

MEMORANDUM

July 15, 2010

TO: Planning, Housing, and Economic Development (PHED) Committee

FROM: Marlene L. Michaelson, Senior Legislative Analyst *MM*

SUBJECT: **Worksession** - Executive Regulation 03-09, *Agricultural Land Preservation Easement Purchases*

The Council received Executive Regulation 03-09, *Agricultural Land Preservation Easement Purchases*, on July 2, 2009. The regulation provides guidance regarding the implementation of the County's Agricultural Easement Program (AEP) and the Building Lot Termination (BLT) Program. Although it was submitted as a Method 2 regulation, the Department of Economic Development has since indicated that it should be a Method 1 regulation, which requires Council approval.

The Council held a public forum on Regulation 03-09 on October 6, 2009, and the Planning, Housing, and Economic Development (PHED) Committee met to discuss the regulations in January 2010. The Committee suggested several changes in the resolution. On July 7, the Executive transmitted revised regulations that include most of the Committee recommended changes (see © 10 to 20). The cover memorandum explains the Department of Economic Development's (DED) position on each of the Committee suggestions. Background information on the regulations and the Building Lot Termination (BLT) program is in the earlier Staff memorandum on this issue, which is attached at © 1 to 9.

Staff believes it is important for the Council to approve the Executive Regulations this summer. These regulations are critical for the ongoing implementation of the AEP program and to allow the use of funds allocated by the Council for the BLT program. Last week, the Council approved the rezoning for the White Flint Sector Plan, which may create a near term market for the purchase of BLTs.

This memorandum first addresses three issues that are worthy of the Committee's attention, followed by a summary of the changes made by DED at the Committee's suggestion.

ISSUES

Limit on Amount of Funding for a Single Property Owner

At the January meeting, the Committee shared Staff's concern that the ranking could lead to having a few property owners receive all the BLT funding in a given year. Staff recommended revising the Executive Regulation to indicate that **no single property should receive more than a certain percentage of the funds available in a given year** (e.g., 20%), unless DED determines there are unique circumstances that justify this allocation (e.g., limited applications or a property that is so far superior to the other applications). DED objected to this language because they believe it limits their flexibility to fund the most superior property (see © 3). Staff has the opposite view and believes that the ranking could lead to having DED required to provide all funding to a single property owner, even if they believe there are other worthy applications.

Staff recommends the following language which would maintain DED's flexibility while giving them the opportunity to allocate money to more than one or two of the highest ranked applicants, if they believe it better serves the needs of the DED program. It should be added on © 26 at the end of section IV. B. 1. e.:

f. The ranking system will not preclude DED and APAB from deciding to purchase BLTs from multiple property owners rather the one or two highest ranked applications if they believe it better achieves the goals of the BLT program.

Alternatively, if the Committee believes that the regulations should specifically require that funds be distributed to multiple property owners each year, the language which follows could be added. This alternative language provides DED the ability to waive this requirement for unique circumstances.

f. No single property owner may receive more than 20% of the available BLT funds in any year unless DED determines that there is justification to waive this requirement. Justification may include an application that is far superior to other applications, a shortage of applications, or other rationale supported by DED that furthers the goals of the BLT program.

Calculating the Cost of Contributions to the Fund

The Committee discussed the amount that developers would be required to pay the public fund if they opt to contribute to the fund instead of purchasing BLTs in the private market. The revisions to the Executive Regulation clarify that the Planning Board will determine the **number** of BLTs and the Executive will calculate the cost of the contribution, which will be the "Maximum Value" as determined by DED on an annual basis (see © 28).

Staff had suggested the possibility of a sliding scale for the amount of the BLT contribution, depending on the location of the property owner purchasing the BLT and the likelihood that the cost of the BLT could have a significantly detrimental impact on the new development. While this is still an option, pursuing this could delay approval of these Executive Regulations. Rather than include differential pricing, the revisions to the Executive Regulation include a description of the potential problem and a suggestion that the sale of BLTs be monitored to see if future action is necessary (see © 29). Staff believes this is an appropriate interim step to ensure that there is no delay in implementing the two easement programs covered by these regulations.

Reserved Residential Rights

The Executive Regulations refer to reserved residential rights, but did not define what they are. A definition has been added (see © 11). Staff recommends adding an additional sentence to the new definition (shown in italics below):

Reserved Residential Lot Rights: Rights contained within a recorded easement giving a party the ability to construct a limited number of residential dwellings subject to the approval processes in Section II (D) (2) and Section IV C (2). *There must be no reserved residential lot rights on any portion of the property for which the BLT has been sold.*

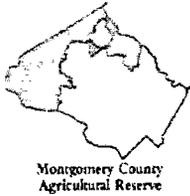
COMMITTEE RECOMMENDED CHANGES INCORPORATED IN THE REGULATIONS

DED made the following changes to the Executive Regulation based on comments from the PHED Committee and Council staff at the last meeting.

- The ranking of properties has been revised to include the number of BLTs (as well as the total size of the properties) as part of the ranking (see © 25).
- The ranking now adds points depending on the imminent threat of development (e.g., extra points in the ranking for properties that have an approved preliminary plan - see © 26).
- The regulations delete the comment that indicates that a smaller property will be given priority ranking if it is contiguous to other lands protected from development by State or County agricultural and conservation easements, since the Executive Regulations do not allocate additional points for this distinction (see © 23).
- The regulations now indicate that the easement terminates one septic system and septic absorption area **for each BLT** to be purchased (see © 23).
- DED has clarified that child lots are not permitted on land covered by a BLT easement (see © 8).
- The Executive Regulation deletes language that referred to the future use of serialized BLTs, since it implied that there could be a future use (see last paragraph on © 29).
- The Regulations have been revised to indicate they will apply to any zone for which the Council determines BLTs should be required (rather than listing specific zones – see © 29).
- The regulations have been amended to clarify that the total acreage of “the entire property” will be included in the application and encumbered by easement (see © 14).

Regulations for Private Transactions

The Executive Regulation focuses on public acquisition of BLTs and does not address any requirements or provisions associated with the private purchase of BLTs. Staff continues to believe that the Planning Department should determine whether any further changes to the Zoning Ordinance or Subdivision Regulations are needed to allow the private sale and purchase of BLTs. With the passage of the White Flint and Great Seneca Science Corridor Sectional Map Amendments, property owners may soon begin submitting development applications.



DEPARTMENT OF ECONOMIC DEVELOPMENT

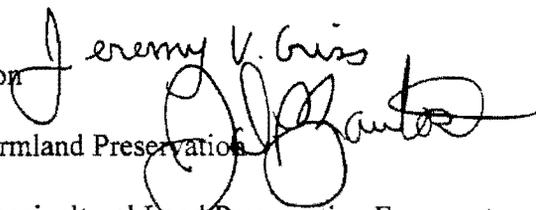
Isiah Leggett
County Executive

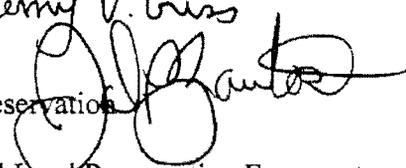
Steven A. Silverman
Director

July 7, 2010

Memorandum

TO: Michael Knapp, Chairman
Planning Housing and Economic Development Committee

FROM: Jeremy V. Criss, Manager
DED Agricultural Services Division 

John Zawitoski, Administrator, Farmland Preservation 

SUBJECT: Executive Regulation 3-09AM -- Agricultural Land Preservation Easement Purchases -- Staff Report

On January 19, 2010, the Planning Housing and Economic Development Committee (PHED) conducted a Council work session involving Executive Regulation 3-09AM: Agricultural Land Preservation Easement Purchases.

The purpose of this memorandum is to address the DED Agricultural Services response to questions and suggestions that were offered by Council and staff that arose during the January 19, 2010 PHED work session and follow up discussions with Council staff.

On June 10, 2010, DED submitted a staff report outlining the specific comments and responses drafted from the January 19, 2010 PHED work session in preparation of scheduled June 28, 2010 follow up PHED work session on Executive Regulation 3-09AM. As a result of our staff memorandum, Council Staff provided additional comments leading to rescheduling the PHED Executive Regulation 3-09AM for July 19, 2010.

This staff report will highlight the comments received and the DED corresponding responses from both the January 19, 2010 PHED work session which starts on Page 4 of this memorandum and the June 10, 2010 staff email to Executive staff which begins on Page 2.

June 10, 2010 Council Staff Comments:

Council staff provided four additional comments after reviewing our June 10, 2010 staff report. These comments are summarized as follows:

1. Council Staff questioned the role of the Planning Board in determining the amount of the Developer Contribution and suggested that it may be easier to have the Planning Board indicate the number of BLTs that need to be purchased and have DED calculate the amount.

Executive Staff Response:

We agree that the certification should be of the number of BLTs (including fractional amounts for a given project). Please see below the conforming change to the regulation addressing the concern raised by Council Staff.

The purchase of BLT Easements may be funded by public funds appropriated through the Agricultural Preservation Capital Improvements Project or by private funds contributed by developers through the development approval process and in the amount of the Maximum Value per BLT or portion of BLT (the "Developer Contribution"). Developer[s] Contributions will be deposited into a separate account within the CIP and appropriated for BLT Easement purchases only ("Fund"). With the exception of donations by developers or others that are unrelated to obtaining additional density, before funds contributed by developers are deposited in the Fund, the Planning Board must transmit a certification to DED specifying the number of BLTs "whole or partial" to be utilized in the master plan area of the development project for which the Developer Contribution is being made. From this certification, DED will determine the specific amount to be paid under the Developer Contribution option.

2. Council staff raised a question about whether the BLT program is a "whole farm" easement program and suggested that the regulation explicitly state that the whole farm would be included in the easement. Council staff believes that the fact that an applicant is required to submit a description of the whole farm does not mean it's under easement.

