children reduce the total number that can be sold from the property.</p>
1986	#26	5	<p>What Happens to Properties In The Agricultural Reserve which Do Not Conform to the Provisions of the RDT Zone?</p>

Same wording as 1982 - No changes

<u>Copyright</u>	<u>Number of Question</u>	<u>Page #</u>	<u>Referenced Sections pertaining to Child Lots</u>
1990	#8	2	<p>Are Lots for Children Exempt?</p> <p>Yes, but for each house to be built on the property for the offspring of the owner, a development right must be held in reserve. The development rights used for children reduce the total number that can be sold from the property. <u>See Question 9.</u></p> <p><i>A new question #9 was added.</i></p>
1990	#9	2	<p>Can the Number of Lots Created for Children Exceed the Density of One Dwelling Unit Per 25 Acres?</p> <p>Yes, provided the lot created is for the child of the property owner who owned the property at the time of the placement of the property in the RDT Zone.</p> <p><i>DED believes this Question 9 was added in 1990 to address the preliminary plans before the Planning Board to provide additional Guidance. If the Planning Board didn't understand the law, this would have been the time to question the interpretation and practical application of the law.</i></p>
1990	#24	5	<p>What Happens to Properties in the Agricultural Reserve Which Do Not Conform to the Provisions of the RDT Zone?</p> <p><i>Same wording as 1982 – No changes</i></p>

<u>Copyright</u>	<u>Number of Question</u>	<u>Page #</u>	<u>Referenced Sections pertaining to Child Lots</u>
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2001 #8 10

Are Lots for the Landowners' Children Exempt?

Maybe, depending on when the property was purchased and the availability of a development right. An exemption is allowed for children of property owners in the RDT Zone prior to January 6, 1981. A development right must be held in reserve for each house built on the property for a child of the owner.

Any development rights used for "child lots" reduce the total number that can be sold from the property. When this application goes through the subdivision process, affidavits will be required to verify that the lots will be used for the landowner's child, and appropriate measures are taken in the land records to restrict development of these properties. Any property owner who purchased land in the RDT Zone after January 6, 1981 is not eligible for a child exemption. See Questions 9 and 23.

2001 #9 10

Can the Number of Lots Created for the Landowner's Children Exceed the Density of One Dwelling Unit per 25 Acres?

If the lots created are for the children of the property owner of record before January 6, 1981 (the time of the placement of the property in the RDT Zone), lots can be created at the density one dwelling per five acres of the previous Rural Zone, but there must be a TDR for each lot.

DED believes that MNCPPC staff memorandum dated December 19, 2005 from Judy Daniel to the Planning Board was incorrect and misinformed the Planning Board. "The staff notes that while it appears that while the density change will change twenty-five years of policy, the language in Plowing New Ground does not support the existing policy." DED believes that if Question #9 had been included in the staff memorandum, the Planning Board would have reached a different conclusion regarding how 25 years of preliminary plans have been approved.

DED believes this Question #9 was further revised in 2001 to reflect the preliminary plans where both Child Lots and RDT lots were requested. This would have provided an additional opportunity in 2001 for the Planning Board to question the interpretation of law.

<u>Copyright</u>	<u>Number of Question</u>	<u>Page #</u>
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2001	#23	14
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Referenced Sections pertaining to Child Lots

What Happens to Properties in the Agricultural Reserve Which Do Not Conform to the Provisions of the RDT Zone?

Prior to the enactment of the [New] Rural Density Transfer Zone, and Rural Cluster Zone, buildable lots were created in accordance with the regulations of the [original] prior Rural zone. Rather than making these lots unbuildable by the new zones, the old lot is "grandfathered" and can continue indefinitely, governed by the laws under which it was originally established. Thus, the law allows any lot recorded, approved for recordation, or created by deed before January 6, 1981 (enactment date of Sectional Map Amendment), to be exempt[ed] from the provisions of the Rural Density Transfer Zone if it was less than 25 acres, and from the provisions of the Rural Cluster Zone if it was less than five acres. No further subdivision of these lots is allowed. However, the final exemption, allowed in both zones, is the creation of one lot *only* for the child, or spouse of child, of a property owner having title to the property on or before January 6, 1981 (date of Sectional Map Amendment).

New wording underlined and Deleted wording bracketed



MEMORANDUM

DATE: June 14, 2006
TO: Jeff Zyontz
FROM: Judy Daniel

SUBJECT: Summary of M-NCPPC staff recommendations for amending the Zoning Ordinance provisions for the creation of child lots in the RDT Zone for the purpose of clarifying ambiguities, codifying established policy, strengthening enforcement of the provision, and establishing new policy

In summary the staff recommended changes:

1. Clarify that child lots may be exempted from the density requirements of the RDT Zone
2. Establish that child lots may be created for the child or the spouse of a child of the property owner – but not both, and require that child lots be restricted to properties that are agriculturally assessed
3. Establish a minimum age of 18 to receive a child lot
4. Establish requirements to aid enforcement (*reflecting long standing practice*) related to affidavits, beneficiaries, and building permits
5. Establish eligibility for child lots (*reflecting existing practice*) in situations where two or more family members hold an undivided interest in a property
6. Establish a definition for the term "property owner" (*reflecting existing practice*) as used for the child lot provision
7. Establish a density policy for child lots that allows continuation of the current practice (child lots plus market lots) for one year; then a new policy that limits future child lots density (child lots that exceed market lots)
8. Establish a new "sunset" provision for the creation of child lots in the RDT Zone of five years from the adoption of that clause
9. Establish a new requirement that any child lots be approved during the lifetime of the property owner
10. Establish a new residency requirement of five years for recipients of child lots
11. Establish new standards for the design of child lot subdivisions designed to preserve the agricultural potential and environmental features of the property
12. Minor technical language modifications to Section 59-C-9.74(a)(2) and (3)

The actual language follows:

1. **Clarify zoning language to specify that child lots are exempt from the density requirements of the RDT Zone.** (Add language to the introductory language of the section referencing the child lot provisions to clarify that density exemptions are possible for child lots.)

Density in RDT Zone (59-C-9.41)

Only one-family dwelling unit per 25 acres is permitted, except as provided in this section and in Section 59-C-9.74(e). (See section 59-C-9.6 for permitted transferable density.) The following dwelling units on land in the RDT zone are excluded from this calculation, provided that the use remains accessory to a farm. Once the property is subdivided, the dwelling is not excluded:

- (a) A farm tenant dwelling, farm tenant mobile home or guest house as defined in section 59-A02.1, title "Definitions."
- (b) An accessory apartment or accessory dwelling regulated by the special exception provisions of division 59-G-1 and 59-G-2.

2. **Modify the exemption zoning language (59-C-9.74) to clearly establish that child lots may be created for the child or the spouse of a child of the property owner – but not both; and include language that requires the creation of child lots to be restricted to properties that are agriculturally assessed:**

59-C-9.74(b)(4): A lot created for use for a one-family residence by either a child (as defined in this Chapter) or the spouse of a child (not both) of a property owner of a parcel of land that is assessed as agricultural land by the Maryland Department of Assessments and Taxation is exempt from the density requirements of Section 59-C-9.41 but must meet the density requirements of the zone applicable prior to classification in the Rural Density Transfer Zone, subject to the following requirements and standards:

3. **Establish a minimum age to receive a child lot:**

59-C-9.74(b)(4)(ii): Only one such lot may be approved in Montgomery County for each child or spouse of a child of the property owner as, and the intended beneficiary must be 18 years of age or older;

4. **Modify the language of 59-C-9.74(b)(4) to include the following requirements that reflect long standing practice related to affidavits, beneficiaries, and building permits:**

- a. The property owner must submit with the application for a preliminary plan of subdivision a notarized affidavit stating the name(s) of each child or spouse of a child to receive a lot, a copy of the birth certificate or adoption documentation for each child and, when applicable, a marriage certificate verifying status of the spouse of a child of the property owner.
- b. The number of development rights used for any lots created shall be noted on the record plat along with the name of the child or spouse of a child who is the intended beneficiary;
- c. At any time prior to issuance of a building permit for the construction of a one-family residence on a lot created under this provision, the intended beneficiary may sell or lease the lot; however the **Department** may not issue a building permit for the construction of any habitable structure to the grantee or lessee of the lot who has acquired a property interest prior to issuance of a building permit to the intended beneficiary. The intended beneficiary of the lot shall file a declaration among the land records of Montgomery County, in a form approved by the Planning Board, agreeing to include a clause in any contract for the sale or lease of the lot prior to issuance of the building permit, notifying any potential grantee or lessee of the above prohibition against the construction of habitable structures on the lot. This restriction shall be noted on the record plat;

