

MEMORANDUM

March 17, 2016

TO: Planning, Housing, and Economic Development Committee
FROM: Jeff Zyontz, Senior Legislative Analyst
SUBJECT: ZTA 16-02, Agricultural Zone – Transfer of Development Rights (TDR) Requirements

Zoning Text Amendment (ZTA) 16-02 was introduced on January 19, 2016. Council President Floreen is the lead sponsor.

ZTA 16-02 would amend the Agricultural Reserve (AR) zone by excluding certain dwellings (Farm Tenant Dwelling and Detached Accessory Apartment) from the calculation of density in the subdivision process under certain circumstances (when the property is encumbered by an agricultural easement or when the subdivision is for the creation of a child lot). The effect of this proposed exclusion allows the property owner to have a subdivision approved without a retained Transfer of Development Right (TDR) for the excluded units.

Public Hearing

The Council conducted a public hearing on February 23, 2016. The Planning Board recommended approval with an amendment to list specific easements that would allow a tenant house not to be counted for TDR purpose and keeping Bed and Breakfast in the list of uses that do not require a retained TDR. The Planning Board also supported the approval of ZTA 16-02 as a codification of the Planning Board pre-2010 interpretation of the zoning code.

The County Executive would support ZTA 16-02 if it was amended to also include **future** farm tenant dwellings and detached accessory apartments. Members of the farming community also wanted to increase the rights of farms to have farm tenant housing. Some testimony recommended the appointment of a special advisory group of all interested parties before taking any action on ZTA 16-02. In particular, testimony cited the ZTA as unfair because the exemption provided in the ZTA would only apply to a limited number of cases.¹

¹ Some testimony indicated that the new Zoning Ordinance changed the prior allowance for tenant dwellings. That is incorrect. The old code, just like the new code, required that tenant dwellings be accounted for in density and with retained TDRs whenever the farm property was subdivided.

Background

There may be something on the order of 150 tenant houses in the County.² Since 2003, the Department of Permitting Services issued permits for 10 such dwellings. All permits for new construction are reviewed by Planning Staff to confirm the permit's conformance to zoning and subdivision requirements.

Under the current code, a development right is not required for farm tenant dwellings as long as the dwelling unit remains accessory to farming; however, if a property in the AR zone is subdivided, the excluded units are **not** excluded from the calculation of density. A subdivision applicant under the current code would need to prove the existence of a retained TDR for both the excluded unit and the proposed new lot.

The new code retained the same provision concerning the effect of any subdivision on property with a farm tenant dwelling. Until July 2010, the Planning Board did not require a retained TDR for a tenant dwelling when that dwelling unit remained accessory to the principle dwelling (and both the principle dwelling and tenant dwelling remained in a single lot or parcel with the farm). In reliance on this interpretation, landowners who negotiated agricultural easements with tenant houses retained only the TDRs necessary for new units, but did not retain one for any existing tenant house.

In the Planning Board's approval of the Barnesville Oak Farm subdivision (July 2010), the Board explicitly changed its interpretation and required a retained TDR for a tenant dwelling when a subdivision created any new lot.

Issues

How would the approval of ZTA 16-02 change the current code?

This ZTA would codify the Planning Board's pre-2010 interpretation for property that sold an agricultural easement **for certain property owners**; it would allow a subdivision without all of the TDRs that would currently be required. It would also allow a landowner to have the right to create the same size subdivision that they may have thought they had when the agricultural easement was sold.

An additional provision in ZTA 16-02 would allow the creation of a child lot on property without a retained TDR for a tenant dwelling or detached accessory apartment when an agricultural easement does not encumber the property.

Why expand the scope of ZTA 16-02?

Tenant houses assure farms of necessary labor. It lowers the cost of housing for farm workers. Farm Tenant Dwellings must be accessory to the principal use.³ Farm Tenant Dwelling is different from an unrestricted or principal dwelling. Farm Tenant Dwelling means a dwelling unit under the control of the owner or operator of the farm on which the dwelling unit is located and occupied by an agricultural worker

² Estimated by the number of units on the 107 parcels in the AR zone with more than 1 unit per lot or parcel.

³ Accessory Use means a use that is incidental and subordinate to the principal use of a lot or site or the principal building, and located on the same lot or site as the principal use or building.

actively engaged in farming on a full-time or part-time basis. Farm Tenant Dwelling provisions allow a farm to have up to 3 mobile homes. It is not restricted in terms of the number of unrelated residents in the household.⁴ Only a farm tenant dwelling in existence before June 1, 1958 may be rented to a tenant other than an agricultural worker.