Executive Staff Response:

We believe the preservation programs adequately encumber lands under an easement. Terminology that is used in the regulation is consistent with and well understood in land transactions. The term "whole farm" is not commonly used real estate terminology. The property descriptions which detail properties' total acreage are recorded exhibits to the preservation easement. DED can cite specific regulatory references whereby the property description involves the total acreage of the farm property. More specifically, Section IV. F. 1. of the Executive Regulation outlines that **the landowner must agree through the terms of the easement to encumber all of the land included in the easement sales application which includes a description of the total acreage.** Our position is further supported by the Application requirements in Section IV. 3. of the Regulation. This section details that as part of the application requirements, that the landowner must include as part of the application a **complete property description which includes the total acreage of the parcel.** DED believes this part of the regulation provides very clear guidance that the BLT program is a "whole"

easement program and therefore will be implemented as such. Moreover, the point system weighs size of applicant farms in determining prioritization of BLT purchases.

DED is willing to provide further guidance within Section IV. Building Lot Termination (BLT) Easement similar to the language found in the Agricultural Easement Program (AEP) section of the regulations that outline when an easement may be purchased on less than the entire parcel acreage. More specifically, Section IV. Building Lot Termination (BLT) Easement is amended to state “The County will purchase easements over less than the entire contiguous acreage owned by a landowner only if the parcel being considered for an BLT Easement is separately deeded, surveyed or subdivided, and is, in the discretion of the Agricultural Preservation Advisory Board, of sufficient size and capability to be used for agricultural purposes”. Furthermore to make this intent even clearer, DED has amended Section II.(C)(1)(e.) of the regulation to state that the property description of the land under consideration for an easement must include the total the total acreage of the entire property

3. Council Staff indicated that the Committee questioned whether something should be added to the regulation to ensure that the entire available BLT dollars in any year do not go to one or a limited number of property owners.

Executive Staff Response:

A major concern of DED is the ability to use the funds for protective buying as circumstances and the rankings best dictate. Capping of the use of the funds may actually frustrate preservation of a very deserving site. We believe the methodology developed provides an objective assessment and valuation process that enables the County to protect the best farmland while treating applicants equally. While one of the objectives of the BLT program is to eliminate Rooftops in the agricultural reserve, the main objective of the Public funded option is to protect valuable agricultural lands from further fragmentation. Placing an arbitrary cap on who may receive funds will hamper our preservation efforts and could discourage landowner participation. We believe we should be given the opportunity to test this program and report back to Council to detail the programs progress. Enhancements to the regulation can be considered at this future date if we find that amendments to the regulation are necessary.

4. Council staff suggested that the regulation not be limited to any specific zone since the Council may add requirements for BLTs to other zones.

Executive Staff Response:

We agree with Council Staff's concern and we have amended the regulation so that the regulation would not limit the zones BLT can be utilized within. We have suggested the following edit:

IV. Building Lot Termination (BLT) Easement

The BLT Easement is another type of easement that may be purchased by the County under Chapter 2B or established through the private market in connection with site development approvals within appropriate zoning classifications.

January 19, 2010 PHED Committee Comments:

Agricultural Easement Program Regulations:

Council and staff did not specifically site any questions or concerns involving the County's Agricultural Easement Program (AEP). It was recognized that this program is 20+ years old, has been very successful and the changes recommended were done so that they were consistent with State Law.

Building Lot Termination Program Regulations:

Council and staff had numerous questions, as well as suggestions regarding this portion of Executive Regulation 3-09AM. The following paragraphs will outline the questions and suggestions made by Council and staff as well as the steps DED Agricultural Services have taken to address them.

General Comments regarding BLT Program:

Is the concept of the BLT being a whole farm easement program part of the Executive Regulation?

DED's response:

Section IV. Building Lot Termination (BLT) Easement regulations detail that the BLT easement is another type of easement that may be purchased by the County under Chapter 2B of the Montgomery County Code. As such, this program as all other existing programs will function as a "whole" easement program as defined by the legal description of the property. Furthermore, Section IV. 3. details as part of the application requirements, that the landowner must include as part of the application a complete property description which includes the total acreage of the parcel. In addition Section V. E. 1. outlines that the landowner must agree through the terms of the easement to encumber all of the land included in the easement sales application which includes a description of the total acreage. DED believes the regulation is very clear that the BLT program is a "whole" easement program and will be implemented as such.

Differences between Public and Private Program:

Council recognized that there may be differences between how the public funded BLT program functions from those BLT's acquired through a private transaction. It was understood that Executive Regulation 3-09AM addresses the procedures and valuation of easements through the Public funded option, while purchases through private market are likely to be between buyers and sellers. There was some discussion as to whether Executive Regulation 3-09AM would be the proper vehicle to develop the private market regulations or if this was better served by developing process through zoning.

DED's Response:

DED believes that Chapter 2B of the County Code only provides the enabling authority to develop regulations for the Public funded BLT program. DED further believes the guidance, procedures and regulations governing private market transactions must be accomplished through the County's Zoning Ordinance as was the case with the development of the County's Transferable Development Rights Program that has been in place since about 1980.

Specific Issues Raised During the Work Session:

Ranking of Properties for BLT Program:

- Council requested DED to consider additional ranking criteria that would include points related to the number of BLTs to be terminated in addition to the size of the total farm.

DED's Response:

DED has amended Executive Regulation 3-09AM, Section IV. B.1.c. to include additional points for the purpose of ranking properties to include points for the number of BLT's to be terminated.

- Council requested DED to consider additional ranking criteria that would include a way to assign points which could ascertain a level of threat of development.

DED's Response:

DED has amended Executive Regulation 3-09AM, Section IV. B.1.c. to include additional points for the purpose of ranking properties when a preliminary plan of subdivision for the property has been filed, or if the property has an approved preliminary plan of subdivision.

- Council raised concern that the ranking could lead to having few property owners receiving all the BLT funding in a given year.

DED's Response:

DED has gone to great lengths to develop a methodology for ranking and determining easement valuation that is objective and treats all applicants equally. The purpose of the Public funded program is to protect vitally important agricultural lands and we believe we have developed the methodology that will achieve this important goal. In anticipation of the concern raised by Council, DED staff prepared a matrix of examples which detailed size of farms, number of lots extinguished, compared to value of the proposed easement values. Given the diversity of farms included within this matrix example, it is very unlikely that a single property owner would receive all of the available funding. Furthermore, the matrix provided showed that the number of BLT's terminated by an easement would have the greatest impact on the value of an easement, rather than the size the property.

DED believes the ranking and valuation system developed should be tested and the DED will report back to Council on the progress of the BLT. Amendments to the regulation will be proposed as needed.

- Council also requested DED remove from the regulation, language pertaining to smaller properties being given priority ranking, because the ranking formula does not provide any consideration for this purpose.

DED's Response:

DED concurred with this observation and has amended Executive Regulation 3-09AM by deleting this reference giving priority ranking under Section IV. A.2.a.

Added Value Formula:

While a formula based approach to easement valuation can be complex, it has been demonstrated to be very effective and key to the implementation of the County's AEP program for over 20 years. DED requested that the Council provide flexibility the ability to field test and evaluate the easement valuation system that has been developed. DED will report back to the Council on the progress of the BLT. Once DED has been able to evaluate the effectiveness of the easement valuation system, we will be able to request amendments to the Executive Regulation if necessary, to address any modifications or lessons learned during this implementation period.

Contribution to the Fund:

- Council deliberated on several issues relating to developers contributing to the Fund, which included: How is the amount for Developer Contributions determined?, Who makes this determination?, and should the price a developer contribute, be based upon some variable rate dependent upon rate of return based upon geographic areas?

DED's response:

DED understands these are critically important questions raised and are important as they relate to the success of the BLT program. The DED believes these issues are not appropriate for inclusion in Executive Regulation 3-09AM. Chapter 2B of the Montgomery County Code primarily provides the County the enabling authority to conduct a public funded program. The only reference in Chapter 2B that pertains to Developer Contributions is outlined in Chapter 2B-17(b) that details payments made must comply with conditions of approval which the Planning Board has imposed for certain development plans. DED believes the most appropriate venue for the specific guidance to the development community for contribution to the fund should be done through the zoning ordinance. The County has offered some additional guidance within Executive Regulation 3-09AM that provides the basis for amending County Zoning as well as providing guidance as to the Maximum Value per BLT under the Developer Contribution option.

Section IV. of the BLT regulation has been amended to state: The BLT Easement is another type of easement that may be purchased by the County under Chapter 2B or established

through the private market in connection with site development approvals within appropriate zoning classifications.

Furthermore, Section IV.D.3. is amended to detail the process for Developer Contributions to be in the amount of the Maximum Value per BLT or portion of BLT (the “Developer Contribution”) and that the Planning Board will certify the number of BLTs (whole or partial) and that once DED receives this certification, will determine the funds to be paid under the Developer Contribution option.

The County has also created a new paragraph E. in Section IV within the Regulation entitled BLT Fund and Program Monitoring. This section details how BLT’s may be purchased through the fund or through private transactions relating to development approvals by the Planning Board in different master plans areas which may have different allowable densities and different returns on investments. This section also details that the County will monitor the private purchase of BLTs in connection with private development to determine the master plan area for which BLT purchases are being used to satisfy density requirements or incentive awards and the prices being paid by master plan areas for BLTs.

This will help the County to determine if differential pricing of Developer Contributions to the County Program is necessary to increase program participation and to achieve greater balance in returns on investments to developers based upon master plan areas or zones.

Reserved Residential Rights/TDRs

- Council indicated that Executive Regulation 3-09AM should include as a defined term, what constituted a reserved residential Right.

DED Response:

DED concurs with the recommendation and has amended Executive Regulation 3-09AM to include as a defined term Reserved Residential Lot Rights.

Proof of Approval for Onsite Waste Disposal System:

- Council requested DED to consider additional language in IV.A.3 (Application Requirements) to clarify that there must be proof of approval for an onsite waste disposal system “for each BLT to be purchased”

DED response:

DED concurs that this clarifying language will be very helpful and therefore have amended Section IV.A.3 to specify that for each BLT to be purchased, that proof of approval for onsite waste disposal system must be provided.