For any lot created after *(the date of approval of these modifications)* the **Department** may only issue a building permit for a dwelling on the lot to the child or the spouse of a child designated on the record plat;

5. **Add language to 59-C-9.74(b)(4) to reflect existing policy guiding eligibility for child lots in situations where two or more family members hold an undivided interest in a property eligible for child lots.**

When two or more family members hold an undivided interest in the property, the number of such lots allowed will be based on an equal division of the acres unless the percentage of ownership is otherwise established in a will or other legal document;

6. **Add language to 59-C-9.74(b)(4) to establish a definition for the term "property owner" as used for the child lot provision reflecting existing policy. (There is currently no definition for "property owner" and issues have arisen when a family trust, partnership or other joint ownership existed on the property before the creation of the RDT zone. Existing policy allows each individual named on the family owned entity to be eligible for the child lot provision – but not business corporations.)**

The definition includes persons jointly holding title, a family trust, family partnership or family-owned corporation; provided, however, that only those family trust, family partnership or family-owned corporation members who are clearly named on formation documents; and have held a continuous property interest in the subject property dating back to January 6, 1981 may benefit from this provision. A corporation or similar entity that is not controlled by, or consists solely of family members is not a property owner, as defined in this section;

7. Add language to 59-C-9.74(b)(4) to establish a density policy for child lots:

Until (DATE ONE YEAR FROM DATE OF ADOPTION) lots created under this provision shall be allowed in addition to the lots allowed under the base density of the zone for the subject property. Such lots may exceed the base density only to the extent that development rights remain available for the subject property.

After (DATE ONE YEAR FROM DATE OF ADOPTION) lots created under this provision shall be included in the count of the permissible number of lots under the base density of the zone for the property. However, the number of lots created may exceed the base density to the extent that development rights remain available for the subject property.

(Because it has been over 25 years since the adoption of the RDT Zone the staff believes that it may well be time to modify the density policy and/or consider eliminating this provision. Montgomery County has one of the most liberal policies in the region for child lots, reflecting the intense fiscal impact of the RDT Zone on property owners in 1980. It is clear that the original intent of this provision related to all property owners in the zone, not just farming families.

The staff recognized that either the elimination of the child lot provision (through a short or longer term sunset provision) or a change in the allowed density policy would be very strongly objected to by the agricultural community. And to impose either (or both) with little prior warning, allowing people to propose child lots they have been planning to create, would be strenuously fought by many longtime RDT property owners, who would regard such changes as a broken trust and exacerbate mistrust of the M-NCPPC.

For these reasons, the staff recommended that a change in the density policy should not be imposed without some period to allow subdivisions under the prior policy. Staff recommended establishing a "sunset clause" for the existing policy – allowing up to a year for subdivisions to be submitted. For child lot subdivisions submitted after that date, a new density policy would go into effect.

The staff recommended support for a subsequent density policy allowing child lots to be created in excess of market lots, not in addition to market lots. The staff believes this "two step" process would be more fair to families in the RDT Zone who have been intending to use the process, but did not know that it was coming into question.)

8. **Add language to 59-C-9.74(b)(4) to establish a "sunset" provision for the creation of child lots in the RDT Zone?**

This subsection will be valid until DATE after which new applications for lots created for the use of a child or the spouse of a child of defined property owners will not be accepted.

(The staff recommends that if the density policy is changed with a one year "grace" period, that a "sunset" clause be put into the zoning language with an expiration in five years. The recommendation is derived from a balance between the need to expire this provision, and the need to honor the promises made to the property owners in the RDT Zone.)

9. **Add language to 59-C-9.74(b)(4) to require that any child lots be approved during the lifetime of the property owner.**

The subdivision of the lot(s) must be approved in the lifetime of the property owner.

10. **Add language to 59-C-9.74(b)(4) to establish a residency requirement for recipients of child lots.**

Following issuance of a building permit for the construction of a one-family residence on a lot created under this provision, the intended beneficiary may not sell or lease the lot or any improvements thereon until the fifth anniversary of the date of the final inspection for a single-family residence constructed on the lot, without the written consent of the **Director**, which may be provided upon a showing of good cause or in the event of foreclosure. The intended beneficiary shall file a declaration among the land records of Montgomery County in a form approved by the Planning Board, agreeing to the above restriction and acknowledging the potential penalties to the declarant and any grantee or lessee if the restriction is violated. This restriction shall be noted on the record plat.

Any building permit issued for construction of a one-family residence on a lot created under this provision shall be conditioned upon the restriction that the intended beneficiary may not sell or lease the dwelling for a period of at least 5 years from the date that the Department approved the final inspection for the dwelling. The **Director** may waive the requirements of this subsection for good cause or in the event of foreclosure.

The Department may enforce the restriction against transfer of property interest under the provisions of Section 8-22 of the County Code.

11. Add language to 59-C-9.74(b)(4) to establish standards for the design of child lot subdivisions, intended to preserve the agricultural potential and environmental features of the property?

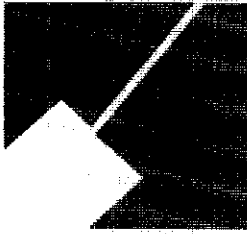
To the greatest extent possible lot(s) should be located to avoid the fragmentation of existing farmfields, pasture, or forest.

(This language reflects the clear intent of the zone and its governing Master Plan. However, given the realities of finding well sites and providing for septic treatment systems, the provision may have practical limitations on its effectiveness.)

12. Technical Language Modifications to section 59-C-9.74(a)(2) and (3):

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

(3) A recorded 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 replatting 2 or more lots; provided that the resulting number of lots is not greater than the number which were replatted.



Staff Memo

Date: February 7, 2006
 To: Faroll Hamer
 CC: Cathy Conlon, Richard Weaver, Tariq El Baba, Matthew Greene,
 Leslie Saville, John Carter
 From: Judy Daniel
 Subject: Child Lot Statistics Summary - Updated

As you requested I evaluated the property information that Matt Greene compiled for the original child lots study. At our previous meeting my understanding was that I would evaluate how many potential child lots might remain to be completed under the following "worst case scenario" criteria:

1. Assuming up to 5 child lot potential for all properties with sufficient TDRs.
2. Assuming a full density benefit – all market lots plus child lots
3. Assuming no criteria for evaluating the property for agriculture

These assumptions mean that I looked at all properties of 10 acres or more, how many dwellings exist on those properties, and how many TDRs remain on the property. The data indicates 93 properties meet those criteria, ranging from 10 to 840 acres in size. My evaluation indicates that these 93 properties would allow a maximum of 298 additional child lots could be created under these parameters. If the smaller properties (10-25 acres) were not included because creating child lots would certainly preclude any reasonable potential for farming, the potential would be 224 child lots.

However, of the 95 child lots created since 1981, the vast majority created groups of 1-2 child lots (see percentage grouping below). Therefore, I believe that the realistic remaining potential for more child lots is substantially lower than either 298 or 224.

<u>Number of Child Lots Created</u>	<u>Number of Subdivisions with Child Lots</u>
1	27 (55%)
2	9 (18%)
3	5 (10%)
4	5 (10%)
5	3 (6%)

To estimate this I calculated the potential remaining child lots with an assumption of the average number of child lots created per subdivision of child lots over the past 25 years, approximately 2 per property. With this assumption, the number of potential future child lots drops to 169 or 90 without the small properties included. The breakdown is:

Further, the 95 child lots created compares to 532 total lots created in 162 subdivisions in the RDT Zone during that period. Thus child lots represent 17.8 % of lots created.

Calculation of Acreage and Percent Reduction of RDT Zone

I have now been requested to determine the impact on acres consumed and the percentage impact on the Agricultural Reserve (primarily the Rural Density Transfer Zone).

