

**Introduction**

**MEMORANDUM**

November 12, 2004

TO: County Council

FROM: Ralph D. Wilson, <sup>RDW</sup> Senior Legislative Analyst  
Sonya E. Healy, <sup>SA</sup> Legislative Analyst

SUBJECT: **Introduction:** Bill 38-04, Contracts and Procurement—Transfer of Development Rights

Councilmember Subin intends to introduce Bill 38-04, Contracts and Procurement—Transfer of Development Rights (TDRs), on November 16, 2004. A public hearing will be scheduled at a later date. Bill 38-04 prohibits the County from selling development rights acquired through the purchase of public land or by the acquisition of an easement. The goal of this bill is to prevent the devaluation of privately-held TDRs by implementing a moratorium on the County sale of TDRs.

TDRs can be used to achieve a wide variety of goals including farm preservation, historic preservation, and the protection of land above valuable mineral resources. Successful TDR programs need healthy market mechanisms including strong incentives for landowner participation and viable development options in the areas receiving additional density or units from the preserved land.

TDRs are distinguishable from other land conservation instruments because the right to develop is divisible from other property rights. A TDR program assigns rights for future development to landowners. TDR programs allow public agencies to restrict allowed development in areas targeted for land preservation by transferring undeveloped density to preferred development areas. Restricted areas are known as “sending sites”, while preferred or targeted areas are “receiving sites”. The County permits landowners in the sending area to sell the right to build to landowners in the receiving areas. The potential development value of the sending site is then permanently restricted, usually by a recorded deed restriction. Landowners receive compensation for the value of the foregone development.

According to the Agricultural Advisory Committee, historically the County's TDR program has never proven to be effective and fair compensation for the down zoning of January 6, 1981. There is currently a greater supply of TDRs than the demand or ability to receive them. The sale of County-owned TDRs would create competition and potentially lower the price of TDRs owned in the private sector.

The County Attorney's Office has advised Council staff that TDRs are considered personal property; and therefore, any law related to the management or disposal of TDRs belongs in County Code Chapter 11B, Contracts and Procurements.

This packet contains:

Bill 38-04

Legislative Request Report

Report from the Agricultural Advisory Committee

Circle #

1-3

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5-12

Bill No. 38-04  
Concerning: Contracts and  
Procurement—Transfer of  
Development Rights  
Revised: \_\_\_\_\_ Draft No. 1  
Introduced: November 16, 2004  
Expires: May 9, 2006  
Enacted: \_\_\_\_\_  
Executive: \_\_\_\_\_  
Effective: \_\_\_\_\_  
Sunset Date: None  
Ch. \_\_\_\_\_, Laws of Mont. Co. \_\_\_\_\_

## COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

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By: Councilmember Subin

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**AN ACT** to:

- (1) prohibit the County from selling development rights acquired through the purchase of public land or through the acquisition of an easement; and
- (2) generally amend County Contracts and Procurement law regarding the management and disposal of goods.

By amending

Montgomery County Code  
Chapter 11B, Contracts and Procurement  
Sections 11B-43 and 11B-44

<b>Boldface</b>	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

*The County Council for Montgomery County, Maryland approves the following Act:*

1           **Section 1.** Section 11B-43 and Section 11B-44 is amended as follows:

2   **11B-43.     Definitions.**

3           In this Article, unless the context indicates otherwise, the following terms have  
4           the following meanings:

5           (a)   Development rights means the potential for the improvement of a parcel  
6               of real property, measured in dwelling units or units of commercial or  
7               industrial space, existing because of the zoning classification of the  
8               parcel.

9           [(a)](b) Goods means goods owned by the County.

10          [(b)](c) Surplus Goods means goods no longer of use to the County

11          (d)   Transfer of development rights means the conveyance of development  
12               rights by deed, easement, or other legal instrument authorized by local  
13               law or another parcel of land and the recordation of that conveyance  
14               among the land records of the County.

15   **11B-44.     Management and disposal of goods.**

16          (a)   The Director must ensure the management of goods during their entire  
17               life cycle.

18          (b)   The Director must dispose of surplus goods. In disposing the  
19               surplus goods, the Director may sell the goods by any competitive  
20               method which the Director determines is likely to bring the highest  
21               return to the County. These methods may include sealed bids, public  
22               auction, or trade in or exchange of goods. The Director may sell surplus  
23               goods by private sale if the Director determines that open competition is  
24               not likely to bring the highest return to the County.