Child Lots:

- The Council sought clarification as to whether the Executive Regulation permitted child lots?

DED response:

During the January 19, 2010 work session, DED explained for the purpose of selling a BLT, a child lot (permissible) under zoning is not eligible for Easement purchase, as these lots are provided for the exclusive use of children and are not intended as market lots. DED will not accept applications or value child lots as eligible BLTs under the program. DED went on further to clarify, that a landowner's ability to exercise the right to utilize a lot for their child's exclusive use should not be prohibited under the easement provided the property is eligible for child lots and the landowner has retained sufficient TDRs. It is also important to note, that under the easement, any future reserved right to lots, whether market, or child, must be approved by the Agricultural Preservation Advisory Board (APAB). The APAB will review all proposed future lots on BLT easement properties so that their location and size does not interfere with the long term viability of the land to sustain agricultural productivity.

Future Use of Serialized BLT (TDRs):

- Council recommended the removal of certain language contained within the Executive Regulation that provided guidance on the future use of BLT's acquired by the County through the easement acquisition process.

DED response:

DED has agreed to amend paragraph E. (now paragraph F. because of the insertion of a new paragraph E.) of the regulations to delete the statement **"The future use of the serialized BLTs owned by the County must be approved by the County"**

Regulations for Private Transactions:

- Chapter 2B of the County Code only provides the enabling authority to develop regulations for the Public funded BLT program. Guidance, procedures and regulations governing private market transactions must be accomplished through the County's Zoning Ordinance as was the case with the development of the County's Transferable Development Rights Program that has been in place since the early 1980's.

DED response:

DED believes the zoning ordinance is the best mechanism to address the details needed for development of the private BLT market; however the County has attempted to provide some guidance within the regulation to address the private market as well as guidance on value of Developer Contributions.

Exempting Properties from BLT requirements:

This is an issue not directly related to the BLT Executive Regulations. The Council's staff report recommends it would be appropriate to discuss as part of the global issues involving the BLT program itself. This issue is related to BLT receiving areas and there are policy issues

and zoning issues that are currently being discussed and the final decisions will have an impact on this issue.

Donations:

- Council noted that while Chapter 2B provides for donations to the BLT program, they questioned as to why it wasn't specifically identified in the regulation.

DED Response:

Since Chapter 2B provides the enabling authority for donations, DED didn't believe it was necessary to include them in the Regulation specifically because they do not involve a process associated with acquisition of a BLT easement, other than what to do with the funds from Donations if received. Section IV.D.3 references donations and distinguishes them from Developer Contributions. DED believes no further section regarding donations is necessary.

MET and other Land Trusts:

- Council requested DED as part of program outreach, conduct follow up discussions with MET and other land trusts in the County who are typically involved in donations of land for easements. Council believes there may be opportunities for DED to partner with these entities to expand donated easements within the County.

DED Response:

DED concurs that there could be new opportunities to expand donated easements within the County as result of the BLT program and we will reach out to MET and other land trusts for partnering opportunities.

Conclusion:

DED believes to have addressed all salient concerns and issues raised as part of the January 19, 2010 PHED Committee work session and it is our hope that the PHED Committee will recommend the adoption of Executive Regulation 3-09AM to the full County Council so that we may begin to implement both the County's Agricultural Easement Program (AEP) and the Building Lot Termination Program (BLT) as soon as possible. If you have any questions regarding this staff report, please do not hesitate to contact us.

cc: Nancy Floreen, County Council President
Marc Elrich, County Council PHED committee member
Steve Silverman, Director, DED
Diane S. Jones, Assistant Chief Administrative Officer
Kathleen Boucher, Assistant Chief Administrative Officer
Vickie Gaul, Associate County Attorney
Marlene Michaelson, Senior Legislative Analyst



MONTGOMERY COUNTY EXECUTIVE REGULATION

Offices of the County Executive • 101 Monroe Street • Rockville, Maryland 20850

Subject AGRICULTURAL LAND PRESERVATION EASEMENT PURCHASES	Number 3-09AM
Originating Department DEPARTMENT OF ECONOMIC DEVELOPMENT	Effective Date

Montgomery County Regulation on:

AGRICULTURAL LAND PRESERVATION EASEMENT PURCHASES DEPARTMENT OF ECONOMIC DEVELOPMENT

Issued by: County Executive Regulation No. 3-09AM

Authority: Code Section 2B-18

Supersedes: Executive Regulation 66-91

Council review: Method 1 under Code Section 2A-15

Register Vol. 26 No. 3

Comment Deadline: March 31, 2009

Effective Date:

Sunset Date: None

SUMMARY: These Executive Regulations regulate the County's supplemental payment for the Maryland Agricultural Land Preservation Foundation's purchase of agricultural land preservation easements and regulate the method for purchasing agricultural easements by the County, including the method for determining easement value, the method for ranking offers to sell easements to the County, and the terms of payment for easements purchased by the County.

ADDRESS COMMENTS TO: Department of Economic Development, 111 Rockville Pike, Rockville, Maryland 20850

STAFF CONTACT: Jeremy V. Criss 301-590-2830, John P. Zawitoski 301-590-2831

BACKGROUND INFORMATION: Since 1978, Montgomery County has participated with the Maryland Agricultural Land Preservation Foundation (Foundation) in purchasing agricultural land preservation easements to preserve County farmland for agriculture and to protect it from development. Bill No. 56-87, Agricultural Land Preservation, was enacted February 16, 1988 to increase the effectiveness of the County's preservation efforts by authorizing the County to purchase easements, using the County's share of the agricultural land transfer tax, directly from the landowner or by supplementing the purchase price offered by the State for an agricultural preservation easement. In 1992, the County approved regulations to allow the County to take title to Transferable Development Rights (TDRs) purchased with agricultural preservation easements, rather than requiring that TDRs purchased under an agricultural preservation easement be extinguished. The TDRs are assets the County may sell in the future to generate revenues for the Agricultural Land Preservation Fund. In 2005, the County celebrated the 25th Anniversary of the Agricultural Reserve and several initiatives to support agriculture were identified, including a proposal to legislate a new preservation



MONTGOMERY COUNTY EXECUTIVE REGULATION

Offices of the County Executive • 101 Monroe Street • Rockville, Maryland 20850

Subject	AGRICULTURAL LAND PRESERVATION EASEMENT PURCHASES	Number	3-09AM
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tool known as the Building Lot Termination (BLT) Easement. In 2007, the Maryland General Assembly approved House Bill 1331 which modified the requirements for State agricultural preservation programs. In response to these modifications to State Law, the County introduced Bill 39-07 to amend Chapter 2B of the Code to be consistent with the State Law and to establish the BLT Easement.

I. Definitions. The definitions in this section supplement those in Chapter 2B.

Added-value formula: The method by which the price of AEP Easements is determined under Sections II(E) and (F).

Agricultural Easement Program (AEP): A County program designed to reduce permitted residential density on agricultural lands by purchasing easements to preserve agricultural production capability.

Building Lot Termination (BLT) Easement: is defined in Section 2B-15 of the Code.

BLT Adjusted Market Value Price: The price for BLT Easements purchased under Chapter 2B and established on an annual basis by the County Executive.

BLT Ranking Formula: The method by which the price of BLT Easements is determined under Section IV(B)(1)(b).

DED: The County's Department of Economic Development.

Director: Director of DED.

Reserved Residential Lot Rights: Rights contained within a recorded easement giving a party the ability to construct a limited number of residential dwellings subject to the approval processes in Section II (D)(2) and Section IV(C)(2).

II. Agricultural Easement Program (AEP)

The County may purchase an easement on real property to preserve agricultural land in the County. The agricultural easement must restrict residential, commercial, and industrial use of the land.

A. Eligibility - AEP Program

1. Eligible Sellers

The County will purchase easements only from the holder of fee simple title to eligible land, or a person or institution that has entered into a binding contract or option to purchase fee simple title to eligible land, if and when that person or institution takes title to the land.



MONTGOMERY COUNTY EXECUTIVE REGULATION

Offices of the County Executive • 101 Monroe Street • Rockville, Maryland 20850

Subject	AGRICULTURAL LAND PRESERVATION EASEMENT PURCHASES	Number	3-09AM
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2. Land Eligible for Inclusion within Agricultural Zones.

The County will purchase easements on 50 acres or more of land that is zoned Rural Density Transfer, Rural, or Rural Cluster, or on land comprised of several contiguous parcels totaling 50 acres or more that are adjacent to properties protected by other State or County agricultural or other conservation easements., or on land with significant agricultural resources if they include at least 10 acres of cropland and are adjacent to properties protected by other State or County agricultural or other conservation easements. The County may purchase easements on land that is already encumbered by a transferable development rights easement provided not all of the TDRs have been transferred from the land. At a minimum, a landowner must have retained TDRs with the land at the density of 1 TDR for every 25 acres to remain eligible for the maximum benefits under the AEP Program. The County will purchase easements over less than the entire contiguous acreage owned by a landowner only if the parcel being considered for an AEP Easement is separately deeded, surveyed or subdivided, and is, in the discretion of the Agricultural Preservation Advisory Board, of sufficient size and capability to be used for agricultural purposes. Under an AEP Easement, the easement price will not include the curtilage around each dwelling and one acre will be subtracted from the total eligible acreage for each dwelling on the property.

3. Additional Land Eligibility Requirements

- a. At least 50 percent of the land under consideration for an easement must meet either i) USDA Soil Classification Standards I, II or III; or ii) Woodland Classifications 1 or 2.
- b. The land must lie outside water and sewer categories 1, 2, and 3.
- c. The Agricultural Preservation Advisory Board may consider purchasing easements on other agricultural land that does not meet the qualifications in Section II(A) if it determines the land has significant agricultural value, is consistent with the long term planning goals of the County and the easement is in the public interest.