Gross Average Calculation

Based on the data already described, the number of remaining child lots that could be created probably ranges from 100 to 200, depending on whether the potential for farming on the parent parcel is considered and the number of children in the affected families. Estimating based on the gross average lot size, taking the potential range of 100 to 200 lots, and the gross average lot size of the lots created is 10.3 acres per lot. With this average lot size, the range of acres impacted would be:

100 lots - 1,030 acres 200 lots - 2,060 acres

Calculating the impact on the Agricultural Reserve (Rural Density Transfer Zone), one can consider the percentage impact on either the approximately 90,000 total acres in the RDT Zone, or the approximately 70,000 acres in the RDT Zone less the acres in public land. This would be:

90,000 total acres in the RDT Zone: 1.1% - 2.3%
 70,000 privately owned acres in the RDT Zone: 1.5% - 2.9%

Finer Grain Calculation

The records of approved child lots indicate that the gross average size of lots in child lot subdivisions 10.3 acres, but this may be more accurately calculated by considering the percentage sizes of lot approved:

53% smaller than 10 acres, with average lot size of 5.8 acres
 37% smaller than 20 acres, with average lot size of 11 acres
 10% at 20 acres or larger, with average lot size of 21.5 acres

The finer grained estimate calculates the possible acreage loss based on a breakdown of average lot sizes approved in the three categories noted above:

100 lots	53% = 53 lots at 5.8 acres	307.4 acres
	37% = 37 lots at 11 acres	407.0 acres
	10% = 10 lots at 21.5 acres	<u>215.0 acres</u>
Total:		929.4
200 lots	53% = 106 lots at 5.8 acres	614.8 acres
	37% = 75 lots at 11 acres	825.0 acres
	10% = 20 lots at 21.5 acres	<u>430.0 acres</u>
Total:		1,869.8

(25)

Calculating the impact on the Agricultural Reserve (Rural Density Transfer Zone), comparing the approximately 90,000 total acres in the RDT Zone, and the approximately 70,000 acres in the RDT Zone less the acres in public land:

90,000 total acres in the RDT Zone:	1.0% - 2.1%
70,000 privately owned acres in the RDT Zone:	1.3% - 2.7%

Comparison

Comparing these two calculation methods reveals:

Acres Consumed

	Gross Average	Refined Average
Lots	Acres	Acres
100	1,030	929.4
200	2,060	1,869.8

Percent Loss of RDT Acres	Under	Under
	Gross Average	Refined Average
90,000 total acres:	1.1% - 2.3%	1.0% - 2.1%
70,000 privately owned acres:	1.5% - 2.9%	1.3% - 2.7%

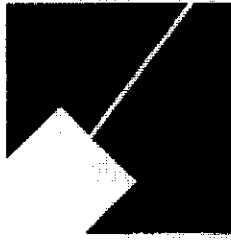
Conclusion

The number of remaining child lots that could be created probably ranges from 100 to 200, depending on whether the potential for farming on the parent parcel is considered and the number of children in the affected families.

The potential acreage loss ranges from almost 930 acres to over 2,000 acres. The potential percentage loss of land in the RDT Zone to development from child lots ranges from just a 1% to almost 3%. This is a wide range of loss, reflecting the amount of uncertainty about how to calculate these lots.

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M-NCPPC



MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING

**THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION**

8787 Georgia Avenue
Silver Spring, Maryland 20910-3760
301-495-4500, www.mncppc.org

**MCPB
Item #6
2/16/06**



MEMORANDUM

DATE: February 3, 2006

TO: Montgomery County Planning Board

VIA: Rose Krasnow, Chief *RK*
Development Review Division

Catherine Conlon, Supervisor *CC*
Development Review

FROM: Richard A. Weaver, Coordinator (301) 495-4544 *RW*
Development Review Division

REVIEW TYPE: Preliminary Plan Review

APPLYING FOR: Subdivision of Eight Lots (5 Child Lots)

PROJECT NAME: Ganassa Property

CASE #: 120040600 (formerly 1-04060)

REVIEW BASIS: Chapter 50, Montgomery County Subdivision Regulations

ZONE: RDT

LOCATION: Located on the west side of Halterman Road approximately 2,000 feet north of New Hampshire Avenue (MD 650) a.k.a. Damascus Road

MASTER PLAN: Agricultural and Rural Open Space (AROS)

APPLICANT: Antonia and Vera Ganassa

ENGINEER: Tri-County Surveys

FILING DATE: March 22, 2004

HEARING DATE: January 19, 2006

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STAFF RECOMMENDATION: Approval, pursuant to Chapter 50 of the Montgomery County Code, of eight lots and one outlot, including five "child lots" pursuant to Section 59-C-9.74 (b)(4) of the Zoning Ordinance, and subject to the following conditions:

- 1) Approval under this preliminary plan is limited to eight one-family residential dwelling units.
- 2) Record plat to include the following note: "Lot Nos. ___ ___ ___ and ___ are being created under Section 59-C-9.74 (b)(4) for use for a one-family residence by a child, or the spouse of a child, of the property owner." Separate notation to be made on each child lot shown on the plat(s) referencing this note.
- 3) Prior to issuance of building permit for a one-family residence on a lot created pursuant to Code Section 59-C-9.74(b)(4), each child for whose benefit such a lot was created shall submit an affidavit to DPS and MNCPPC staff, in a form approved by MNCPPC staff, attesting, among other things, that the affiant is a child of the Applicant.
- 4) Compliance with the conditions of approval of the preliminary forest conservation plan. The applicant must satisfy all conditions prior to recording of plat(s) or MCDPS issuance of sediment and erosion control permits, as applicable.
- 5) If any house on proposed lots 2 through 7 are sited within 50 feet of an unforested portion of the proposed forest conservation easement, a two-rail permanent split rail fence must be erected along the conservation easement boundary.
- 6) Compliance with the conditions of approval of the MCDPS stormwater management approval dated March 12, 2004.
- 7) Compliance with conditions of MCDPWT letter dated September 9, 2005, unless otherwise amended.
- 8) The applicant shall dedicate all road rights-of-way shown on the approved preliminary plan to the full width mandated by the Master Plan unless otherwise designated on the preliminary plan.
- 9) Record plat to reflect a Category I easement over all areas of stream valley buffers and forest conservation.
- 10) Compliance with conditions of MCDPS (Health Dept.) septic approval dated May 4, 2005 with correction dated September 2, 2005.
- 11) Record plat to reflect common ingress/egress and utility easements over all shared driveways.
- 12) The Adequate Public Facility (APF) review for the preliminary plan will remain valid for sixty-one (61) months from the date of mailing of the Planning Board opinion.
- 13) Other necessary easements.

SITE DESCRIPTION:

The 81-acre subject property is located at 24250 Halterman Road on the north side of New Hampshire Avenue extended (Attachment A). The property currently includes one one-family residence, farm buildings, lawn, pasture, and woodlands. There are 21.35 acres of existing forest on the property. The site includes a stream flowing south to north with associated floodplains and wetlands. The entire property is within the Upper Patuxent River watershed and is zoned Rural Density Transfer (RDT).

PROJECT DESCRIPTION:

This is an application to subdivide the Subject Property into eight (8) lots for the construction of seven one-family detached residences; the existing house will be located on the remaining lot (Attachment B). Access to six of the eight lots will be from Halterman Road. Four of those six lots will share a common driveway. The existing farmhouse and proposed Lot 2 will each have direct driveway access from Halterman Road. Proposed Lots 7 and 8 will have no frontage on a public right-of-way but will have access via a shared driveway from Damascus Road (MD 108).

The owners of the property wish to create five lots, one for each of their five children and three "market" lots.¹ The existing house (farmhouse) and a majority of the farmland will be located on one of the market lots. The lot, proposed Lot 1, will include the house along with the farm outbuildings and pastures. The lot is to be approximately 39.0 acres in size and can, therefore, continue to receive an agricultural assessment. Proposed Lots 7 and 8, at 9.0 and 9.5 acres respectively, are also market lots. The child lots are identified on the preliminary plan as proposed Lots 2-6 and are 2.8, 2.4, 3.5, 3.2 and 7.2 acres, respectively. The location of the child lots on the property serve to preserve as much of the contiguous farm area for proposed Lot 1 as practical. All the lots are approved by MCDPS for standard septic systems and private wells.

All forest and stream buffers on this property will be protected by conservation easements. The property is entirely within the Patuxent River Watershed and the Patuxent River Primary Management Area (PMA). As such, existing and proposed impervious surfaces on the property may not exceed 10% of the gross tract area. Staff has evaluated the project and determined that it meets this standard.

Because tributary streams to the Patuxent River bisect the property and would require a stream crossing to provide public road access to Halterman Road for Lots 7 and 8, the plan proposes "lots without frontage" based on the justification outlined later in this report.