25          (c)   After public notice, the Chief Administrative Officer may give, loan, or  
26               sell below fair market value, surplus goods to another public entity if the  
27               Chief Administrative Officer determines the disposition would benefit

28 the residents of Montgomery County. Public notice may be given  
29 through the Montgomery County Register.

30 (d) If surplus goods have no resale or scrap value, the Director may dispose  
31 of the goods in any responsible manner.

32 (e) Notwithstanding any other provision of County law, any gun that is  
33 surplus must be destroyed.

34 (f) The County Executive or a designee must not sell any development  
35 right acquired through the purchase or condemnation of land for a  
36 public purpose or through acquisition of an easement.

37 *Approved:*

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Steven A. Silverman, President, County Council Date

39 *Approved:*

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Douglas M. Duncan, County Executive Date

41 *This is a correct copy of Council action.*

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Mary A. Edgar, CMC, Clerk of the Council Date

# LEGISLATIVE REQUEST REPORT

Bill 38-04, Contracts and Procurement—Transfer of Development Rights

<b>DESCRIPTION:</b>	Prohibits the County from selling development rights acquired through the purchase of public land or through acquisition of an easement.
<b>PROBLEM:</b>	According to the Agricultural Advisory Committee, historically the TDR program has never proven to be effective and fair compensation for the down zoning of January 6, 1981. There is currently a greater supply of TDRs than the demand or ability to receive them. The sale of County-owned TDRs will create competition and potentially lower the price of TDRs owned in the private sector.
<b>GOALS AND OBJECTIVES:</b>	To prevent devaluation of privately-held TDRs by implementing a moratorium on the County sale of TDRs.
<b>COORDINATION:</b>	Chief Administrative Officer, Office of Economic Development, Department of Public Works and Transportation
<b>FISCAL IMPACT:</b>	To be requested.
<b>ECONOMIC IMPACT:</b>	To be requested.
<b>EVALUATION:</b>	To be requested.
<b>EXPERIENCE ELSEWHERE:</b>	To date, 134 different local jurisdictions and regional entities nationwide have adopted TDR programs. According to a study by the Brooking Institution, more than half of the programs are located in four states: California and Florida, where environmental protection issues are of major importance, and Pennsylvania and Maryland, where farmland protection issues are important. Staff could not identify any programs that prohibited the sale of TDRs by the State or County government.
<b>SOURCE OF INFORMATION:</b>	Ralph D. Wilson, Senior Legislative Analyst (240-777-7937), and Sonya E. Healy, Legislative Analyst (240-777-7970)
<b>APPLICATION WITHIN MUNICIPALITIES:</b>	NA
<b>PENALTIES:</b>	NA

Lux zoning

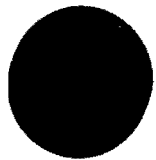


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AGRICULTURAL ADVISORY COMMITTEE  
October 22, 2004

011641

TO: Montgomery County Council Members  
FROM: William F. Willard, Chairman  
Agricultural Advisory Committee  
SUBJECT: Agricultural Community Recommendations  
regarding Public owned TDRs



On behalf of Montgomery County Agricultural Advisory Committee (AAC), I am forwarding to you a copy of our report and recommendations on policies for public owned TDRs.

The AAC met on October 19, 2004 and it was recommended that we also forward a copy of our report to the County Council in light of the Council discussions on public TDRs and pending legislation.

Attachments

cc: Ralph Wilson, Senior Legislative Analyst

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MONTGOMERY COUNTY  
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AGRICULTURAL ADVISORY COMMITTEE

MEMORANDUM

October 6, 2004

TO: Douglas M. Duncan  
County Executive

FROM: William Willard, Chairman,  
Agricultural Advisory Committee (AAC)

Michael Sutherland, Chairman,  
Agricultural Preservation Advisory Board (APAB)

SUBJECT: Agricultural Community Recommendations-  
Public Owned TDRs

On behalf of the Montgomery County Agricultural Advisory Committee and the Agricultural Preservation Advisory Board, we hereby submit our written recommendations regarding public owned TDRs.

The AAC and the APAB conducted several meetings since July 2004 to discuss this issue and develop the enclosed recommendations. We are most appreciative for your sensitivity to this issue and your direct request for our organizations to formulate our recommendations.