With these restrictions, a farm tenant dwelling that remains accessory to a working farm is a substantial benefit to farming.

ZTA 16-02 as introduced would have allowed some flexibility for a farm with an agricultural easement, but not all farms have easements.⁵ The ZTA, as introduced, addressed current dwellings and not future dwellings.

The pre-2010 Planning Board interpretation of the Zoning Ordinance was consistent with helping working farms to survive, even if it was not consistent with the black letter of the Zoning Ordinance. Subdivisions that did not split the relationship between the tenant dwelling and the farm use did not require a building right (exempt from one unit per 25 acres) and did not require a TDR.

How can ZTA 16-02 be revised to reflect the pre-2010 Planning Board interpretation?

Staff attached a draft revision to this memorandum. The key provision is describing the type of subdivision that would trigger the need for development rights:

A Farm Tenant Dwelling is included in any density calculation if the Farm Tenant Dwelling is subdivided in a different lot or parcel such that it no longer meets the definition of an Accessory Use.

Other limitations on when a Farm Tenant Dwelling would be excluded from density calculations would be deleted.

Should there be protections from abuse?

The County is going to considerable effort to reduce the number of rooftops in the Agricultural Reserve through easement programs. In particular, the Building Lot Termination program was focused on this issue. A ZTA that allows more dwellings (independent of farming) runs counter to those efforts.

The potential for tenant houses to cease being accessory to farming exists. Tenant houses have been illegally subdivided by deed and sold to individual homeowners. To assure that the dwellings are accessory to the farm, staff recommends that there should be some relationship between the number of tenant houses and on-site farming needs. Easement programs have done this by limiting the number of tenant dwellings by the acreage of the farm.⁶

⁴ The definition of one household is limited to 5 unrelated individuals.

⁵ There are 4 programs that purchase easements from farmers that restrict development rights:

- 1) Montgomery County Agricultural Easement Program (AEP);
- 2) the Maryland Agricultural Land Preservation Program (MALPF);
- 3) the Montgomery County Rural Legacy Program (RLP); and
- 4) the Building Lot Termination Program (BLT).

⁶ Most of the public funded easement programs require at least 100 whole acres per tenant house (AEP, RLP, and BLT). The only exception is that under the MALPF program. The MALPF Board of Trustees may consider and approve tenant housing

Staff recommends additional requirements to avoid abuse of the new code provisions for new tenant houses by requiring a covenant that prohibits any subdivision by deed. This requirement would be made by an amendment to the Subdivision Regulations and not by ZTA 16-02. This recommendation is acceptable to interested parties. All interested parties want to avoid abuses through illegal subdivision created by deed.

Staff would also recommend limiting the number of new tenant houses to some number related to the size of the farm (1 new Tenant Dwelling for the first 200 acres of land and 1 additional dwelling for every additional 100 acres in the farm parcel). This limitation would require a further amendment to ZTA 16-02. Farming interests objected to this recommendation. In their opinion, it is an unnecessary restriction that does not allow for flexible farming circumstances.

Should a Bed and Breakfast be deleted from the list of dwellings that do not require a development right?

The Planning Board recommended deleting Bed and Breakfast from the list of dwellings that do not require a development right. The Zoning Ordinance requires that a bed and breakfast be in the owner-occupied house. Tenant dwellings that are accessory cannot be owner-occupied. A subdivision would be required for a tenant dwelling to be owned by someone other than the owner of the farm. A bed and breakfast may not be in a separate unit from the principal dwelling, except in a designated historic structure. Bed and Breakfast means a detached house that is owner-occupied with no more than 5 guest rooms for rent and customarily serves breakfasts to guests. A bed and breakfast is prohibited in a dwelling unit that also provides guest rooms for roomers (long-term renters), or in a farm tenant dwelling, or on a site that includes an Accessory Apartment. In the Agricultural, Rural Residential, and Residential zones, on a lot of less than 2 acres, a maximum of 3 bedrooms may be designated as guest rooms for which compensation is charged.

In the Agricultural and Rural Residential zones, a bed and breakfast may be allowed in an accessory building designated as historic on the Master Plan for Historic Preservation.

Staff recommends deleting Bed and Breakfast from the list of dwellings that do not require a development right as indicated in ZTA 16-02 as introduced.

<u>This Packet Contains</u>	<u>© number</u>
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on less than 100 acres, but it requires their approval and concurrence from the County. This is usually a case-by-case request and approval.