COUNTYWIDE PARK TRAIL PLAN

The plan proposes to create a 4.52 acre outlot on the westernmost edge of the property, which is severed from the main part of the property by a Colonial gas pipeline. The outlot area is identified by the MNCPPC - Countywide Park Trails Plan as a desirable linkage between the Seneca Creek Watershed and the Patuxent Watershed. The applicant proposes to donate this outlot to MNCPPC to create this linkage and this is shown on the preliminary plan.

RELATIONSHIP TO THE MASTER PLAN

¹ The applicant has submitted birth certificates identifying the five children at birth as: Stephen Anthony, Frank Joseph, Michael Peter, Rina Marie and Linda Ann Ganassa, As a condition of approval, each of the children must submit an affidavit prior to issuance of building permit.

The Agricultural and Rural Open Space (AROS) Master Plan establishes agriculture as the preferred use for land in the Rural Density Transfer (RDT) zone. The preliminary plan lot configurations in the RDT zone should promote the continued use of the property for agricultural purposes. For this plan, a 39-acre farm operation will be maintained on proposed Lot 1. The five designated child lots are smaller, generally separated from the main farm parcel by a conservation easement along a wetland swale. The applicant has attempted to shrink the child lots to only include the house, septic and wells, and pipestems. While proposed Lot 6 may be able to shrink further, it would serve little purpose as most of the rear yard is stream buffer to be protected by a conservation easement. The two "market" lots on the far western side of the site are 9.0 acres and 9.5 acres and may be large enough for some type of agricultural use. The proposed preliminary plan conforms to the recommendations for preservation of agricultural uses which are included in the Agricultural and Rural Open Space Master Plan.

DENSITY CALCULATION - ZONING ORDINANCE

Because of the child lots, the density proposed in this application is higher than the one lot per twenty-five acres permitted under the zone. Specifically, the five proposed "child lots" are shown in addition to "market" lots ("Market Lots") permitted under the base density in the RDT zone. The proposal is consistent with the Planning Board's prior practice of not counting child lots toward the base density. As discussed below, certain groups have challenged this practice and interpretation of the child lot provisions of the RDT zone.

CIVIC GROUP'S POSITION

In a detailed memorandum dated September 29, 2005 (Attachment C), the Conservation Federation of Maryland, Inc. ("CFM") and T/A For a Rural Montgomery ("FARM") presented their opposition to "child lots" being created in addition to, rather than inclusive of, base zone density. CFM and FARM contend there is nothing in the Zoning Ordinance to support the Board's longstanding application of the child lot provision. In support of their position, CFM and FARM argue that Section 59-C-9.41 of the Zoning Ordinance (Density in the RDT zone) only exempts a "farm tenant dwelling, farm tenant mobile home, or guest house" and "an accessory apartment or accessory dwelling" from the one one-family dwelling unit per 25 acre density limitation in the RDT zone. The section also states that once property is subdivided, these dwellings are no longer excluded from density calculations. CFM and FARM contend that although Section 59-C-9.74(b)(iii) allows the number of "child lots" to exceed regular density, the section cannot be interpreted to exempt them from being included in the density calculation since they are not specifically exempted from density requirements by Section 59-C-9.41 or any other within the Zoning Ordinance.

PREVIOUS BOARD DISCUSSIONS OF DENSITY

The interpretation of the density provision as submitted by CFM and FARM was presented to the Board on December 8, 2005, as part of an item discussing proposed modifications to the RDT child lot provisions. Staff discussed the differences between the Board's long-standing interpretation and this alternative interpretation, but did not recommend modification of the established interpretation and practice. The Board did not act on staff's

recommendations at that time. While the CFM and FARM request that density be limited by their suggested interpretation, the Agricultural Preservation Advisory Board and the Agricultural Advisory Committee have voiced strong support for the existing interpretation of the density calculation.

STAFF'S POSITION

The Planning Board's interpretation and application of the RDT zone density limits, as applicable to child lots, has remained constant since the inception of the RDT zone and the accompanying zoning text amendment. Specifically, the Board has consistently interpreted and applied the language in Division 59-C-9 as permitting child lots to be created in addition to the base zone density of one unit per twenty-five acres. An original tract owner (who meets the eligibility requirements) may create a lot for each child or the spouse of a child plus "market" lots up to the base density, provided the total number of lots do not exceed the number of TDRs (one per five acres) available for the original tract.

There appears to be no disagreement that, under the current Zoning Ordinance language, eligible property owners may create one child lot for each of their children, provided sufficient TDRs remain on the property. Staff agrees with CFM's and FARM's position that the language of Section 59-C-9.41 (Density in RDT zone) does not preclude child lots from exceeding the one dwelling unit per twenty-five acre density limit in the RDT zone. On page 7 of their memorandum, CFM and FARM expressly concede that "Section 59-C-9.74(b)(iii) does allow the number of [child lots] to exceed the Regular Density applicable to the RDT zone . . ." (See also pages 3 and 5, and Examples 4 and 7 in the memorandum).²

Because child lots may be created above base density, interpreting the child lot provisions as prohibiting Market Lots if child lots have been created to base density—as CFM and FARM would like the Planning Board to do—would potentially result in the disparate treatment of

² Additional support for the view that child lots may exceed the base density of the RDT zone follows. The child lot provision of the RDT zone was fashioned on and mirrors the child lot provision in the Rural zone, with one significant difference. In the Rural zone, the District Council expressly precluded child lots from exceeding the base density, by enacting Zoning Ordinance language exempting child lots from the area and dimensional requirements of the Rural zone provided that, among other things, "[t]he overall density of the property does not exceed one dwelling unit per 5 acres in any subdivision recorded as of October 1, 1981." Code § 59-C-9.71(d)(3). However, in approving the language of the RDT zone, it is Staff's view that the Council purposefully omitted the above-quoted density-setting language from the Rural zone, replacing it with language confirming the Council's intent to permit child lots to exceed the base density in the RDT Zone. Code § 59-C-9.74(b)(4)(iii) (providing that child lots are exempt from the area and dimensional requirements of the RDT zone provide, among other things, that such lots "must not exceed the number of development rights for the property."). It is conceivable that the Council, in allowing child lots to exceed base density in the RDT zone acknowledged the significant downzoning of the property from, generally, one dwelling unit per 5 acres to one unit per 25 acres (in contrast with the earlier and less substantial downzoning to the Rural zone, generally from one unit per 2 acres to one unit per 5 acres).

similarly situated farmers based on the timing of their applications. For example, CFM and FARM would argue that a farmer who created child lots up to base density in 1985 should not be permitted, in 2006, to create any Market Lots on the property. However, if that same farmer had created the Market Lots to base density in 1985, CFM and FARM do not contend that the property owner may not subsequently create child lots for each of his or her children on the remainder. Therefore, under the interpretation presented by CFM and FARM, simply choosing to create child lots first, penalizes the farmer.

In Staff's view, it is unreasonable to expect farmers, the first time they subdivide their property, to anticipate all possible ways they might want to utilize that property. CFM and FARM's interpretation may, in fact, have the unintended consequence of encouraging farmers to subdivide farmland to base density with Market Lots simply to preserve their right under the Zoning Ordinance to create such Market Lots. The Board should note that, although CFM and FARM contend that the Ordinance does not permit Market Lots in addition to child lots, they do not—and, in Staff's view, cannot—point to any language in the Zoning Ordinance that would preclude such an interpretation.

ENVIRONMENTAL ANALYSIS

Forest Conservation

There are 21.35 acres of existing forest on the property, including 5 distinctive forest stands. All stands have good forest structure value and are of mixed age, but suffer from excessive invasive growth in the understory. Chestnut oaks, tulip trees, and red maples are the dominant tree species.

The applicant has submitted a declaration of intent to farm 27.8-acres of the 39-acre lot and requests an exemption for the area from the forest conservation requirements. The 11.2 acres not included in the agricultural exemption is forested. The Agricultural Declaration of Intent reduces the net tract area on which forest conservation requirements are calculated from 81.7 acres to 53.9 acres. Section 22A-12(f)(2)(A) of the Montgomery County code states "in an agricultural and resource area, on-site forest retention must equal 25% of the net tract area". Since this property is zoned RDT, the forest conservation plan must comply with this section of the code. The applicant is proposing to preserve all 21.35 acres of existing forest and place this forest in a Category I conservation easement. This corresponds to approximately 40 percent of the net tract area, which exceeds the minimum requirements established by the code.