4. Determining significant agricultural value

- a. For purposes of Section II(A), the land has significant agricultural value if the land:
 - i. has a soil conservation plan approved by a local soil conservation district and the plan is fully implemented according to the implementation schedule in the plan;
 - ii. is recommended by the majority of the APAB members after an on-site inspection is conducted by one or more members of the APAB or the APAB's designee; and
 - iii. meets either of the following criteria:



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(a) A minimum of 72 percent of the land (less any acreage included within the 100-year floodplain and less any acreage included in State or federal wetlands) contains of a combination of soils with U.S.D.A. Soils, Class I, II, and III classifications on cropland or pasture land and Woodland Groups 1 and 2 classifications on wooded areas.

(b) A detailed farm management plan describing the nature of the agricultural operation, including a detailed summary of the viability of the land as a profitable agricultural enterprise and the Montgomery County Cooperative Extension and the Montgomery Soil Conservation District concur that the land is capable of a profitable agricultural enterprise.

- b. After the APAB determines whether land has significant agricultural value, it will provide a recommendation to the Director about whether an easement should be purchased, The Director will consider the APAB's recommendation when deciding whether to approve or deny the purchase of an AEP Easement.

B. Eligible Farmland – Land Eligible for Inclusion within Non -Agricultural Zones

Agricultural land within non-agricultural zones is eligible for easement purchase if the land meets the requirements stated in Sections II(A)(1)(3) and (4).

The County will purchase easements on 50 acres or more of land, or on land comprised of several contiguous parcels totaling 50 acres or more that are adjacent to properties protected by other State or County agricultural or other conservation easements, or on land with significant agricultural resources if they include at least 10 acres of cropland and are adjacent to properties protected by other State or County agricultural or other conservation easements. The County will purchase easements over less than the entire contiguous acreage owned by a landowner only if the parcel being considered for an AEP Easement is separately deeded, surveyed or subdivided, and is, in the discretion of the Agricultural Preservation Advisory Board, of sufficient size and capability to be used for agricultural purposes. Under an AEP Easement, the easement price will not include the curtilage around each dwelling and one acre will be subtracted from the total eligible acreage for each dwelling on the property.

C. AEP Easement Sales Application Requirements

If a landowner is interested in selling an agricultural easement to the County, the landowner must submit an easement sales application to DED. The application must include a completed property description as outlined in Section II(C)(1), must pertain to a parcel of land or contiguous parcels of land at least 50 acres in size, and must include the landowner's asking price for the easement, which price must not exceed the calculated maximum easement value as described in Section II(E). Once DED receives an application, it will



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notify the landowner if the application is incomplete. If the application is complete, DED will review it under the requirements of these regulations.

1. **The property description of the land under consideration for an easement must include:**
 - a. the full names and addresses of all landowners of record;
 - b. the full names of all of the landowners' children;
 - c. the property address;
 - d. a copy of the tax map;
 - e. the total acreage of the entire property;
 - f. deed references for the deeds conveying the land to the landowners;
 - g. the current land use and the USDA soils productive capability class;
 - h. the number of dwelling units on the land;
 - i. the current zoning of the land;
 - j. all third party interests in the land;
 - k. a description of the farming operation;
 - l. an inventory of farm buildings on the land; and
 - m. other information necessary to evaluate the land's eligibility for an easement (i.e. Opinion of Title, surveys, metes and bounds legal descriptions, and for an application under the BLT Program: [a letter] a copy of the septic system site plan from the Department of Permitting Services (DPS) approving an individual onsite waste disposal system.

D. Permitted Activities- Lands Subject to AEP Easements

The following activities are permitted on lands encumbered by County Agricultural Preservation Easements subject to the limitations and conditions of Chapter 59 of the Code:

1. **Agricultural Use**
 - a. use of the land for agriculture;
 - b. operation of any machinery used for agriculture or the primary processing of agricultural products, regardless of the time of operation;
 - c. all normal agricultural operations, performed in accordance with good husbandry practices, that do not cause bodily injury or directly endanger human health; and
 - d. operation of a Farm Market.



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2. Residential Use

Under an Agricultural Preservation Easement, a landowner retains limited rights to construct dwellings on the land. Before constructing a dwelling on land under an easement, the landowner must apply in writing to the Agricultural Preservation Advisory Board (APAB) for approval. The APAB's approval of a dwelling will be contingent upon the landowner's compliance with the requirements of this Section II(D)(2).

- a. *For the landowner's use.* A landowner may request one acre, or the minimum lot size required by the zoning and well and septic regulations, which ever is greater, to build a dwelling for use by the landowner. However, irrespective of the number of landowners holding title to the land, there must not be more than 1 landowner lot. For purposes of this subsection, land titled in individuals, partnerships, or limited liability corporations whose principals are all related family members, are eligible to request permission to construct a dwelling.
- b. *For the landowner's children's use.* Up to 3 one-acre lots, or the minimum lot size required by the zoning and well and septic regulations, whichever is greater, to build houses for the use of the landowner's adult children at a maximum density determined by the following acreage calculation:
 - i. one child lot for the first 25 acres;
 - ii. a second child lot for properties greater than 50 acres but less than 120 acres;
 - iii. a third child lot for properties greater than 120 acres in size;
- c. When a landowner submits an easement application to DED, the landowner may request that the easement provide for the landowner's right, intended to run with the land, to construct one dwelling to support a farming operation provided:
 - i. no viable dwellings exist on the land at the time of easement acquisition;
 - ii. the landowner agrees that the requested dwelling must never be subdivided away from the land under easement; and
 - iii. the landowner agrees that the requested dwelling is in lieu of any right to future child lots.
- d. A landowner may also request permission to construct a dwelling for the landowner's tenants (tenant house) who are fully engaged in farming the land, but the maximum density for tenant houses must not to exceed one tenant house for every whole 100 acre increments (i.e. 100 acres is eligible for 1 tenant house, 150 acres is eligible for 1 tenant house and 200 acres is eligible for 2 tenant houses).



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e. If the APAB approves a landowner's request to construct a dwelling, the acreage approved for the dwelling must be released from the requirements of the easement. Any release issued under this regulation must include:

i. An affidavit from the landowner or the landowner's child, as applicable, that the released acreage (released lot) will not be transferred to a third party for a period of 5 years from the date the release is recorded among the land records, except:

1. with the prior written approval of the APAB upon demonstration by the landowner or the child of severe economic hardship; or
2. upon a lender providing notice to the APAB of a transfer pursuant to a bona fide foreclosure of a mortgage or deed of trust or the lender accepting a deed in lieu of foreclosure.

f. For the purpose of this regulation, if a landowner or a landowner's child wishes to transfer a released lot within a period of less than 5 years because of severe economic hardship, the APAB with the concurrence of the Director, may allow a transfer of the released lot. To petition for relief from the 5 year requirement, the landowner or the landowner's child, as appropriate, may petition the APAB, stating succinctly the severe economic hardship that the landowner or the landowner's child, is sustaining, and providing the APAB with the following information:

i. A recent financial statement documenting all assets and liabilities and a statement signed by the landowner or landowner's child, as appropriate, that the information contained in the financial statement is, based upon personal knowledge, true and accurate;

ii. Other information documenting the severe economic hardship including, by way of example, information from mortgage holders, lien holders, creditors, attorneys, taxing authorities, or other third parties who can address the economic condition of the landowner or the landowner's child. To the extent permitted by law, the APAB and the Director, as applicable, must deny public access to the financial information provided to the APAB under this regulation. However, nothing in this regulation precludes the APAB from discussing or sharing the financial information with the Director, whose concurrence is required in any relief provided under this subsection.

iii. The APAB may also consider other documentation of hardship, including any court order, writ, or decree which calls for a division of assets associated with any separation or divorce proceeding or with distributing an estate.



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3. Restriction on Subdivisions

Except as otherwise provided under this regulation, land under an agricultural easement must not be used or subdivided for residential, commercial, industrial, or any other-non agricultural use.

4. Lots Created Prior to Easement Sale

The curtilage of any dwelling located on land proposed for an easement will be excluded from the easement price and the value of one acre of land for each dwelling will be subtracted from the total price paid for the easement.

E. Establishing AEP Easement-Value

The added-value formula is the method for establishing easement value under the Agricultural Easement Program. It is an added-value formula based on the point system in Sections II(E) and (F).

1. Time frame for Determination of Easement Value

The maximum value of an easement using the added-value formula is determined at the time of the County's receipt of a complete easement sales application from the landowner. A landowner may have only one easement sales application for a specific property pending at any one time.

2. Maximum Easement Value and Relationship with TDRs.

The maximum value of an easement, as determined by the added-value formula, will take into account the number of TDRs retained with the property. At a minimum, 1 TDR per every 25 acres must be retained with the land in order to be eligible for the maximum easement value.

3. Right to Revise/Withdraw

If the maximum easement value determined by the County using the added-value formula is lower than the requested purchase price submitted by the landowner, then the landowner must either revise their requested purchase price or withdraw the offer to sell an easement to the County.



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F. AEP Easement Formula Valuation Procedure

The maximum value of an easement is obtained by combining two separate values: (1) the per acre base value for an easement on agricultural land in the County (Base Value), and (2) the added value for certain farm quality characteristics (Added Value), the quality of which is determined by APAB.

1. Determining Base Value

By July 1st of each year, the County Executive determines the Base Value for the fiscal year. In setting the Base Value, the County Executive considers such factors as recent prices paid for agricultural easements by the Maryland Agricultural Land Preservation Foundation within Montgomery County, recent County TDR prices and recent prices paid for fee simple acquisitions of County agricultural land, including prices for parcels with and without agricultural easements. The Base Value is applicable County-wide.