If the preserved land is 100 to 199.99 acres, the public easement would only allow 1 newly constructed tenant house, subject to the approval of the APAB and County (and state, if MALPF easement).

If the preserved land is 200 to 299.99 acres, the public easement would only allow 2 newly constructed tenant houses, subject to the approval of the APAB and County (and state, if MALPF easement).

Zoning Text Amendment No.: 16-02
Concerning: Agricultural Zone –
Transfer of Development
Rights Requirements
Draft No. & Date: 2 - 1/14/16
Introduced: January 19, 2016
Public Hearing:
Adopted:
Effective:
Ordinance No.:

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

Lead Sponsor: Council President Floreen

AN AMENDMENT to the Montgomery County Zoning Ordinance to:

- exempt certain dwellings in the Agricultural Zone from the calculation of density under certain circumstances; and
- generally amend the provisions concerning the special requirements for the transfer of density

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

DIVISION 59-4.2. “Agricultural Zone”
Section 4.2.1. “Agricultural Reserve Zone (AR)”
DIVISION 59-3. “Residential Uses”
Section 3.3.3 “Accessory Residential Uses”

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

ORDINANCE

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

1 **Sec. 1. DIVISION 59-3.3 is amended as follows:**

2 **Division 3.3. Residential Uses**

3 **Section 3.3.3. Accessory Residential uses**

4 * * *

5 **E. Farm Tenant Dwelling**

6 **1. Defined**

7 Farm Tenant Dwelling means a dwelling unit under the control of the owner
8 or operator of the farm on which the dwelling unit is located and occupied
9 by an agricultural worker actively engaged in farming on a full-time or part-
10 time basis. Farm Tenant Dwelling includes up to 3 mobile homes. A Farm
11 Tenant Dwelling is not restricted by the definition of household, and may
12 share a well or septic system or both.

13 **2. Use Standards**

14 Where a Farm Tenant Dwelling is allowed as a limited use, it must satisfy
15 the following standards:

- 16 a. In the Agricultural and Rural Residential zones, it is excluded from
17 any density calculations, if it remains accessory to a farm. [[If the
18 property associated with a Farm Tenant Dwelling is subsequently
19 subdivided, the Farm Tenant Dwelling is included in the density
20 calculations.]] A Farm Tenant Dwelling is included in any density
21 calculation if the Farm Tenant Dwelling is subdivided in a different
22 lot or parcel such that it no longer meets the definition of an
23 Accessory Use.
- 24 b. The maximum number of tenants in a single dwelling is limited by
25 well and septic capacity.
- 26 c. In the RE-2C zone only one Farm Tenant Dwelling is allowed and it
27 must be a mobile home.

- 28 d. In the Agricultural, Rural Residential, RE-2, and RE-1 zones, a Farm
29 Tenant Dwelling in existence before June 1, 1958, may be rented to a
30 tenant other than an agricultural worker, if the dwelling meets all
31 applicable health and safety regulations.
- 32 e. In the RE-2, RE-1, and R-200 zones, only one mobile home is
33 allowed.

34 **Sec. 2. DIVISION 59-4.2. is amended as follows:**

35 **Division 4.2. Agricultural Zone**

36 **Section 4.2.1. Agricultural Reserve Zone (AR)**

37 * * *

38 **D. Special Requirements for the Transfer of Density**

39 1. In General

40 a. Under Section 4.9.15.B and in conformance with a general
41 plan, master plan, or functional master plan, residential density
42 may be transferred at the rate of one development right per 5
43 acres minus one development right for each existing dwelling
44 unit, from the AR zone to a TDR Overlay zone.

45 b. A development right is not required for the following dwelling
46 units on land in the AR zone as long as the dwelling unit
47 remains accessory to Farming [[and the principle dwelling]]:

48 [a] i. Farm Tenant Dwelling[,]; and

49 [b. Attached Accessory Apartment,]

50 [c] ii. Detached Accessory Apartment[, and]

51 [d. Bed and Breakfast].

52 [[b. If a property is subdivided,]] [dwellings associated with these
53 uses] [[any Farm Tenant Dwellings or Detached Accessory
54 Apartments are not excluded from the calculation of density

55 and must have a retained a development right in addition to the
56 retained development right for any newly created lot; however,
57 these dwellings are excluded from the density calculation and
58 need not have a retained development right if:]]
59 [[i. the dwelling existed before October 31, 2014;
60 ii. the dwelling remains accessory to Farming and the
61 principle dwelling; and
62 iii. the subdivision is for:
63 (a) property encumbered by any agricultural easement
64 program administered by the County before
65 October 31, 2015; or
66 (b) the sole purpose of creating a child lot.]]
67 c. A development right is required for any Farm Tenant Dwelling
68 or Detached Accessory Apartment when the Farm Tenant
69 Dwelling is subdivided in a different lot or parcel such that it no
70 longer meets the definition of an Accessory Use.
71 [[c]]d. The density transfer provisions are not applicable to publicly
72 owned rights-of-way for roads, streets, alleys, easements, or
73 rapid transit routes classified in the AR zone.