Environmental Buffers

The site includes 30.45 acres of environmental buffer (26.05 acres of stream buffer and 4.5 acres of wetland buffer). There is also a farm pond in the middle of the subject property. Proposed Lots 1, 6, 7, and 8 will have on-lot conservation easements. All environmental buffers on proposed Lots 6, 7, and 8 will be included in conservation easement along with the forested portions of the environmental buffers on proposed Lot 1. Proposed Lots 2, 4, and 5 will border environmental buffers. The preliminary plan of subdivision does not indicate any encroachment into the environmental buffers except for the continuation of the agricultural activities.

Imperviousness

The subject property is located in the Patuxent River Primary Management Area (PMA) and is subject to a 10 percent impervious limitation. The applicant's preliminary plan of subdivision shows imperviousness levels of less than 5 percent.

LOTS WITHOUT FRONTAGE

As noted above, the plan proposes two lots (Lots 7 and 8) without frontage on a public right-of-way. Frontage for these lots is required under Section 50-29(a)(2) of the Subdivision Regulations, however, this section allows the Planning Board, in exceptional circumstances, to approve not more than two lots without frontage on a private driveway where a proper finding is made for the driveway to:

- Provide adequate access for emergency vehicles
- Allow placement of public utilities
- Provide access for other public service vehicles
- Not hinder future subdivisions

Staff has received the necessary approval from the Department of Fire and Rescue Services that assures that the largest piece of County fire apparatus and other public vehicles can reach and depart the two homes on the proposed private driveway. The conditions of approval require that a common ingress/egress and utility easement be placed on the driveway so that utilities can be run along its length. Further, staff does not believe that the lack of a public road will preclude future development since property to the north is State Park and the property to the west has ample frontage on a public road if it should ever subdivide.

This is exceptional circumstance given the environmental impacts that would result if a public right-of-way and road were required to be constructed to Halterman Road to serve proposed Lots 7 and 8. Aside from the loss of farmland to accommodate a road, both a wetland and stream channel would need to be crossed. The alternative to a road extension would be to create two extremely long pipestems that would extend from proposed Lots 7 and 8 to the east, all the way across the property, to serve as frontages on Halterman Road. Excessively long pipestems are unnecessary, awkward and poor design. Long pipestems can and do become a maintenance and liability problem as well as a source for neighbor discord. Staff has historically looked at all alternatives to avoid unnecessary stream crossings and strongly feels that the shared driveway out to Damascus Road is the best alternative. Therefore, Staff recommends approval of the two lots without frontage.

CONCLUSION:

Staff finds, for reasons discussed and set forth above, that: Preliminary Plan #1-04064, Ganassa Property, conforms to the Agricultural and Rural Open Space Master Plan and meets all necessary requirements of the Subdivision Regulations and Zoning Ordinance, as summarized in attached Table 1; the size, width, shape, and orientation of the proposed lots are appropriate for the location of the subdivision; and the density calculations are based on the Planning Board's historical interpretation and application of the relevant provisions of Division 59-C-9, which allows child lots to exceed the base zone density of the TDR zone. The applicant has demonstrated the availability of sufficient Transfer Development Rights (TDRs) remaining on the property to support the requested lots. As such, Staff recommends approval of the preliminary plan, subject to compliance with the above conditions.

ATTACHMENTS:

- Attachment A – Vicinity Map
- Attachment B – Preliminary Plan
- Attachment C – Conservation Federation/Farm Memorandum
- Attachment D – Agency Correspondence

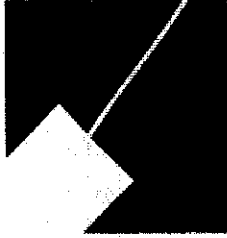
TABLE 1. Preliminary Plan Data Table and Checklist

Plan Name: GANASSA PROPERTY				
Plan Number: 120040640				
Zoning: RDY				
# of Lots: 8				
# of Outlots: 1				
Dev. Type: Residential/Agricultural				
PLAN DATA	Zoning Ordinance Requirements	Proposed for Approval on Preliminary Plan	Verified	Date
Minimum Lot Area	40,000 s.f.	Must meet min.		1/6/06
Lot Width	125 ft.	Must meet min.		1/6/06
Lot Frontage	25 ft.	Must meet min.		1/6/06
Setbacks				1/6/06
Front	50 ft. Min.	Must meet min.		1/6/06
Side	20 ft. Min.	Must meet min.		1/6/06
Rear	35 ft. Min.	Must meet min.		1/6/06
Height	50 ft. Max.	May not exceed maximum		1/6/06
Max Resid'l d.u	3 as per base zone *	3 "market" lots 5 child lots		1/6/06
MPDUs	Not required	0		1/6/06
TDRs	8 must be available	8 available		1/6/06
Site Plan Req'd?	No	No		1/6/06
FINDINGS				
SUBDIVISION				
Lot frontage on Public Street	Yes	Yes**	As shown on plan	9/29/05
Road dedication and frontage improvements	Yes 60 ft. on Halterman	Dedication has been provided	By agency Memo	9/9/05
Environmental Guidelines	Yes	Yes	By staff memo	9/22/05
Forest Conservation	Yes	Yes	By staff memo	9/22/05
Master Plan Compliance	Yes	Yes		9/29/05
ADEQUATE PUBLIC FACILITIES				
Stormwater Management	Yes	Yes	By agency memo	3/12/04
Well and Septic	Yes	Wells and standard septic	By agency memo	9/10/05
Local Area Traffic Review	N/A	N/A		
Fire and Rescue	Yes	Yes	By agency letter	11/22/05
State Highway	Yes	Yes	By agency letter	7/26/05

* Child lot provisions permit additional density.

** Two lots without frontage requested pursuant to Planning Board finding

M-NCPPC



MONTGOMERY COUNTY DEPARTMENT OF PARK AND PLANNING

THE MARYLAND-NATIONAL CAPITAL
PARK AND PLANNING COMMISSION

8787 Georgia Avenue
Silver Spring, Maryland 20910-3760
301-495-4500, www.mncppc.org

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 *JD* (301-495-4559)
Community-Based Planning Division

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

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 Zone¹ 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:

¹ 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 selling², 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.

² 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

**THE CONSERVATION FEDERATION OF MARYLAND, INC.
T/A FOR A RURAL MONTGOMERY (FARM)
(301) 916-3510**

September 29, 2005

MEMORANDUM

Re: Abuse of Children's Lots in the Rural Density Transfer (RDT) Zone

Background

The allowance in the Zoning Ordinance for the creation of lots for children of property owners in accordance with prior zoning standards or a relaxation of existing standards, ("Tot Lots"), has always been perceived as an intent by the District Council to allow family members to build a house and live on family property, notwithstanding the subsequent down-zoning of such property since it was originally acquired by the property owner(s). The concept of Tot Lots is not unique to the RDT Zone.

For example, Section 59-C-1.3 of the Zoning Ordinance provides:

The following lots shall have the area and dimensional requirements of the zone applicable to them prior to their classification in the RE-2, RE-2C, and RE-1 Zones: ... (3) in the RE-2C Zone, a lot created as a one family residence by a child of the property owner or the spouse of a child or by the parents of the property owner, provided the property owner can establish that he/she had title on or before March 16, 1982. This provision permits the creation of only one lot for each child, whether created for the child or spouse of the child, and only one lot for the parents, whether created for one or both parents. The overall density of the property shall not exceed 1.1 dwelling units per acre in any subdivision recorded.

Similarly, Section 59-C-9.71, regarding the Rural (five acre) Zone, provides:

The following lots are exempt from the area and dimensional requirements of Section 59-C-9.4, but they must comply with the requirements of the zone applicable to them prior to their classification in the Rural Zone. ...

(d) a lot created for use for a one family residence by a child, or the spouse of a child, of the property owner, provided that the following conditions are met:

- (1) the property owner can establish that he had legal title on or before June 4, 1974;
- (2) this provision applies to only one such lot for each child of the property owner; and
- (3) the overall density of the property does not exceed one dwelling unit per five acres in any subdivision recorded as of October 1, 1981.

Provisions for such Tot Lots also are set forth in Section 59-C-9.73 with regard to the Rural Cluster Zone and Low Density Rural Cluster Development Zone.

With regard to the RDT Zone specifically, very similar language is set forth in Section 59-C-9.74.(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.

.....
(4) a lot created for use for 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;
- (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.