2. Determining Added Value

The Added Value is based on several farm quality characteristics that have a direct effect on the future potential of the land to support agriculture and on the threat to the property from non-agricultural uses. These characteristics are:

- a. Size, as determined by deed or recent survey: For each 5 acres of land, the Added Value is one percent of Base Value. Land size is determined from the most recent property tax assessment or other documentation acceptable to DED.
- b. Land quality, as determined by DED: The land quality value varies by soil quality. The Added Value is three percent for each acre of land in the United States Department of Agriculture (USDA). Capability Class I; 2 percent for each acre of land in USDA Capability Class II or Woodland Group I; and, one percent for each acres of land in USDA Capability Class III or Woodland Group II. In addition 10 percent of base value is added to the added-value formula for farms that have implemented a soil conservation plan approved by the Montgomery Soil Conservation District. The USDA Capability Classification is determined by the Natural Resources Conservation Service (NRCS).
- c. Land Tenure: The Added Value for land tenure is 25 percent of the Base Value. It is applicable if:
 - i. the landowner earned gross income of at least \$5,000 annually from agricultural use of the land on or before October 1, 1980, in at least three of the previous five years, or continuously from the time the landowner acquired the land, or



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- ii. the land is being purchased under binding contract of sale by a buyer who certifies under oath that the buyer intends to start a new agricultural operation, such as farming, or to enter into a long term lease with a third party to use the land for agriculture purposes; or
 - iii. the land is being farmed by an operator under a long term lease agreement with the landowner.
- d. Road Frontage: The Added Value for road frontage is one percent of the Base Value for each 50 feet of frontage on a public road up to a maximum of 100 percent of the Base Value. Road frontage is determined by DED and may be verified by the landowner by metes and bounds survey.
- e. Agricultural Zone Edge: The Added Value for land located within the RDT Zone but situated on the edge of that zone, is 100 percent of the Base Value if the land, as determined by DED, is within one mile of the border with other zones in the County, including incorporated towns.

G. County Purchase Procedure

1. Ranking of AEP Easement Purchases

The County will accept applications to sell easements during set purchase periods. If funds are available, the County will hold at least one purchase period annually. The County will accept only those applications to sell an easements received by DED during the purchase period. At the end of each purchase period, applications to sell easements will be ranked by the APAB using land size, soil quality and threat of development as the primary factors in determining priority rankings.

2. County Offer to Buy

- a. Upon the recommendation of the Director, and the Chief Administrative Officer, or their designees, an offer to purchase an agricultural easement may be tendered to the landowner. The offer must contain the specific terms of purchase, including the disposition of any TDRs retained with the land and any rights to be reserved by the landowner for the construction of future dwellings for the landowner, the landowner's children or the landowner's tenants. A landowner's satisfaction of the requirements of these regulations does not establish an obligation by the County to purchase an easement. Further, the County's offer to purchase an easement may specify terms, contingencies, and conditions not contained in the landowner's application to sell an easement.



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- b. Following the conclusion of any purchase period, the County will tender offers to purchase all easements approved for purchase to the extent possible with the funds allocated. Funds for County easement purchases are allocated annually on July 1st in the Capital Improvement Projects budget.
- c. The County will endeavor to tender offers to purchase easements approved for purchase within 60 days following the conclusion of the purchase period.

3. Rejection of Application

- a. The County will notify a landowner if their application to sell an easement is not accepted within 60 days following the conclusion of the purchase period. The notice will briefly describe the reason or reasons for the County not accepting the easement application, i.e. the County lacked sufficient funds to purchase all proposed easements or the land proposed for easement acquisition did not meet eligibility criteria.
- b. If a landowner's applications to sell an easement is not accepted because the County lacks funds, with the landowner's permission, the application to sell will be reconsidered during the next purchase period.

4. Landowner Acceptance

The landowner will have 30 days following the County's offer to purchase in which to accept the offer. Failure to respond after 30 days will be considered a rejection of the offer. The landowner may reject the offer to purchase up to the point of settlement. A landowner who rejects a County offer to purchase will forfeit the landowner's right to sell an easement to the County for a period up to 24 months.

5. Closing and Payment

- a. Settlement will occur following landowner's acceptance of the County's offer to purchase an easement and is contingent upon a title search and any other evidence, such as a land survey, that may be necessary to establish clear title.
- b. Payment will be in full at time of settlement, or the landowner can choose a partitioned payment over more than one tax year; or
- c. A longer term structured payment subject to a negotiated agreement acceptable to both the landowner and the County.



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- b. Payment will be in full at time of settlement, or the landowner can choose a partitioned payment over more than one tax year; or
- c. A longer term structured payment subject to a negotiated agreement acceptable to both the landowner and the County.



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6. Recordation and Monitoring

The County's acquisition of an AEP easement will be recorded in the land records and in the AEP Program's annual report. DED must maintain a ledger of all of the TDRs conveyed to the County through the AEP Program. DED will monitor the properties under easement at least biannually to ensure compliance with easement requirements.

H. Referral to State Program

For the purpose of leveraging State and County funds, the Chief Administrative Officer or designee may, upon the recommendation of the Director, request that the landowner apply to the Maryland Agricultural Land Preservation Foundation and make a good faith offer to sell an agricultural easement to the Foundation.

III. County Supplement to Maryland Agricultural Land Preservation Foundation Easement Price

Under Chapter 2B-3(g), if the Foundation buys an agricultural easement, the County may make an additional payment to the landowner of up to 15 percent of the State's purchase price upon completion of the sale of the easement to the Foundation. This supplemental payment is to encourage landowners to choose to sell easements to the Foundation.

The amount of the supplemental payment will be determined by Executive Order annually on July 1st. The amount of the supplemental payment will be determined in part by the value paid by the County for AEP easements in the previous year and by the amount needed to encourage landowners to participate in the Foundation's easement purchase program. At the discretion of the County Executive, the value of the supplemental payment may be revised more than once each year.

IV. Building Lot Termination (BLT) Easement

The BLT Easement is another type of easement that may be purchased by the County under Chapter 2B or established through the private market in connection with site development approvals within appropriate zoning classifications. Similar to other agricultural easements purchased by the County, the primary purpose of the BLT Easement is to preserve agricultural land by reducing the fragmentation of farmland resulting from residential development. A BLT Easement will restrict residential, commercial, industrial and other non-agricultural uses. A key feature of the BLT Easement is an enhanced level of compensation to a landowner who can demonstrate that their land is capable of residential development and agrees, as part of the BLT Easement, to forego residential development and also agrees to restrict other types of development on their land. The County will purchase easements over less than the entire contiguous acreage owned by a landowner only if the parcel being considered for an BLT Easement is separately deeded, surveyed or subdivided, and is, in the discretion of the Agricultural Preservation Advisory Board, of sufficient size and capability to be used for agricultural purposes



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A. Eligibility for County Purchase

1. Eligible Sellers

The County will purchase easements only from the holder of fee simple title to eligible land, or to a person or institution that has entered into a binding contract or option to purchase fee simple title to eligible land, if and when that person or institution takes title to the land. Child lots permitted under Chapter 59 of the Code are not permitted under BLT Easements.

2. Land Eligible for Inclusion in BLT

- a. The land must be located in the RDT Zone and must be at least 50 acres in size; however, a smaller property may be ~~[[maybe be]]~~ considered ~~[[and will be given priority ranking under Section IV(B)1(b)]]~~ if it is contiguous to other lands protected from development by State or County agricultural and conservation easements.
- b. At least 50 percent of the land under consideration for an easement must meet either i) USDA Soil Classification Standards I, II, or III; or (ii) Woodland Classifications 1 or 2.
- c. The land must lie outside water and sewer categories 1, 2, and 3.
- d. The Land must not be encumbered by a federal, State or County agricultural or conservation easement; except, however, land protected by a Transferable Development Right (TDR) Easement may still be eligible.

3. Application Requirements

If a landowner is interested in selling a BLT Easement to the County, the landowner must submit an easement sales application to DED. The application must include a completed property description as outlined in Section II(C)(1), including the requirement in Section II(C)(1)(m) of a [letter from the Department of Permitting Services approving a[n individual onsite waste disposal] septic system site plan approved by DPS with an on-site septic absorption area contained entirely within the legal description of the property, [[and]] a minimum absorption area of 10,000 square feet or such additional area required by DPS for each BLT to be purchased, and demonstration that the septic absorption area being terminated by the BLT Easement is separated from any other septic absorption area on the property by at least 50 feet. Once DED receives an application, it will notify the landowner if the application is incomplete. If the application is complete, DED will forward the application to the APAB and the APAB will review it under the requirements of these regulations.



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B. Review and Approval Procedure

1. DED and the APAB will accept applications, rank them, and provide notice to landowners under the requirements of this subsection.

a. The County will accept applications to sell BLT Easements during set purchase periods. If funds are available, the County will hold at least one purchase period annually. The County will accept only those applications to sell a BLT Easement received by DED during the purchase period. At the end of each purchase period, applications to sell BLT Easements will be ranked numerically by the APAB, from highest to lowest, using the BLT Ranking Formula set out in Section IV(B)(1)(b).

b. i. The BLT Ranking Formula is equal to the Added Value and is used to determine the numerical ranking of BLT Easement applications received by the County during set purchase periods.

ii. The Maximum Easement Value is equal to the sum of the BLT Annual Base Value and the Added Value and is used to determine the price that the County will be pay for a BLT Easement. The BLT Annual Base Value is the minimum price that will be paid for a BLT Easement and will be determined annually by the County Executive as set out in Section IV(D)(1). The Added Value is used to increase the purchase price of a BLT Easement above the BLT Annual Base Value.

iii. The Added Value will be determined using a point system and the monetary value of the Added Value will be determined annually by when the County Executive as set out in Section IV(D)(1).

The Added Value consists of a maximum point value of 20 points within 3 categories:

- (a) Size of property, as determined by deed or recent survey, represents up to a maximum of 5 points:
 - a. zero points for properties less than 25 acres;
 - b. one point for properties at least 25 acres but less than 50 acres in size;
 - c. two points for properties at least 50 acres but less than 75 acres in size;
 - d. three points for properties at least 75 acres but less than 100 acres in size; and
 - e. four points for properties 100 acres but less than 150 acres in size; and
 - f. five points for properties 150 acres or greater in size.