74 * * *

75 **Sec. 3. Effective date.** This ordinance becomes effective 20 days after the
76 date of Council adoption.

77
78 This is a correct copy of Council action.

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80 _____
81 Linda M. Lauer, Clerk of the Council



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

OFFICE OF THE CHAIR

February 19, 2016

TO: The County Council for Montgomery County, Maryland, sitting as the District Council for the Maryland-Washington Regional District in Montgomery County, Maryland

FROM: Montgomery County Planning Board

SUBJECT: Zoning Text Amendment No. 16-02

BOARD RECOMMENDATION

The Montgomery County Planning Board of The Maryland–National Capital Park and Planning Commission reviewed Zoning Text Amendment No. 16-02 at our regular meeting on February 11, 2016. By a vote of 5:0, the Planning Board recommends approval, with amendments, of the text amendment to amend the Agricultural Reserve (AR) zone by excluding farm tenant dwellings and detached accessory apartments from the calculation of density in the subdivision process when the property is encumbered by an agricultural easement or when the subdivision is for the creation of a child lot. The effect of this proposed exclusion allows the property owner to have a subdivision approved without a retained Transfer of Development Right (TDR) for the excluded units if the dwelling existed before October 31, 2014; the dwelling remains accessory to Farming and the principle dwelling; and the subdivision is for an encumbered property existing before October 31, 2015 or for the sole purpose of creating a child lot. Currently, a Bed and Breakfast is depicted as exempt from retaining a TDR but was taken out as part of this ZTA because the Code prohibits this use if the lot or parcel on which the use is located is in the AR zone and is encumbered by a recorded Transfer of Development Rights easement. However, the Board recommends keeping the Bed and Breakfast use in the Code as an exemption until the impacts are realized from the County Council’s recently introduced ZTA No. 16-03 revising the definition and requirements for a Bed and Breakfast.

The Board made additional revisions to ZTA No. 16-02 clarifying that any subdivision being exempt from the density calculation and the retention of development rights can be encumbered by only certain agricultural easement programs that include: Montgomery County Agricultural Easement Program (AEP); the Maryland Agricultural Land Preservation Foundation (MALPF); the Montgomery County Rural Legacy Program (RLP); and the Building Lot Termination Program (BLT).

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Under the current code, a development right is not required for farm tenant dwellings or an accessory apartment as long as the dwelling unit remains accessory to farming; however, if a property in the AR zone is subdivided, these units are not excluded from the calculation of density. A subdivision applicant under the current code would need to prove the existence of a retained TDR for the principle dwelling, any excluded unit, and the proposed new lot.

Until July 2010, the Planning Board did not require a retained TDR for a tenant dwelling when that dwelling unit remained accessory to the principle dwelling (and both the principle dwelling and tenant dwelling remained on a single lot or parcel with the farm). In reliance on this interpretation, landowners who negotiated agricultural easements with tenant houses retained only the TDRs necessary for new units, but did not retain one for any existing tenant house.

ZTA 16-02 would codify (grandfather) the Planning Board's pre-2010 interpretation for property that sold an agricultural easement; it would allow a subdivision without requiring TDRs for farm tenant dwellings or accessory apartments so long as these units remain accessory to farming. It would also allow a landowner to have the rights to create the same size subdivision that they may have thought they had when the agricultural easement was sold.

CERTIFICATION

This is to certify that the attached report is a true and correct copy of the technical staff report and the foregoing is the recommendation adopted by the Montgomery County Planning Board of The Maryland-National Capital Park and Planning Commission, at its regular meeting held in Silver Spring, Maryland, on Thursday, February 11, 2016.