Obvious Purpose

The obvious purpose of all of the various "Tot Lot" provisions contained within the Zoning Ordinance were to allow family members to receive a lot(s) smaller in size and perhaps greater in density than what may otherwise be currently required as a result of a down-zoning after the property owners acquired title to the property, in order that children, or the spouse of a child, and in some cases even parents, could acquire such a smaller lot at perhaps greater density than otherwise allowed, build a house and live in the property, notwithstanding the most recent rezoning of the property. Although under no legal obligation to do so, the District Council places these exceptions to the general

rules in the Zoning Ordinance for what is recognized as no doubt a noble and worthy purpose.

Purposes not Intended

Those exceptions to the general rules in the Ordinance were not intended to allow the creation of children's lots for the sole purpose of immediate sale to the general public, nor intended to serve only as a monetary reward to property owners for their potential procreative proclivity, so to speak.

If the District Council meant to even imply that such lots were intended to be created and then only to be sold to unrelated third parties, then the various provisions of the Ordinance would not contain the language to the effect that those exceptions to the normal requirements were only for "a lot *created for use for a one-family residence by a child, or the spouse of a child*, of the property owner. . .", and, if the former was the District Council's intention, that bold portions of that quoted language would be rendered, for all intents and purposes, entirely superfluous and unnecessary.

It is a fundamental principle of statutory construction that all language in legislation, in this case the Montgomery County Zoning Ordinance, is to be afforded its ordinary meaning and to read the same in order that no language is rendered superfluous. The District Council could have very well utilized far more general and non-specific language, for example, 'one single-family lot per each child or spouse of child'. But, that is not what the District Council chose to do nor is it what it meant by its clear and unambiguous language. The Council purposely chose, it is submitted, to insert specific and express language limiting such lots for use for a single family residence by a child, or the spouse of a child. Again, it really doesn't make sense that the intent was to reward a property owner for their reproductive ability.

Second, there is nothing in the Zoning Ordinance relating to the RDT Zone that would indicate that the creation of Tot Lots, which can exceed the maximum density otherwise normally imposed, should be ignored in calculating any remaining density for creation of additional lots by subdivision. Again, it just doesn't make a whole lot of sense.

Definition of Terms

In order to fully appreciate and understand this Memorandum, an explanation of terms is in order, especially in light of the very common public misperceptions that the RDT zone is a "25 acre zone" (See the distinct differences between "Density" and "Lot Size" discussed below).

Regular or Normal Density. Normal Density in the RDT zone is one dwelling unit per 25 acres, which means, for each full 25 acres, a maximum density of one dwelling is usually permitted.

Lot Size or Area & Dimensional Requirements. The RDT zone normally requires a minimum lot size of 40,000 square feet, and certain dimensional requirements, which refers to road frontage, setbacks, etc. While the majority of property placed in the RDT zone was previously zoned as 5 acres, there were also properties rezoned from what are commonly referred to as the 1 acre and ½ acre zone (even though the area requirements attributable thereto are slightly less; e.g., 40,000 and 20,000 square feet, respectively.)

Development Rights. At the same time property was re-zoned to the RDT zone, each parcel of property received 1 Transferable Development Right (TDR) for every full 5 acres of property, to sell or keep. (For example, 100 acres = 20 TDRs.) Each separate dwelling existing or to be erected on the property would require 1 TDR attributable to that dwelling. Other TDRs may be sold if the property owner so desires.

Tot Lot Density. Per the above, a maximum of 1 Tot Lot per each Development Right (1 per 5 acres) regardless of prior zoning classification.

Regular Development

In light of the foregoing, regular residential development in the RDT zone requires a minimum of a 40,000 square lot per dwelling, and a total density not to exceed 1 dwelling per each full 25 acres. In addition, each full 5 acres has one Development Right (TDR), 1 of which would be applied to any dwelling, and the remainder of which may be sold. The followings examples of possible Regular Development are provided.

Example #1: 100 acres with 1 existing residence.

100 acres divided by 25 = 4 single family dwelling lots. (Regular Density)
Less 1 existing residence = 3 lots for sale or development. (Regular Density)
Lot size could be as small as 40,000 square feet for 3 lots and 97+ acres for 1 remaining lot. (Lot Size)
20 TDRs total, 4 used, 16 remaining for sale. (Development Rights)

Example #2: 100 acres vacant, small lots.

100 acres divided by 25 = 4 single family dwelling lots. (Regular Density)
Lot size as small as 40,000 square feet for all 4, and 96+ remaining acres for agricultural land. (Regular Density)
20 TDRs total, 4 used, 16 remaining for sale. (Development Rights)

Example #3: 100 acres vacant, 25 acre lots.

100 acres divided by 25 = 4 single family dwelling lots. (Regular Density)
25 acres each lot. (Regular Density)
20 TDRs total, 4 used, 16 remaining for sale. (Development Rights)

Development With Tot Lots

In connection with lots to be used by children of the property owner for their residence, which is, after all, what the law says, the Regular Density requirement is substantially lessened from 1 dwelling per 25 acres to 1 dwelling per the number of Development rights. (1 per 5 acres). Again, each full 5 acres has one Development Right (TDR), 1 of which would be applied to any existing or proposed dwelling, and the remainder of which may be sold.

Utilizing the examples above (1-3), the following examples are provided to illustrate development of property with Tot Lots assuming 4 children's lots will be utilized.

Example #4: 100 acres with 1 existing residence, same as Example #1 above, but now with 4 Tot Lots.

100 acres divided by 25 = 4 single family dwelling lots. (Regular Density)
Less existing residence = 3 lots for sale or development. (Regular Density)
Lot size could be as small as 40,000 square feet for 3 and 97+ acres for 1. (Lot Size)

Tot Lot size could possibly go down to as little as 20,000 square feet for each residential Tot Lot if previously in the R200 zone. (Tot Lot Area & Dimensional Requirements)

Up to 19 Children's lots (down to 1 per 5 acres) could be created (20 minus Development Right for existing residence). (Tot Lot Density)

Existing residence, 1, plus 4 Tot Lots = 5 total.

Regular Density has been exceeded, no additional lots, other than Tot Lots available to create or sell.

20 TDRs total, 15 remaining for sale. (Development Rights)

Example #5: 100 acres vacant, Example #2 above, but now with 4 Tot Lots

100 acres divided by 25 = 4 single family dwelling lots. (Regular Density)
Lot size as small as 40,000 square feet for all 4, and 96+ acres for agricultural land. (Regular Density)

Tot Lot size could possibly go down to as little as 20,000 square feet for each residential Tot Lot if previously in the R200 zone. (Tot Lot Area & Dimensional Requirements)

Up to 20 Children's lots (down to 1 per 5 acres) could be created. (Tot Lot Density)

4 Tot Lots meets maximum Regular Density, no additional lots, other than Tot Lots available to create or sell.

20 TDRs total, 16 remaining for sale. (Development Rights)

Example #6: 100 acres vacant, Example #3 above, but now with 4 Tot Lots
100 acres divided by 25 = 4 single family dwelling lots. (Regular Density)
25 acres each lot. (Regular Density)
Up to 20 Children's lots (1 per 5 acres) could be created. (Tot Lot Density)
4 Tot Lots meets maximum Regular Density, no additional lots, other than Tot
Lots available to create or sell.
20 TDRs total, 4 used, 16 remaining for sale. (Development Rights)

A final example:

Example #7: 100 acres vacant, 10 Tot Lots
100 acres divided by 25 = 4 single family dwelling lots. (Regular Density)
10 Tot Lots = 1 per every 10 acres.
Up to 20 Children's lots (1 per 5 acres) could be created. (Tot Lot Density)
10 lots exceeds maximum Regular Density, no additional lots, other than Tot Lots
available to create or sell.
20 TDRs total, 10 used, 10 remaining for sale. (Development Rights)

Discussion

The idea to provide limited exemptions for Tot Lots in the RDT zone was not by any means a new idea in connection with the creation of the RDT zone. Historically, the District Council, and the Upper Montgomery County Planning Commission before that, have included various exceptional provisions in the Zoning Ordinance regarding "down-zoning" of property to allow property owners who acquired the property prior to the down-zoning to create lots for their children under the area and dimensional requirements of the prior zoning classification, and that principle was carried forward in the RDT zoning enacted as a result of the adoption of the Functional Master Plan for the Preservation of Agriculture & Rural Open Space. While still serving a noble purpose, its use and application in the much more transient Montgomery County today admittedly is not as important to most property owners in maintaining the "family homestead" as it was 30 or even 20 years ago.