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- (b) Soil quality, as determined by DED, represents up to a maximum of 10 points, determined as a percentage of USDA Soil Capability Classifications I, II, III and Woodland Classifications 1 and 2:
 - a. two points if a minimum of 50 percent of the land but less than 65 percent (less any acreage included within the 100-year floodplain and less any acreage included in State or federal wetlands) contains of a combination of soils of Class I, II, III and Woodland 1 and 2 soils;
 - b. four points if a minimum of 65 percent of the land but less than 70 percent (less any acreage included within the 100-year floodplain and less any acreage included in State or federal wetlands) contains of a combination of soils of Class I, II, III and Woodland 1 and 2 soils;
 - c. six points if a minimum of 70 percent of the land but less than 75 percent (less any acreage included within the 100-year floodplain and less any acreage included in State or federal wetlands) contains of a combination of soils of Class I, II, III and Woodland 1 and 2 soils;
 - d. eight points if a minimum of 75 percent of the land but less than 80 percent (less any acreage included within the 100-year floodplain and less any acreage included in State or federal wetlands) contains of a combination of soils of Class I, II, III and Woodland 1 and 2 soils; and
 - e. ten points if greater than 80 percent of the land (less any acreage included within the 100-year floodplain and less any acreage included in State or federal wetlands) contains of a combination of soils of Class I, II, III and Woodland 1 and 2 soils.

- (c) Land tenure represents up to a maximum of 5 points. These points will be awarded if the land is used for agriculture by the landowner and if the landowner is registered as a producer of agricultural products with the local agricultural support agencies; or, if a landowner demonstrates that the landowner has a long term lease agreement with a producer of agricultural products and the producer is registered with the local agricultural support agencies. One point will be awarded for each year the landowner has used the property for agriculture; or, alternatively, one point will be awarded for each year that a producer has used the land for agriculture under a lease agreement.

c. In addition to the criteria in IV(B)(1) for ranking applications for BLT Easements, the APAB will consider the following additional criteria for the sole purpose of ranking applications. The points awarded under this IV(B)(1)(c) will not affect easement valuation. For each application received, the following additional points shall be awarded:

- i. One point for each BLT terminated by the easement.



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ii. Two points for properties contiguous to other properties protected by agricultural and conservation easements.

iii. Three points for properties that have a filed preliminary plan of subdivision.

iv. Five points for properties that have an approved preliminary plan of subdivision.

d. [[c.]] DED must provide its recommendation, and that of the APAB, to the Director about whether or not to tender an offer to purchase a BLT Easement from the landowner

[[d.]] e. If DED receives sales applications for BLT Easements after the closing of a purchase period, it will notify the landowner that the purchase period is closed, but the application will be placed on a waiting list for the next purchase period.

C. Permitted Activities on Lands Protected under BLT

The following activities are permitted on lands encumbered by BLT Easements subject to the limitations and conditions of Chapter 59 of the Code:

1. Agricultural Use

- a. use of the land for agriculture;
- b. operation of any machinery used for agriculture or the primary processing of agricultural products, regardless of the time of operation;
- c. all normal agricultural operations, performed in accordance with good husbandry practices, that do not cause bodily injury or directly endanger human health;
- d. operation of a Farm Market.

2. Residential Use

- a. No residential uses are permitted on lands encumbered by a BLT Easement except when reserved residential rights are retained with the easement;
- b. To the extent allowed by the easement, the landowner of a BLT Easement may retain certain rights to future residential dwellings. The landowner must apply in writing to the APAB prior to filing a preliminary plan of subdivision;

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- c. If a landowner’s request to retain rights for future residential dwellings is approved, each retained right is be equal to two acres, or the minimum lot size required by zoning and well and septic regulations, which ever is greater, to build a dwelling, unless a larger size does not interfere with the agricultural character of the land, as determined by the APAB in its sole discretion;
- d. Any permitted residential right terminated under a BLT Easement must include the termination of an individual on-site sewage waste disposal system that would be used to support the residential dwelling.

3. Restriction on Subdivisions

The landowner whose land is subject to a BLT easement must not use or subdivide the land for residential, commercial, industrial, or any other non-agricultural uses except as provided under this regulation and contained within the terms of the easement.

D. Establishing BLT Easement-Value

The method for establishing the Base and Maximum value for a BLT Easement will be through the application of a County- established BLT Ranking and Easement Valuation Formula.

1. Determining the BLT Base Value, Maximum Value and Added Value

- a. **Base Value.** The Base Value is the minimum price that the County will pay for a BLT Easement. By July 1st of each year, the County Executive will determine the Base Value for BLT Easements for that fiscal year. In setting the Base Value, the County Executive considers such factors as recent prices paid for agricultural easements in Montgomery County, including BLT Easements, recent County TDR prices and recent fair market value prices paid for fee simple acquisition of County agricultural land, including prices for parcels with and without agricultural easements. The Base Value for BLT Easements is expressed as a percentage of the fair market value of a parcel of agricultural land with at least one TDR and an individual on-site sewage waste disposal system. The Base Value [[Valuable]] is applicable County-wide.
- b. **Maximum Value.** The Maximum Value is the highest or maximum price that the County will pay for a BLT Easement. By July 1st of each year, the County Executive will determine the Maximum Value for BLT Easements for that fiscal year. In setting the Maximum Value, the County Executive considers such factors as recent prices paid for agricultural easements in Montgomery County, including BLT Easements, recent County TDR prices and recent fair market value prices paid for fee simple acquisition of County



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agricultural land, including prices for parcels with and without agricultural easements. The Maximum Value for BLT Easements is expressed as a percentage of the fair market value of a parcel of agricultural land with at least one TDR and an individual on-site sewage waste disposal system. The Maximum Value [[Valuable]] is applicable County-wide. The price that the County will pay for a BLT easement must not exceed the Maximum Value.

- c. Added Value. The Added Value is the difference of the Maximum Value and the Base Value (Maximum Value – Base Value = Added Value).

2. Right to Withdraw

If the landowner rejects the County’s offer of the Maximum Easement Value, the landowner must withdraw the BLT Easement sales application from further consideration for that purchase period. If a landowner wishes to participate in future easement purchase period, the landowner must resubmit an easement sales application consistent with Section IV(E)(2)(d).

3. Compensation

- a. The County’s offer to a landowner for a BLT Easement must not exceed the Maximum Easement Value. BLT Easements may be funded in cash as provided in Section IV(D)(3)(b).
- b. The purchase of BLT Easements may be funded by public funds appropriated through the Agricultural Preservation Capital Improvements Project or by private funds contributed by developers through the development approval process and in the amount of the Maximum Value per BLT or portion of BLT (the “Developer Contribution”). [[Funds contributed by d] Developer[s] Contributions will be deposited into a separate account within the CIP and appropriated for BLT Easement purchases only (“Fund”). With the exception of donations by developers or others that are unrelated to obtaining additional density, before funds contributed by developers are deposited in the Fund, the Planning Board must transmit a certification to DED specifying the [[amount of funds]] number of BLTs “whole or partial” to be utilized in [[required from the developer]]the master plan area of the development project for which the Developer Contribution is being made. From this certification, DED will determine the specific amount to be paid under the Developer Contribution option.
- c. The purchase price paid by the County for a BLT easement must not exceed the Maximum Easement Value.

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E. BLT Fund and Program Monitoring

1. BLTs may be purchased by the County through the Fund or they may be purchased in private transactions related to Planning Board development approvals for properties with zoning that requires or allows density incentive awards through the purchase of BLTs. These zones are found in several different master plan areas which have different allowable densities and could have widely disparate returns on investment to land owners which could in turn have a significant impact upon the success of the private BLT market and upon economic development.
2. The County must monitor the private purchase of BLTs in connection with private development to determine the master plan area for which BLT purchases are being used to satisfy density requirements or incentive awards and the prices being paid by master plan areas for BLTs. This tracking will be used to determine if differential pricing of Developer Contributions to the County Program is necessary to increase program participation and to achieve greater balance in returns on investments to developers based upon master plan areas or zones.

[[E.]] E. Building Lot Termination Program Purchase Procedure

1. Restricting the Use of Land. If the County’s offer to purchase a BLT Easement is accepted, the landowner must agree through the terms of the easement to encumber all of the land included in the easement sales application with the BLT Easement[[. E]] except for reserved residential rights under Section IV(C)(2):

- a. The terms of the BLT Easement must provide that the landowner agrees to give up [all] certain permitted residential lot rights that would otherwise be available for development; and
- b. The terms of the BLT Easement must also provide that the landowner agrees to give up the right to subdivide the land for [any and all] residential, commercial, industrial or any other non-agricultural uses except as otherwise provided in the BLT Easement.

Similar to the manner in which TDRs are serialized in TDR Easements, for each BLT Easement acquired by the County, the BLTs representing permitted residential density will be serialized and conveyed by the landowner to the County in a document separate from the BLT Easement; however, the BLT Easement will make reference to the document conveying the BLTs to the County. [[The future use of the serialized BLTs owned by the County must be approved by the County [Executive].]] Except for reserved rights for residential lots under Section IV(C)(2), the landowner must record a TDR Easement to serialize any TDRs remaining with the land. The TDR Easement is in addition to the residential lot rights terminated under the terms of the BLT Easement.



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2. County Purchase Procedure

a. Purchase Periods for BLT Easements

The County will accept applications to sell BLT easements during established purchase periods. The purchase period must end upon the earlier of, meeting the cap of applications established by the APAB for each purchase period, or the end of the purchase period established by DED for each purchase period.

The County will accept applications to sell easements on or before the last day of each purchase period.