Casey Anderson
Chair

CA:GR

Zoning Text Amendment (ZTA) No. 16-02, Agricultural Zone – Transfer of Development Rights Requirements



Gregory Russ, Planner Coordinator, FP&P, gregory.russ@montgomeryplanning.org, 301-495-2174



Pam Dunn Chief, FP&P, pamela.dunn@montgomeryplanning.org, 301-650-5649

Completed: 02/4/16

Description

Zoning Text Amendment (ZTA) No. 16-02 would exempt certain dwellings in the Agricultural Reserve Zone from the calculation of density under certain circumstances. Specifically, ZTA 16-02 would amend the Agricultural Reserve (AR) zone by excluding farm tenant dwellings and detached accessory apartments from the calculation of density in the subdivision process when the property is encumbered by an agricultural easement or when the subdivision is for the creation of a child lot. The effect of this proposed exclusion allows the property owner to have a subdivision approved without a retained Transfer of Development Right (TDR) for the excluded units if the dwelling existed before October 31, 2014; the dwelling remains accessory to Farming and the principle dwelling; and the subdivision is for an encumbered property existing before October 31, 2015 or for the sole purpose of creating a child lot.

Summary

Staff recommends approval of ZTA No. 16-02 as introduced. The ZTA would exempt certain dwellings in the Agricultural Reserve zone from the calculation of density under certain circumstances.

Background/Analysis

Under the current code, a development right is not required for farm tenant dwellings or an accessory apartment as long as the dwelling unit remains accessory to farming; however, if a property in the AR zone is subdivided, these units are not excluded from the calculation of density. A subdivision applicant under the current code would need to prove the existence of a retained TDR for the principle dwelling, any excluded unit, and the proposed new lot.

Until July 2010, the Planning Board did not require a retained TDR for a tenant dwelling when that dwelling unit remained accessory to the principle dwelling (and both the principle dwelling and tenant dwelling remained on a single lot or parcel with the farm). In reliance on this interpretation, landowners who negotiated agricultural easements with tenant houses retained only the TDRs necessary for new units, but did not retain one for any existing tenant house.

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In the Planning Board's approval of the Barnesville Oak Farm subdivision (July 2010), the Board explicitly changed its interpretation and required a retained TDR for a tenant dwelling when a subdivision created any new lot. ZTA 16-02 would codify (grandfather) the Planning Board's pre-2010 interpretation for property that sold an agricultural easement; it would allow a subdivision without requiring TDRs for farm tenant dwellings or accessory apartments so long as these units remain accessory to farming. It would also allow a landowner to have the rights to create the same size subdivision that they may have thought they had when the agricultural easement was sold.

An additional provision in ZTA 16-02 would allow the creation of a child lot on property without a retained TDR for a tenant dwelling or detached accessory apartment when an agricultural easement does not encumber the property.

Staff has no objection to grandfathering the Planning Board's pre-2010 interpretation for property that sold an agricultural easement.

Attachments

1. ZTA No. 16-01 as introduced

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**TESTIMONY ON BEHALF OF COUNTY EXECUTIVE ISIAH LEGGETT ON
ZONING TEXT AMENDMENT 16-02, AGRICULTURAL ZONES-TRANSFER
OF DEVELOPMENT RIGHTS REQUIREMENTS**

February 23, 2016

Good afternoon, I am Jeremy Criss the Agricultural Services Manager and I am here to provide comments on behalf of the County Executive Isiah Leggett regarding Zoning Text Amendment (ZTA) 16-02, Agricultural Zones-Transfer of Development Rights Requirements.

The County Executive understands the intent of the ZTA exempts existing farm tenant dwellings or detached accessory apartments in the Agricultural Reserve-AR Zone from the calculation of transferable development rights.

The County Executive understands the importance for exempting existing farm tenant dwellings. However, the County Executive cannot support ZTA 16-02 unless it is amended to also include future farm tenant dwellings and detached accessory apartments, which remain accessory to farming and exempts them from the calculation of transferable development rights.

The County Executive is one of the strongest supporters of the Agricultural Reserve including the legislative intent to promote agriculture as the primary land use. It is his belief however that ZTA 16-02 needs work to meet the needs of the agricultural community and fulfill the intent of the AR zone.

It is important that all stakeholders of the Agricultural Reserve recognize that if a property is subdivided this does not mean that farming activities will discontinue.

There are numerous examples of proposed subdivisions in the Agricultural Reserve, including Barnesville Oaks, where both development and farming activities will continue to co-exist.

The Barnesville Oaks property encompasses 840 acres and the subdivision proposed 21 new lots, three out lots, and two farm remainder parcels totaling 780 acres which includes nine existing dwellings.

As proposed the two farm remainder parcels totaling 780 acres, or over 90 percent of total farm acres, would be restricted to agricultural use and not subject to future subdivision.

The Executive staff will be available to further discuss these comments and suggested amendments as part of the work session.

Thank you.