The somewhat novel idea in connection with the Functional Master Plan for the Preservation of Agriculture and Rural Open Space in 1981, however, was to introduce the concept of total *density* of residential development into the mix, regardless of lot size, as well as the concept of TDRs. It is essentially a simple concept but, as noted above, is often misunderstood by the general public, and sometimes even by elected and appointed officials. When Tot Lots are thrown into the mix, the concept becomes even more confusing.

What does the Zoning Ordinance actually say regarding Tot Lots?

Section 59-C-9.74.(b) states:

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 classifications in the Rural Density Transfer zone. (Emphasis Supplied) . . .

(4) A lot created for use for a one-family residence by a child, or the spouse of a child, of the property owner

It then goes on to set certain conditions; for example, that the property owner must have taken title prior to the property being placed in the RDT zone.

Subsection (iii) thereof further provides:

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.

Section 59-C-9.41 expressly sets forth the only conditions for exemption of the density requirements for development in the RDT zone in connection with further development. And that provision **only** exempts "farm tenant dwelling, farm tenant mobile home or guest house" and "an accessory apartment or accessory dwelling", but then goes even further to expressly state that even with regard to those limited exceptions, "[o]nce the property is subdivided, the dwelling is not excluded."

While Section 59-C-9.74.(b)(iii) does allow the number of **Tot Lots** to exceed the Regular Density applicable to the RDT zone, there is absolutely nothing that can be pointed to which would exempt Tot 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. And it is submitted that it's not there because, again, when you really sit down and think about it, it really wouldn't make sense.

The Problems

The problems associated with the continued creation of "Tot Lots" in connection with the Planning Board's past approvals of subdivisions in the RDT Zone are twofold.

1. **Frustration of the Intent.** The obvious intent of the District Council in allowing children to acquire a lot on a family's property and build a house and live in that house was to preserve some sense of a family unit on certain property. This applies not only to the RDT Zone, but all of the other zones discussed above as well.

This first problem, therefore, is that intent has been frustrated by certain property owners who have created Tot Lots, with no intention whatsoever that they would serve as homesteads for their children, but rather as a means to create lots which exceed the maximum Regular Density, and then turn right around and sell those "Tot Lots" at

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substantial personal gain on the open market. The more children you can claim, the more money you can make.

It is submitted the law was never intended to financially reward a property owner for their proclivity of procreation in order that any number of Tot Lots could be created for any number of children, only to be immediately sold on the open market. Again, that just doesn't make sense, especially in light of the express language of the Zoning Ordinance.

The intent was, and always has been, that such lots would be created for the purpose of children building a house and residing on the property. For example, at least in the late 1980's, the Montgomery County Planning Board required a bold notation on the recorded plat of subdivision stating that a particular lot had been created for a child of the property owner [a requirement which apparently has been discontinued for reasons we do not understand]. While the legal significance of that may be subject to debate, it nevertheless put the world on notice as to the purpose of that lot, and it would have been difficult for a property owner to simply put a Tot Lot on the open market without a child never even having taken legal title to the lot.

Notwithstanding that prior practice, the creation of Tot Lots in the RDT Zone has been subject to *substantial* abuse over the past several years. A growing number of land owners in the RDT Zone have used the Tot Lot provision to create subdivided lots for the sole purpose of sale on the open market. Some of these transactions have flagrantly ignored the purposes of that particular provision in the Zoning Ordinance.

In some cases, the land owner has complied with the letter but not the spirit of the law and have avoided compliance by apparently misrepresenting their intentions to the Montgomery County Planning Board and the applicable County agencies.

For example:

In 1998, two Tot Lots were created on a farm west of Poolesville, and immediately sold on the open market as building lots.

In 1999, a land owner near Barnesville created children's lots by asserting that he jointly owned the land with a sibling (thus making use of two families' headcount of children), and even *before the preliminary plan of subdivision was finally approved by the Montgomery County Planning Board*, began marketing the Tot Lots through a real estate broker as a residential subdivision. To the best of our knowledge, none of the children for whom those Tot Lots were approved ever took title to the land, much less built a residence, or lived in any residence in that subdivision, and all of the lots and houses are now owned and occupied by unrelated persons.

A farming family obtained subdivision approval incorporating three Tot Lots near Beallsville on or about 2003. By that date, some staff of the Planning Board had at least become aware of the continuing pattern of abuse of the Tot Lot privilege, and asked

outright of the property owner if the lots would be used for a residence of his children. The landowner actually flat out refused to answer that question. Nevertheless, the Planning Board went ahead and approved the subdivision. The Planning Board, in order to approve any Tot Lots, really must make an affirmative finding that such lots "are created for use for a one-family residence by a child, or spouse of a child, of the property owner", as required by Section 59-C-9.74.(b) of the Code. If the landowner actually refused to provide evidence of the purpose of the Tot Lots, *how on God's green earth could the Planning Board have approved that subdivision?*

This is not rocket science. It's the application of clear and unambiguous law and, for that matter, plain common sense.

2. Unlawful Increase in Density. This second issue is, by far, the more pressing concern. It requires no interpretation of Legislative intent. It requires no Zoning Text Amendment. It requires no adoption of Rules of the Planning Board. It requires no future enforcement action. It only requires the plain application of existing law in the approval of any subdivision incorporating Tot Lots.

This issue relates to the fact that Tot Lots consistently have been ignored in the past in the Planning Board's and Staff's calculation of total density in connection with subdivisions in the RDT Zone. For reasons that appear to be totally unjustified and with no basis in law, the Planning Board has routinely *excluded* Tot Lots from the maximum density calculations in reviewing plans of subdivision which include other lots for development and sale.

Under the existing ordinance, a 100 acre parcel of vacant property could yield a maximum of 20 Tot Lots (1 per Development Right or every 5 acres). That's not necessarily desirable, but a correct application of the current law.

Let's say, for example, a property owner has 8 children and 100 vacant acres. 8 Tot Lots could be created (1 per 12.5 acres), 200% of the Regular Density. 8 TDRs used, 12 remaining for sale. No additional subdivision should be allowed.

But wait, under prior opinions of the Planning Board, the Tot Lots have not been included in calculating the total density of the subdivision. IN OTHER WORDS, IT IS AS IF THE TOT LOTS DID NOT EXIST. That misplaced application of the law means an additional 4 lots could be created for sale pursuant to the Regular Density, thereby increasing the total lots to 12 (1 per 8.33 acres), and the total density to 300% of that normally allowed.

It is not subject to any serious debate that the existing provisions of the Zoning Ordinance allow Tot Lots created to exceed the otherwise maximum density in the RDT zone. The troubling question is: How can the Planning Board and its staff basically ignore the existence of those Tot Lots in connection with even further development?

What is the basis for excluding those Tot Lots from the maximum allowable density in connection with further development of property? Under existing law, there is no basis whatsoever.

Notwithstanding what appears to be clear and unambiguous language of the Zoning Ordinance, the Montgomery County Planning Board continues to approve plans of subdivision which include Tot Lots, and simply ignore and exclude those Tot Lots from density calculations. On the basis of the plain language of the law, Tot Lots may be created smaller in area and dimensions than what is required under the applicable provisions of the RDT Zone, (provided they adhere to prior zoning requirements applicable to the subject property), but it does not, should not have in the past, and definitely should not in the future, serve to undermine or alter the maximum density available to the property owner in the RDT Zone in connection with further development, as set forth quite clearly in Section 59-C-9.41. The property owner is afforded the *privilege* of an increase in allowable density for Tot Lots. The property owner is not afforded *any more* over and above that.

It is, after all, an accommodation, an exception, an aberration, and a privilege afforded by the District Council in its wisdom to long time property owners to maintain the family unit on the family property. *It is not and never has been* some vested right in landowner to line their pockets at the expense of the intent of the Zoning Ordinance and Master Plan.

Conclusion & Requested Relief

Property in the Agricultural Reserve no doubt is becoming more valuable every day, and always will attract questionable, and sometimes even attempted unlawful actions, by a few landowners attempting to "push the envelope" to its absolute maximum. Obviously, this is a problem not unique to the Reserve.

While this organization, when we first began to carefully examine these continuing abuses, considered that a Zoning Text Amendment may be required in order to address this matter, we have now come to the conclusion that, at a minimum, the enforcement of the plain meaning of the existing law would, by itself, go quite a long way to protect the Agricultural Reserve as it relates to these "Tot Lots", at least with regard to total density as it relates to other lots to be created. Such a common sense interpretation and application will serve the purposes of the law, (e.g., provide long time property owners with the opportunity to create residential lots for children under prior zoning regulations), and at the same time discourage the continued abuse of the law, (e.g., remove to a certain extent the economic incentive to market those lots to the general public by enforcing across the board the maximum density allowed in the RDT zone).