It is our hope you will find our recommendations constructive. We believe these recommendations will enable the County to not only address the proper course of action for public owned TDRs, but expand the capacity for TDR use throughout the County as well. This recommended action will take a few years to accomplish given that specific changes to the TDR law and program will be necessary. This ultimately means the sale of public owned TDRs should not take place at this time.

You should know that historically, the TDR program has never proven to be an effective and fair compensation for the down zoning of January 6, 1981. Our farmers are finally seeing encouraging TDR prices in today's market. It is not the right time to sell public owned TDRs for use in receiving areas which were created for private owned TDRs and as an opportunity for restoring a portion of lost equity from the down zoning.

If you need any further assistance or guidance on this issue, please do not hesitate to ask. Thank you once again for soliciting our input into this very important policy issue.

a:aacapabduncan(aac04)

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Department of Economic Development • Agricultural Services Division



Summary of Discussion  
Public Owned TDRs  
Recommendations from the Agricultural Community

**Background:**

The County Executive requested input and recommendations from the Agricultural Advisory Committee and the Agricultural Preservation Advisory Board as to whether public owned TDRs should be sold.

The Executive has said that he does not wish to interfere with the market, moderate or depress prices. The sale of public owned TDRs will only occur if the agricultural community is on board, and only as a case of last resort. TDR application would follow Smart Growth principles.

*In view of the request from the County Executive, the Agricultural Advisory Committee provides the following recommendations:*

**The intended purpose of a program for public TDR sale would be to:**

To identify a variety of recommendations where the County can fulfill its responsibility in creating new TDR demand/TDR receiving areas that can be used for private and public owned TDRs.

To identify how the proceeds from sale of public TDRs will be used.

To help developers gain access to TDRs owned by the public if no opportunities exist for private owned TDRs.

**These are the circumstances under which the agricultural community may support sale of public TDRs.**

- 1) No sale without new receiving areas
  - new residential and mixed/use zones – Recommended in the TDR Task Force Report
  - for both private TDRs and public, but for the primary use of private TDRs
  - It seemed that *if* the County Government commits to *not* selling TDRS in the existing Residential Zone Receiving Areas, the agricultural community *may* be willing to support the County Government in the development of a new TDR market that used both private and public TDRs in mixed use zones.
- 2) Control where the money goes – must be encumbered and used for Agricultural projects:
  - wildlife/ deer control
  - agricultural preservation

- C.
- agriculture-related programs only
  - no forward motion on TDR sales until infrastructure for program is established
  - A dedicated fund must be set up for money raised from TDR sale, or there will be no assurance that this money will be used for agricultural projects.

3) Developers must use 80% of the TDRs they put into their plans.

4) Develop a selling and pricing system which would ensure that County TDR prices were higher than private TDR prices, encouraging developers to buy from private owners for example:

- 120% of highest recorded sale in prior 3 months -- one year limit
- limit number of TDRs sold throughout the year
- actively publish County TDR prices
- sell public TDRs in new receiving areas only

### **Alternative Approach**

5) In the event a public TDR sale program is not practical or acceptable, extinguish county-owned TDRs, bearing in mind the positive and negative economic effects this would have.

- If public TDRs are extinguished, they would not impact the TDR market, constituting a positive consequence.
- If public TDRs are extinguished, this may be detrimental to County's economy.
- If the TDRs are extinguished this issue will be resolved once and for all, and the County will not need to spend the additional staff time in the future.

### **Concerns the agricultural community has regarding sale of public-owned TDRs:**

- there is currently a greater supply of TDRs than the demand or ability to receive them
- where will new TDR receiving areas be created? -- concern that it may be in the RDT zone
- existing receiving areas as currently planned should not use public TDRs
- when Clarksburg is built out, the TDR bubble will burst and prices will go back down
- future TDR situation (landowners not selling TDRs) may change as properties change hands
- current versus future: need to work towards overall future need, not current developer need
- the county will influence the market no matter what or how it sells

- the sale of County TDRs could set a precedent for the sale of MNCPPC, State, Federal, WSSC, other TDRs, causing a flood on the market and a depression of prices
- potential negative impact of public TDR sale on TDR brokers