At the end of each purchase period, the APAB will rank the properties in order from highest point value to lowest as determined by the BLT Ranking Formula and the value determined will form the basis for the County's offer to buy a BLT Easement.

b. County Offer to Buy BLT Easement

The County's offer to purchase BLT easements must be conducted in the manner provided under Sections II(G)(2).

c. Rejection of Offer - BLT Easement

If the County declines to purchase a BLT easement from a landowner, the County must notify the landowner in the manner provided under Sections II(G)(3).

d. Landowner Acceptance - BLT Easement

The landowner will have 30 days following the County offer to purchase in which to accept the offer. Failure to respond within the 30 day period will be considered a rejection of the County's offer. The landowner may reject the offer to purchase up to the point of settlement. A landowner who rejects a County offer to purchase will forfeit the right to sell a BLT Easement to the County for a period of 24 months.

e. Closing and Payment - BLT Easement

The process and procedure for BLT easement closings and payments must be conducted in with the manner provided under Sections II(G)(5).

f. Recordation and Monitoring - BLT Easement

Each BLT Easement must be recorded among the land records of Montgomery County, Maryland. The BLT Easement must include a legal description of the property under



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easement and a legal description, or any other appropriate description, of the area on which the on-site waste disposal system terminated by the BLT Easement is located. The BLT Easement must also include a requirement that the septic absorption area being terminated by the BLT Easement must be separated from any other septic absorption area on the property by at least 50 feet. Each acquisition of a BLT Easement must be included in DED's annual report on agricultural easements, and DED must maintain a ledger of all of the serialized TDRs created and conveyed to the County through the BLT Program. [[DED must maintain an accounting reference for all BLTs created and conveyed to the County.]] DED will monitor the properties under easement at least biannually to ensure compliance with the easement terms.

V. Easement Termination and Repurchase.

Agricultural easements purchased by the County after the effective date of Bill 39-07 are not eligible for easement termination and repurchase, except as provided in Chapter 2B-10, A landowner who owns land encumbered by an AEP easement prior to the effective date of Bill 39-07 may, not earlier than 25 years after an agricultural easement purchased by the County has been recorded among the County's land records, make a written request to the APAB to terminate the agricultural easement. Termination may be requested earlier only if the District Council re-zones the land under easement in a manner that precludes agricultural use as a matter of right.

If a request for termination is approved, the landowner must pay the County the present value of the easement prior to the termination being recorded among the land records. An bona fide, third party appraisal must be used to establish the present easement value and an appraisal obtained for purposes of this section may be considered viable for up to 12 months from date of the appraisal. Appraisals will be ordered by the County but will be at the landowner's expense.

VI. Effective Date

This regulation becomes effective 30 days after approval by the County Council.

Isiah Leggett
County Executive

Approved as to Form and Legality
Office of the County Attorney

By: _____
Vickie L. Gaul
Associate County Attorney

Date: _____

MEMORANDUM

January 15, 2010

TO: Planning, Housing, and Economic Development (PHED) Committee

FROM: Marlene L. Michaelson, Senior Legislative Analyst

SUBJECT: **Worksession** - Executive Regulation 03-09, *Agricultural Land Preservation Easement Purchases*

The Council received Executive Regulation 03-09, *Agricultural Land Preservation Easement Purchases*, on July 2, 2009. The Council held a public forum on Regulation 03-09 on October 6, 2009. Although it was submitted as a Method 2 regulation, the Department of Economic Development has since indicated that it intended to send it as a Method 1 regulation, which requires Council approval.

The latest draft of the proposed regulation appears on © 1 to 21 and background materials from the Executive and the Department of Economic Development (DED) appear on © 22 to 96. Attached on © 97 is the latest version of Chapter 2B §15-17 of the County Code, which was amended to allow the Building Lot Termination (BLT) Program. This Executive Regulation is needed to implement Bill 39-07, which amended Chapter 2B of the County Code to be consistent with State Law. The regulation provides guidance regarding the implementation of the County's Agricultural Easement Program (AEP) and the Building Lot Termination (BLT) Program.

Agricultural Easement Program Regulations

The Montgomery County AEP is a 20+ year old program to purchase easements to protect land for agricultural purposes. To maintain its ability to use Agricultural Transfer Tax revenues to purchase agricultural easements, the County easement program must be consistent with the state agricultural easement program and the County must be certified by the Maryland Agricultural Land Preservation Foundation. The certification allows the County to keep 75% of the Agricultural Transfer Tax for local use. **The regulations modify the County program to be consistent with recent changes in the state program, including the following:**

- Eliminates the requirement for State Agricultural Districts;
- Limits the number of child lots to 3;
- Allows the property owner to build one dwelling to support farming operations;

- Requires that a child lot be owned by the child for at least 5 years, except in certain hardship cases;
- Indicates that one TDR must be held for every 25 acres to be eligible for the maximum easement value;
- Modifies the formula for determining the maximum easement purchase price related to land tenure and location near the edge of the agriculturally zoned area (see © 27-28); and
- Eliminates the property owner's right to terminate the easement.

Background on the BLT Program

When the Council created the Agricultural Reserve, it downzoned land in the reserve to one unit per 25 acres and also created the Transferable Development Rights (TDR) program. This program has been described in depth elsewhere and is not addressed here other than to define certain key terms. For each 25 acres of land in the Agricultural Reserve, a property owner has 5 TDRS, 4 that may be sold to property owners desiring higher density in a TDR receiving area, and one that may be sold or used to build a residential lot. The TDRs that can be sold but not used for building in the Agricultural Reserve are referred to as “**excess TDRs**”. The TDR that can be used to create a buildable lot is referred to as the “**buildable TDR**”.

At the time the Council created the Agricultural Reserve, it anticipated that property owners would rarely build residential units at 1 per 25 acres. Large lot residential developments with multiple units were not anticipated in the Agricultural Reserve, and recent efforts to create such developments are of concern. Suburban housing could jeopardize agriculture, principally by fragmenting farmland. The Council's Ad Hoc Agricultural Policy Working Group recommended establishing a BLT easement program as a way to prevent fragmentation of farmland in the Agricultural Reserve. The BLT program would pay a landowner for an easement that eliminates the future development of a residential lot. The goals of the BLT program are as follows: (1) to preserve by easement as much useable farmland as possible, and (2) to reduce the number of buildable lots in the Agricultural Reserve while providing equity to landowners.

The intent of the regulations is for DED to put the whole farm under easement, even if the property owner does not plan to sell all development rights. This provides DED with the ability to consider the whole farm, limits the size of any future residential dwelling units (if not all BLTs are extinguished), and requires the landowner to apply to the Agricultural Preservation Advisory Board (APAB) prior to filing a preliminary plan of subdivision (see section C. 2. on © 16). Collectively, these provisions provide APAB opportunities to maximize the protection of farmland, even for areas that are being developed. **Staff believes the Executive Regulation would be much clearer to those not familiar with the program if the concept of the whole farm easement were addressed somewhere in the regulation.**

Differences between Public and Private Program

The BLT program was created to allow the purchase and sale of BLTs between 2 private property owners similar to the transferable development rights (TDR) program, but it also has a public program that would allow the County to purchase BLTs. The Council has provided five million dollars in seed funding for this program. This is particularly important, since it may be a few years before the first

properties are developed that require the purchase of BLTs under the Transit Station Mixed-Use (TMX) Zone or the proposed Commercial-Residential (CR) Zone.

Section 2B-16 of the County Code establishes the basic requirements for a BLT:

- (b) A BLT easement may only be created on a buildable lot which is:
- (1) located in the Rural Density Transfer (RDT) zone;
 - (2) zoned for residential density no higher than one dwelling unit per 25 acres; and
 - (3) capable of being served by an individual sewage treatment unit which meets the requirements of Chapter 27A and applicable regulations issued under that Chapter.

The Executive Regulation establishes further eligibility criteria for publicly purchased BLTs. There are no further guidelines to determine what constitutes an acceptable private BLT. While the public program focuses on preserving agriculture (see discussion of ranking below), private BLT purchases may focus on land that is not ideal for farming, since those easements are likely to be less expensive. The Executive Regulations provide clear guidance on the price the County will pay for a BLT; private purchases will be a negotiation between buyer and seller.

Eligibility

The eligibility requirements to participate in the public program are listed on © 13. They include the following:

- The land must be located in the RDT Zone and must be at least 50 acres in size; however, a smaller property may be considered and will be given priority ranking if it is contiguous to other lands protected from development by State or County agricultural and conservation easements.
- At least 50 percent of the land under consideration for an easement must meet either i) USDA Soil Classification Standards I, II, or III; or (ii) Woodland Classifications 1 or 2.
- The land must lie outside water and sewer categories 1, 2, and 3.
- The Land must not be encumbered by a federal, State, or County agricultural or conservation easement; except, however, land protected by a Transferable Development Right (TDR) Easement may still be eligible.

ISSUES

The Council has strongly supported the creation and funding of the BLT program and Staff believes the Council should move as rapidly as possible to adopt the regulations and other required changes in law, procedure, and policy. This is especially true since the price of land in the Agricultural Reserve is currently reduced due to the economy's impact on the demand for new housing. Nonetheless, there are certain policy issues that Staff believes need to be addressed before adoption.

Ranking of Properties

The Executive Regulation includes a point system that will be used to rank potential BLT purchases and also to establish the price of the purchase. The focus of the ranking and pricing is on providing a higher rank and purchase price based on suitability for agriculture, and Staff believes this is appropriate. While there is also a value to reducing development in the Agricultural Reserve in areas not best suited for crop-based farming, the limited resources available to fund the program justify a higher ranking for those properties most likely to support ongoing agricultural operations. The point system is as follows:

- Size (5 pts)
- Soil quality (10 pts)
- Land tenure (5 pts)

BLTs that do not rank high based on these point allocations are more likely to be sold in the private BLT market where these criteria do not apply and where buyers will instead prefer the lowest prices without regard to the quality of the land being preserved.

While Staff supports these criteria, staff has **four concerns** that the Committee may wish to consider. The criterion related to size is based on the size of the entire farm, not the amount preserved. Therefore, a 150 acre farm that only wants to sell 1 BLT would be ranked higher than a 125 acre farm that wants to sell 5 BLTs. Staff believes that the ranking formula should include points related to the **number of BLTs** to be preserved **in addition** to the size of the total farm.