In the grand scheme of things, it really should not be that difficult to adopt standards and strict rules regarding Tot Lots without the necessity of a Zoning Text Amendment. Common sense application and enforcement of existing law could include, at a minimum:

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1. Require affidavits from the property owner(s) and children to the effect the Tot Lots are being created "for use for a one-family residence by a child, or spouse of a child" in connection with approval of a plan of subdivision, (which, after all, only quotes the Zoning Ordinance provision granting the privilege which the landowner seeks to invoke in the first instance);
2. Require a notation to that effect on the recorded Plat of Subdivision (which, after all, the Planning Board previously required at least as recently as the 1980s); and
3. Require a minimum residency requirement for a period of time before a Tot Lot may be sold outside of the family, only to be waived by the Planning Board during that time for good cause, i.e., death, foreclosure, etc.

With regard to number 3 above, some may question whether there is sufficient authority to impose such a condition. But that is exactly the type of condition imposed by the Maryland Agricultural Land Preservation Foundation in connection with Tot Lots created on property subject to an easement pursuant to that State Program. While COMAR Section 15.15.01.17.B(c) grants the authority to the Foundation to approve a Tot Lot provided "... that the lot and the dwelling house are only for the use of the landowner or the landowner's children . . ." (sound familiar?), the State law and regulations provide no more guidance nor express authority to the Foundation. Nevertheless, the Foundation, applying more than a little bit of common sense, typically requires a minimum 5 year residency requirement before such a residential lot for a child may be sold or transferred.

The time has come for Montgomery County and the Planning Board to apply a little bit of common sense of its own in protecting, preserving, and furthering the obvious intent of the privilege of Tot Lots granted under the Zoning Ordinance.

Perhaps a Zoning Text Amendment with more definitive restrictions is required if the existing plain language of the law simply cannot be adequately applied and enforced. Or perhaps the Tot Lot provisions should just be done away with altogether, as some elected and appointed officials have actually suggested in the past. But we believe the latter would be truly unfortunate, because, as set forth above, the Tot Lot provisions serve a very worthy purpose, so long as they are appropriately applied in the circumstances to which they were intended to apply, and thereafter adequately enforced. Our greatest fear is that the District Council will simply throw up its hands up in frustration and just do away with these exceptional provisions altogether, thereby denying legitimate long time farm families with legitimate concerns the opportunity to further enjoy these provisions.

That would be truly unfortunate.



And there simply is no reasonable fashion that the Zoning Ordinance can be interpreted to exclude Tot Lots from the total mix of density at the time of simultaneous or future subdivision which creates additional lots for sale.

We recognize, of course, that the Planning Board has seen fit to apply some type of administrative interpretation that apparently is at odds with this analysis. And we also recognize that administrative interpretations generally are entitled to some degree of deference.

However, any such interpretation, no matter how strained, must be based on some language of the law to justify that position. Such language just doesn't exist here. In fact, at least with regard to the density issue, prior actions of the Planning Board do not appear to be based on any 'interpretation'; but rather, and with all due respect to the Planning Board and its Staff, more akin to basic ignorance of the actual language of the Zoning Ordinance. And the District Council, the legislative body, certainly should know what it meant by its legislation, and owes no deference to a misplaced administrative interpretation of its own words.

As a matter of public urgency, the responsible officials, including the office of the County Attorney and Counsel for the Montgomery County Planning Board, must immediately provide competent guidance on the scope, meaning and enforceability of the "Tot Lot" provisions of the law, not only with regard to the RDT Zone, but with regard to other zoning classifications as well. This should not take a long investigation. It is simply a matter of reading the plain language of the law and enforcing the same, which has been severely lacking over the past two decades. If it is determined that a Zoning Text Amendment is advisable to provide clarification, then the same should be immediately prepared and forwarded to the District Council for prompt consideration.

Obviously, the requested action to remedy this problem would have no effect on those subdivisions abusing the Tot Lot privilege that may have been previously approved. The requested action will, however, serve to prevent future abuses. At least an earnest effort to apply and enforce the existing law and its intent will be far better than the previous pattern of simply, for all intents and purposes, ignoring the same.

Perhaps this continuing abuse of the law has been brought to the forefront by recent problems associated with the developments in other areas of the County. It is unfortunate that this matter is one more issue to deal with, but it is an issue that cries out for immediate attention and resolution. These Tot Lot abuses have been going on for far too long, and are only increasing in frequency as the pressure for development in the RDT zone increases.

The concerns of those persons, including representatives of this organization, who have appeared and testified at public hearings on subdivision applications incorporating Tot Lots before the Planning Board to date seem to have fallen largely upon deaf ears. In the past, maybe we were not detailed enough in the presentation of our concerns in order for the Planning Board to fully appreciate them.

Hopefully, this admittedly lengthy, but absolutely necessary document, will remedy any prior oversight on our part. It is long overdue.

Respectfully, the time also is long overdue for the Planning Board to remedy its respective oversights regarding this issue. Any remedy probably cannot change that erroneously approved before. That is done and over with. But, the Planning Board can immediately begin applying the plain language of the Zoning Ordinance to further its obvious intent and, we submit, applying at least a modicum of common sense to the application of that law.

That really is not too much to ask.

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Zoning Text Amendment No: 05-
Concerning: Child Lots in the RDT Zone
Draft No. & Date: 1 – 12/01/05
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:

- Eliminating the Child Lot Provision for the Rural Density Transfer 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-9.7. "Exempted lots and parcels and existing buildings and permits."
Section 59-C-9.74(b)(4). "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:

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

DIVISION 59-C-9. AGRICULTURAL ZONES.

* * *

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) The number of lots created for children in accordance with the Maryland Agricultural Land Preservation 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 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 a 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 replatting 2 or more lots; provided that the resulting number of lots is not greater than the number which were replatted.
 - (4) A lot created for use for 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;
 - (ii) This provision applies to only one such lot for each child of the property owner, and

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- (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.]

(c) Criteria for creating a lot for the use of a one-family residence by a child (as defined in this Chapter) or the spouse of a child, of the property owner:

(1) A lot for the use of 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 but must meet the density requirements of the zone applicable prior to classification in the Rural Density Transfer Zone 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;
- ii. Only one such lot may be approved in Montgomery County for each child of the property owner;
- iii. The number of such lots created may not exceed the number of development rights existing on the property at the time of subdivision;
- iv. The property owner must submit with the application for a preliminary plan of subdivision a notarized affidavit stating the names of each child to receive a lot, a copy of the birth certificate or adoption documentation for each child or when applicable a marriage certificate verifying status of the spouse of a child of the property owner;

(2) Standards for creating a lot for the use of a one-family residence by a child or the spouse of a child, of the property owner:

- i. Recognizing that intent of the Rural Density Transfer Zone is to preserve farmland and agriculture, the Planning Board may deny an application for subdivision if the Planning Board finds that viable agricultural activity cannot be sustained on some portion of the subject property submitted for subdivision.
- ii. The number of development rights used for any lots created are to be noted on the record plat along with the name of the child or spouse of a child who is the intended beneficiary;

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- iii. For the purposes of this provision, a "property owner" is defined as the person or persons who have held continuous property interest in the subject property. The definition includes persons jointly holding title, or a family trust or family partnership whose members are clearly named on proper supporting documents. A corporation is not a property owner, as defined in this section
 - iv. When two or more family members hold an undivided interest in the property, the number of such lots allowed will be based on an equal division of the acres unless the percentage of ownership is otherwise established in a will or other legal document.
 - v. The number of lots permitted under this provision are in addition to the base density of the zone; and
 - vi. The Department may only issue a building permit for a dwelling on the lot to the child designated on the record plat, and that child must retain ownership of the lot for a period of at least five years from the date that the Department approved the final inspection for the dwelling, unless an exemption is granted by the Director during that time for good cause or in the event of foreclosure. This restriction must be noted on the record plat along with other required information about the subdivision. The Department has exclusive authority to enforce the ownership requirement of this section.
- (3) This subsection will be valid until January 6, 2011 after which child lot subdivisions will no longer be allowed in the RDT Zone.

Sec. 2. Effective date. This ordinance becomes effective 20 days after the date of Council adoption.

This is a correct copy of Council action.

Linda M. Lauer, Clerk of the Council

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