**These are the facts that must be considered:**

- Olney Master Plan & Shady Grove Master Plan are coming up for approval
- Nothing in the law says Montgomery County cannot sell TDRs
- the County DED owns 694 TDRs through AEP and 301 jointly with the State through RLP
- public lands have TDRs on them; thus the fear of a sales precedent despite that there has been no creation or sending of TDRs from public lands, historically
- State, WSSC, Pepco have already sold TDRs
- the real TDR capacity of receiving areas is always less than the theoretical capacity
- to change the program, must change the County Code – Zoning, Chapter 59
- given that TDR sending capacity is currently greater than receiving capacity, it does not make sense to consider a public TDR program until additional capacity is approved and available to absorb these additional public TDRs
- potential for more TDR receiving areas to be approved as other subdivisions come online
- no data currently exists for how many TDRs will be used on future subdivisions
- most TDRs currently being serialized are coming from brokers

A:summaryaacapab(aac04)

Summary of Discussion

Public Owned TDRs

Recommendations from the Agricultural Preservation Advisory Board (APAB)

**Background:**

The County Executive requested input and recommendations from the Agricultural Advisory Committee and the Agricultural Preservation Advisory Board as to whether public owned TDRs should be sold.

The Executive does not wish to interfere with the market, moderate or depress prices. The sale of public owned TDRs will only occur if the agricultural community is on board, and only as a case of last resort. TDR application would follow Smart Growth principles.

*The Agricultural Preservation Advisory Board (APAB) is in agreement with many of the recommendations outlined in the Agricultural Advisory Committee's (AAC) report. In the interest of avoiding redundancy and providing clarity, the APAB will only comment on APAB recommendations that differ from those provided by the AAC.*

**The intended purpose of a program for public TDR sale would be to:**

To identify a variety of recommendations where the County can fulfill its responsibility in creating new TDR demand/TDR receiving areas that can be used for private and public owned TDRs.

To identify how the proceeds from sale of public TDRs will be used.

To help developers gain access to TDRs owned by the public if no opportunities exist for private owned TDRs.

**Listed below are the specific APAB recommendations that differ from those recommendations provided by the AAC.**

**1.) No Sale without new receiving areas- Bullet #3 - APAB recommends striking this recommendation third bullet.**

- ~~It seemed that if the County Government commits to not selling TDRS in the existing Residential Zone Receiving Areas, the agricultural community may be willing to support the County Government in the development of a new TDR market that used both private and public TDRs in mixed use zones.~~

*APAB rationale: The APAB felt that we shouldn't support or at least imply support until the details on how new receiving area capacity could be accomplished, whether in mixed use zones, or new residential receiving capacity.*

**2.) Control where the money goes – no less than 50% of the TDR sale proceeds must be encumbered and used for Agricultural projects.**

*APAB rationale: The APAB recommends setting a threshold percentage of the funds to be directed to agricultural initiatives. The APAB felt that by modifying this recommendation it would establish a percentage value of proceed sales earmarked for agricultural projects. They felt this percentage represented a fair compromise and it would help to belay some of the fears that proceeds of TDR easement sales would not be directed to agricultural initiatives*

**3.) Developers must purchase 80% of the TDRs that are recommended within individual master plans.**

*APAB rationale: The APAB recommends a modification of recommendation #3 so that there is mandatory requirement for the purchase of TDRs for receiving areas that are currently approved. The APAB felt that this would encourage TDR usage while reaffirming the County's commitment to provide a market for the private sale of TDRs for those landowners seeking compensation from the down-zoning of their properties.*

**4.) Restrict MNCPPC's authority to "trade off" TDR use for MPDU's unless new TDR receiving areas are created.**

*APAB rationale: - The APAB recommends adding a new recommendation identified here as #4. The APAB feels adding this recommendation will help to ensure that the use of MPDU's does not come at the expense of utilizing TDRs in receiving areas. Each instance where TDR's are traded off for MPDU's erodes landowner's assets or equity.*

**5.) Striking the Alternative Approach Recommendation**

~~5) In the event a public TDR sale program is not practical or acceptable, extinguish county owned TDRs, bearing in mind the positive and negative economic effects this would have.~~

- ~~• If public TDRs are extinguished, they would not impact the TDR market, constituting a positive consequence.~~
- ~~• If public TDRs are extinguished, this will be detrimental to County's economic growth.~~
- ~~• If the TDRs are extinguished this issue will be resolved once and for all, and the County will not need to spend the additional staff time in the future.~~

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*APAB rationale: The APAB felt that extinguishing TDRs that are currently held would be a mistake as it has potential consequences that would yield negative economic development impacts, whether as potential economic opportunities through development, County asset management, or overall County economic viability.*

a;/APABTDRrecommendations.doc(ACC 2004 disk)