Second, Staff believes that the ranking should allow the Agricultural Preservation Advisory Board (APAB), which will review and make recommendations on BLT acquisitions, to consider the **threat of development** in deciding the ranking of properties, as it does for the AEP easement. If there are 2 properties that are otherwise identical in their size, soil quality, and land tenure, the property that is platted or has an approved subdivision plan and could more easily be developed should be ranked higher than a property that has not started the development process.

Third, Staff is concerned that the ranking could lead to having a few property owners receive all the BLT funding in a given year. Staff recommends revising the Executive Regulation to indicate that **no single property should receive more than a certain percentage of the funds available in a given year** (e.g., 20%), unless DED determines there are unique circumstances that justify this allocation (e.g., limited applications or a property that is so far superior to the other applications).

Finally, the Regulation establishes **a point system** for ranking applications (see © 14 to 15), with a clear and objective means of assigning points that should facilitate the rankings. However, there is at least one reference to a factor that should influence ranking for which no points are assigned. On © 13 the Regulation language is as follows:

The land must be located in the RDT Zone and must be at least 50 acres in size; however, a smaller property maybe be considered **and will be given priority ranking** (emphasis added) under Section IV(B)1(b) if it is contiguous to other lands protected from development by State or County agricultural and conservation easements.

It is unclear to Staff how APAB will assign priority ranking for these properties if they are not included in the point system.

Added Value Formula

The Executive will determine the price he will pay for a BLT each year by obtaining appraisals on the value of a parcel of agricultural land with at least one TDR and an individual on-site sewage waste disposal system. He will then set a base and maximum price that is a percentage of fair market value (since the property owner retains ownership of the land and its use for agricultural purposes, the easement should be less than the fair market value). The base price sets a floor, and a pricing formula will be used to determine potential increases in the base value (the "value added"), based on its suitability for agriculture. The factors to be considered to determine agricultural suitability are size, land quality, and land tenure. While the Council received testimony questioning the complexity of the pricing formula, it was designed to mirror the pricing strategy used for the AEP program by having a base price and a maximum price and factors that can increase price. Unlike the AEP program, the BLT formula does not provide additional value for road frontage or land that is within one mile of the border of non-agriculturally zone land.

Contribution to Fund

The Executive Regulation does not address when a property owner may pay into the BLT Account Fund instead of purchasing a BLT in the private market. It also does not indicate the amount of the contribution to the fund and suggests that the Planning Board will specify "the amount of funds required from the developer". Staff believes these are critical issues that must be addressed, either in the Executive Regulation, or elsewhere in written form at this time and not deferred for future consideration.

The only references to the contributions to the fund are as follows:

In County Code Section 2B-17(b):

- The BLT Account must contain payments made to comply with conditions of approval which the Planning Board has imposed for certain development plans, and may also contain funds received through donation, appropriation, bond proceeds, or any other source.

In the draft Regulations:

- The purchase of BLT Easements may be funded by public funds appropriated through the Agricultural Preservation Capital Improvements Project or by private funds contributed by developers. Funds contributed by developers will be deposited into a separate account within the CIP and appropriated for BLT Easement purchases only ("Fund"). With the exception of donations by developers or others that are unrelated to obtaining additional density, before funds contributed by developers are deposited in the Fund, the Planning Board must transmit a certification to DED specifying the amount of funds required from the developer.

DED previously indicated that a property owner could opt for payments to the fund in lieu of purchasing BLTs on the private market when the owner needed a partial BLT to achieve its development objectives. It is unclear whether there any other circumstances under which an owner could choose to contribute to

the fund (e.g., if a developer could not find a willing BLT seller or if they need a large number of BLTs which would require negotiating with many sellers). **Provided there is adequate incentive for the property owner to choose private BLTs, Staff sees no reason not to give each buyer the option of contributing to the fund instead of private purchases.** For example, the price to purchase a BLT by contributing to the fund could be 90% of current fair market value. Since the retained value of the land is usually more than 10%, most owners of RDT land should be willing to sell for a price that is less than 90% of fair market value, leading developers to opt for the private, less expensive purchase option.

Perhaps the most significant reason to allow property owners to contribute to the fund instead of purchasing BLTs in the private market is so that BLTs can be priced differently, depending on the location of the buyer. The PHED Committee has already discussed the fact that the cost of a BLT will have a far greater impact in less affluent areas of the County where the BLT will have a greater impact on the development’s financial return. While, in some areas, the purchase of BLTs may have marginal impact on the viability of development, in areas where the returns on new development are marginal to begin with, the cost of a BLT could make development unfeasible. **Rather than eliminating the requirement to purchase a BLT in certain geographic areas, the Committee’s preference was to establish a pricing policy for BLTs linked to the likely return on investment in certain geographical areas.**

While there are several ways to estimate the financial return in different areas, Staff believes the easiest proxy is the average rental for a square foot of Class A office space by submarket, data that is regularly tracked by organizations such as CoStar. More work should be done to determine how to price BLTs, both to encourage the private purchase of BLTs where feasible and to discount the price in areas where the purchase of a BLT could prevent development from proceeding. **An example of one option** for a pricing strategy would be to look at the average rental rates and have all properties with the highest average rentals pay more than the likely price of a BLT on the private market (to encourage those buyers to buy on the private market) and then discount the BLT price as the rental price decreases. Staff has not assessed whether the percentages below would achieve the stated objective but provides this chart as **an example** of how this system could work.

Average Rental Rates for Class A Office Space	Cost of BLT
90 to 100% of highest average rental rate	90% of FMV
80 to 90% of highest average rental rate	80% of FMV
70 to 80% of highest average rental rate	50% of FMV
60 to 70% of highest average rental rate	30% of FMV
50 to 60% of highest average rental rate	20% of FMV
Less than 60% of highest average rental cost	5% of FMV

FMV is Fair Market Value of a 25 acre lot in the RDT zone

Reserved Residential Rights/TDRs

The Executive Regulation allows “reserved residential rights” but does not explain what this means or when they are allowed. This provision would only apply when the whole farm is placed under easement but the property owner chooses not to sell all BLTs. For example, if a farm is 100 acres and the owner

only chooses to sell 2 BLTs, they would have 2 reserved residential rights (since there is 1 BLT per 25 acres). The definition of reserved residential rights and the fact that they are only intended to apply for properties that do not sell all BLTs should be added to the regulation.

Proof of Approval for Onsite Waste Disposal System

Chapter 2B requires that a property is “capable of being served by an individual sewage treatment unit which meets the requirements of Chapter 27A” before it can sell a BLT. (If the property cannot be served by an individual sewage treatment unit, it is not a developable property and has no development right to sell.)

The Executive Regulation provides additional detail on what is to be submitted by the property owner, and the latest draft further refines this requirement:

The application must include a completed property description as outlined in Section II(C)(1), including the requirement in Section II(C)(1)(m) of a [letter from the Department of Permitting Services approving a[n individual onsite waste disposal] septic system site plan approved by DPS with an on-site septic absorption area contained entirely within the legal description of the property and a minimum absorption area of 10,000 square feet or such additional area required by DPS.

It may be advisable to refine the language to indicate that the easement terminates one system and septic absorption area **for each BLT** to be purchased.

Child Lots

The Executive Regulation does not appear to permit child lots:

“Child lots permitted under Chapter 59 of the Code are not permitted under BLT Easements.

However, language in a memorandum from DED staff to the DED Director on © 30 appears to suggest that they are allowed in the following sentence:

“Child lots permitted under Chapter 59 of the Code may be expressly provided for within the BLT easement for properties that meet the pre 1981 landowner eligibility date.”

Executive staff should be asked to clarify their intent.

Future Use of Serialized BLTs

The Council received testimony questioning the Executive Regulation’s reference to future use of BLTs held by the Executive (see first paragraph of © 19 and DED summary of testimony on © 59):

The future use of the serialized BLTs owned by the County must be approved by the County [Executive].

All development rights expire once the BLT is acquired, but this language could be interpreted to mean that some future use of the land would be allowed. In addition, testimony stated that the Executive should not be able to resell BLTs or TDRs. The Executive should clarify what is intended by this provision.

Regulations for Private Transactions

The Executive Regulation focuses on public acquisition of BLTs and does not address any requirements or provisions associated with the private purchase of BLTs. While the Executive Regulation may not be the place to address these issues, it is critical that the needed changes to other sections of the County Code or the Zoning Ordinance be identified and developed immediately so that they are operational before the first TMX or CR zoned property is developed. The Committee should confirm which agency (County Government or M-NCPPC) will take the lead in drafting these provisions and what the timeframe will be for submitting any necessary changes to the County Council. (Staff notes that the Council cannot approve zoning text amendments after October 31 in an election year until the new Council is in office.)

Exempting Properties from BLT Requirements

The specific properties required to purchase BLTs will be determined by the zoning decisions made during master plans and the requirements in specific zones. Although this issue is not (and should not be) addressed in the Executive Regulation, Staff believes it is worth addressing while the Committee is focused on the BLT program. Staff believes that no geographic area or specific land use should be exempt from BLT purchases, because this could significantly weaken the program. Staff has recommended a sliding scale for geographic areas based on rental values and recommends against exempting land uses such as life sciences. (The Committee has made a preliminary decision to exempt life science uses from purchasing BLTs as part of its consideration of the amendments to the Life Sciences Center zone. A final Committee vote on this issue is scheduled for later this month.)

Donations

Section 2B explicitly allows for donations of BLT easements or funds to the BLT Account Fund. The Executive Regulation is silent and the Planning Board Chair testified that more should be done to encourage donations. Staff does not believe that any change in regulations are needed to accept donations but that the County should have follow-up discussions with organizations such as the Maryland Environmental Trust (MET) to be sure they are aware of the program and can bring it to the attention of potential donors.